JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
25 June 1998 *

In Joined Cases T-371/94 and T-394/94,

British Airways plc, a company incorporated under English law, established in Hounslow, England,

Scandinavian Airlines System Denmark-Norway-Sweden, a company incorporated under the laws of Denmark, Norway and Sweden, established in Stockholm,

Koninklijke Luchtvaart Maatschappij NV, a company incorporated under the laws of the Netherlands, established in Amstelveen, the Netherlands,

Air UK Ltd, a company incorporated under English law, established in Stansted, England,

Euralair International, a company incorporated under French law, established in Bonneuil, France,

TAT European Airlines, a company incorporated under French law, established in Tours, France,

* Language of the cases: English.

represented by Romano Subiotto, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 15 Côte d'Eich,

applicants in Case T-371/94,

and

British Midland Airways Ltd, a company incorporated under English law, established in Castle Donington, England, represented by Kevin F. Bodley, Solicitor, and Konstantinos Adamantopoulos, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicant in Case T-394/94,

supported by

Kingdom of Sweden, represented by Staffan Sandström, acting as Agent,

Kingdom of Norway, represented by Margit Tveiten, acting as Agent, with an address for service in Luxembourg at the Royal Norwegian Consulate, 3 Boulevard Royal,

Maersk Air I/S, a company incorporated under Danish law, established in Dragøer, Denmark,

and

Maersk Air Ltd, a company incorporated under English law, established in Birmingham, England, represented by Roderic O'Sullivan and Philip Wareham, Solicitors, having an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

interveners in Case T-371/94,

Kingdom of Denmark, represented by Peter Biering, Head of Division in the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

and

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Richard Plender QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

interveners in both cases,

v

Commission of the European Communities, represented by Nicholas Khan and Ben Smulders, of its Legal Service, acting as Agents, assisted by Ami Barav, of the Bar of England and Wales and of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

French Republic, represented by Marc Perrin de Brichambaut, Director of Legal Affairs in the Ministry of Foreign Affairs, and by Edwige Belliard, Catherine de Salins and Jean-Marc Belorgey, respectively Deputy Director, Head of Subdirectorate and Chargé de Mission in the Legal Affairs Directorate of that Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

and

Compagnie Nationale Air France, a company incorporated under French law, established in Paris, represented by Olivier d'Ormesson, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

interveners,

APPLICATION for the annulment of Commission Decision 94/653/EC of 27 July 1994 concerning the notified capital increase of Air France (OJ 1994 L 254, p. 73),

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

composed of: C. W. Bellamy, President, K. Lenaerts, C. P. Briët, A. Kalogeropoulos and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 6 and 7 May 1997,

gives the following

Judgment

Facts and procedure

Administrative procedure

1 By letter of 18 March 1994, the French authorities informed the Commission, pursuant to Article 93(3) of the EC Treaty, of their plan to inject FF 20 billion into the capital of Compagnie Nationale Air France ('Air France'). Enclosed with that notification was a restructuring plan entitled 'Projet pour l'Entreprise' ('the Plan').

2 Following a meeting and an exchange of correspondence with representatives of Air France and the French Government, the Commission opened the procedure under Article 93(2) of the Treaty. It informed the French authorities to that effect by letter of 30 May 1994, which was the subject of a communication published in the *Official Journal of the European Communities*, C 152 of 3 June 1994, p. 2 ('the communication of 3 June 1994').

3 In that communication, the Commission took the view that the planned capital injection constituted State aid, while pointing out that it had to examine whether the aid plan would affect trade to an extent contrary to the common interest. In that regard, the Commission took the view in particular that:

— economic reality required that account should be taken of the economic situation and prospects of the entire Air France group;

— it had to examine the effects which the aid would have on the competitive situation of Air France on its international and domestic routes competing with other European carriers.

4 The French authorities subsequently sent the Commission a series of letters and, together with representatives of Air France, took part in several meetings organised by the Commission. By 4 July 1994, the Commission had received observations from 23 interested parties, among them the Kingdom of Denmark, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Sweden, the Kingdom of Norway, the Association des Compagnies Aériennes de la Communauté Européenne (Association of Airline Companies of the European Community, hereinafter 'ACE') and a large number of European air companies, including the applicants.

5 Most of the interested parties shared the Commission's doubts regarding the legality of the aid in question. The following were among their principal objections:

— the aid would benefit not only Air France but also the entire group;

— the aid would lead to overcapitalisation of the Air France group;

— the purchase of 17 new aircraft at a cost of FF 11.5 billion would be unacceptable;

— the compatibility of the aid with the common market ought not to be assessed solely from the standpoint of the development of its beneficiary;

— in the event of authorisation of the aid, a massive reduction in Air France's capacity ought to be imposed.

6 The views of the interested parties were communicated to the French authorities, which responded to them by letter of 13 July 1994 to the relevant Commission department. On 14 July 1994, the French Prime Minister sent a letter to the Member of the Commission responsible for such matters, outlining his Government's commitments in the event that the Plan should be approved. On 18 July 1994, the French Government sent a note containing two further commitments. Finally, on 26 July 1994, the French authorities provided the Commission with additional information.

The contested decision

7 On 27 July 1994, the Commission adopted Decision 94/653/EC concerning the notified capital increase of Air France (OJ 1994 L 254, p. 73) ('the contested decision'), which may be summarised as follows.

8 After describing the structure of the Air France group (which is involved in air transport, the hotel industry, tourism, catering, maintenance and pilot training), the Commission noted that it was, together with British Airways and Lufthansa, one of the three biggest European air carriers. Since early 1990, it had been pursuing a strategy of acquiring shareholdings in other airline companies (UTA, Air Inter, Sabena and CSA), with a view in particular to consolidating its influence on the

domestic market and meeting competition on international routes. The Air France group had begun a policy of modernisation and expansion of its fleet financed through borrowings, the financial charges on which had negatively affected the group's final result, leading to an initial loss of FF 717.2 million in 1990. To counter this situation, the group had adopted a number of restructuring plans, none of which, however, was successful.

9 In summary, the Commission found that the Air France group was in a state of very serious financial and economic crisis: after a FF 3.2 billion loss in 1992, it recorded its fourth consecutive annual loss, amounting to FF 8.4 billion, in 1993. The group's situation had deteriorated constantly over the previous three years. The gap between the Air France group and its competitors had increased because of the poor results in 1993, which were due mainly to poor productivity, high operating costs and heavy financial charges.

10 The Commission went on to outline the Plan, which was intended to 'make Air France a real company' ('faire d'Air France une véritable entreprise'), an aim to be attained between 1 January 1994 and 31 December 1996 through a reduction in costs and financial expenses, through a different conception of the product and better utilisation of resources, through reorganisation of the company and through employee participation.

11 In that context, the Commission noted in particular that the number of new aircraft to be delivered during the restructuring period was to be reduced from 22 to 17 and that the corresponding investment would thus amount to FF 11.5 billion. The operating fleet (145 aircraft) was to be increased by just one plane; the number of seats offered was to be slightly reduced. Air France was also to rationalise its fleet by disposing of a number of aircraft. The mixed nature of its fleet (24 different types or versions) was one of the factors contributing to its high operating costs. In addition, Air France was to simplify its network, increase frequencies on profitable routes, develop long-haul routes, abandon marginal routes and focus on

routes where growth prospects were good. As regards personnel, the Plan envisaged in particular staff reductions of 5 000, a wages freeze (subject to re-examination) and a block on promotions. Air France was also to be restructured into 11 operating centres responsible for their own financial results, each centre having its own assets. Implementation of the Plan was to be financed by an increase in capital and by the sale of non-core assets.

12 The Commission noted that, during its negotiations with the French Government, the latter had made a number of commitments regarding implementation of the Plan and the use of the capital granted to Air France, with the capital injection to be made in three tranches: FF 10 billion in 1994, FF 5 billion in 1995 and FF 5 billion in 1996. Those commitments were set out, in the form of conditions, in the operative part of the contested decision.

13 On the basis of the foregoing, the Commission took the view that the capital injection in question constituted State aid within the meaning of Article 92(1) of the Treaty and Article 61(1) of the Agreement on the European Economic Area ('the EEA Agreement'), which, taking into account Air France's large European network and the intense competition existing on most of its routes, distorted competition within the EEA. In addition, the aid affected trade between the EEA countries, given the international character of the civil aviation industry.

14 After excluding the application of other derogating provisions of the Treaty and the EEA Agreement, the Commission examined to what extent the aid met the criteria laid down in Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement.

15 Examining the current situation in the civil aviation industry, the Commission took the view that the sector appeared to have overcome the serious economic

crisis which had prevailed since 1990. Despite positive results (increases in passenger traffic), some European airlines were still loss-making because of market overcapacity. However, the prospects for the European aviation industry were quite positive in the medium term. In the light of those forecasts, overcapacity appeared to be a phenomenon of temporary duration. The Commission accordingly took the view that the European air-transport market was not affected by a structural overcapacity crisis and that the state of the aviation industry did not require general capacity cutbacks.

16 After assessing the Plan, the Commission formed the view that its successful implementation was capable of restoring the economic and financial viability of Air France and that a genuine restructuring of the company would contribute to the development of the European air transport industry by improving its competitiveness and was therefore in the common interest. In that connection, a footnote referred to the Commission's action programme 'The way forward for civil aviation in Europe' (COM(94) 218).

17 In assessing whether the proposed aid was proportionate to Air France's restructuring needs, the Commission considered that it was both necessary and proportionate to enable the company successfully to accomplish its restructuring plan and return to viability. In that connection, the Commission reviewed the various financial instruments issued by Air France between 1989 and 1993 and concluded that the gearing (debt/equity) ratio would be 1.12: 1 at the end of 1996. The structure of the Air France group balance sheet should then be as follows: equity (capitaux propres) = FF 18.65 billion; debt = FF 20.85 billion. That ratio would be above average for the civil aviation industry, in which 1.5: 1 was considered to be an acceptable debt/equity ratio. The Commission then stated that, apart from the aid, Air France could improve its financial standing through its own efforts by, *inter alia*, postponing aircraft orders and selling assets. As regards the first possibility, the Commission noted that Air France had already delayed a number of aircraft orders; further postponement would take the average fleet age beyond 10 years, which was too high for an airline aiming at regaining its competitive strength. So far as the sale of assets was concerned, the Commission noted that there was only a limited number of assets, such as Méridien, Sabena and Air Inter, whose sale could bring in significant amounts of money. Sabena and Air Inter were two important core assets for Air France's aviation business. The sale of the remaining

assets was already part of the Plan and would not in any event lead to a significant reduction in the amount of the aid.

18 In verifying that the aid would not affect trade to an extent contrary to the common interest, the Commission referred to the commitments made by the French Government during the administrative procedure — in particular, the commitment that Air France would be the only beneficiary of the aid — and concluded that they limited its concern as to the possible effects of the aid in so far as they virtually prevented Air France from using the aid to cross-subsidise Air Inter's activities. The Commission therefore limited its analysis of the effects of the aid on trade to Air France, the actual beneficiary of the aid.

19 The Commission took the view that those commitments involved severe limitations on capacity, supply and pricing freedom for Air France and prevented it from pursuing an aggressive price policy on all the routes which it operated within the EEA. Further, during the first four months of 1994, Air France had already reduced its supply on the European market by 6.4% in relation to the corresponding period in 1993, whereas that of European airlines as a whole had increased on average by 3.8%. If Air France's supply were limited even below market growth, its market share within the EEA would decrease, to the benefit of its competitors. This would prevent the aid from affecting trade to an extent contrary to the common interest.

20 The Commission pointed out that, for the purpose of analysing the effects of the aid within the EEA, it had also to take into account the increased liberalisation in the air transport sector in the Community following the adoption in 1992 of a number of Council regulations referred to as the 'third package'. In that context, it considered that the removal of constraints protecting Air France from competition represented an appropriate compensatory justification for the granting of aid compatible with the common interest.

21 Finally, the Commission considered that the negative effects of the aid were not reinforced through the use of exclusive rights or through privileged treatment for Air France, since the French authorities had undertaken both to modify the traffic distribution rules for the Paris airport system in order to make them non-discriminatory and to ensure that the works necessary to adapt the two air terminals at Orly South and Orly West should not affect conditions of competition to the detriment of the airlines operating at Orly Airport. The Commission also pointed out that, on 27 April 1994, it had adopted a decision requiring France to authorise Community carriers to exercise traffic rights on the routes from Paris (Orly) to Toulouse and Marseille by 27 October 1994 at the latest.

22 The Commission concluded that the commitments made by the French authorities together adequately met the concerns which it had expressed in opening the administrative procedure.

23 Article 1 of the contested decision stated that the aid to be granted in the period 1994 to 1996 in favour of Air France, in the form of a FF 20 billion capital increase to be paid in three tranches, and aimed at its restructuring in accordance with the Plan was compatible with the common market and the EEA Agreement by virtue of Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement, provided that the French Government complied with 16 commitments set out as part of that article.

24 Article 2 of the contested decision made payment of the second and third tranches of the aid subject to fulfilment of those commitments and to the actual implementation of the Plan and achievement of the planned results, in order to ensure that the amount of aid remained compatible with the common market. Before release of the second and third tranches of aid in 1995 and 1996, the French Government was required to submit to the Commission a report on the progress of the restructuring programme and on the economic and financial situation of Air France. The

Commission was to have the proper implementation of the Plan and the fulfilment of the conditions laid down for the approval of aid verified by independent consultants.

Procedure before the Court of First Instance

25 The applicants then brought the present actions, which were registered at the Court of First Instance on 21 November 1994 and 22 December 1994 respectively.

26 The written procedures followed the normal course.

27 By orders of the President of the First Chamber (Extended Composition) of the Court of First Instance of 10 March 1995, 8 May 1995 and 12 June 1995, the Kingdom of Denmark, the United Kingdom, the Kingdom of Sweden, the Kingdom of Norway, Maersk Air I/S and Maersk Air Ltd ('the Maersk companies' or 'Maersk') were granted leave to intervene in support of the forms of order sought by the respective applicants.

28 By orders of the President of the First Chamber (Extended Composition) of the Court of First Instance of 12 June 1995, the French Republic was granted leave to intervene in support of the forms of order sought by the defendant.

29 By orders of the Court of First Instance (First Chamber, Extended Composition) of 12 June 1995, Air France was granted leave to intervene in support of the forms of order sought by the defendant and to plead in French during the oral procedures.

30 By decision of the Court of First Instance, the Judge-Rapporteur was transferred to the Second Chamber (Extended Composition), to which the cases were accordingly allocated.

31 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedures without any preparatory inquiry. It did, however, request the parties to amplify their submissions on a number of issues.

32 The parties presented oral argument and replied to the Court's questions at the hearing on 6 and 7 May 1997.

33 On that occasion, the Court adopted a measure of organisation of procedure under Article 64 of its Rules of Procedure, inviting the applicants and the interveners supporting them to lodge with the Registry the observations which they had submitted to the Commission during the administrative procedure, to the extent that they were not yet included on the case-file. The observations of British Airways plc ('British Airways'), TAT European Airlines ('TAT'), Scandinavian Airlines System Denmark-Norway-Sweden ('SAS'), Euralair International ('Euralair') and Air UK Ltd ('Air UK') were thus lodged with the Registry on 8 May 1997, those of the Kingdom of Denmark, the United Kingdom, the Kingdom of Sweden and the Kingdom of Norway having already been lodged during the hearing.

34 Having heard the parties' arguments on this point during the hearing, and in the absence of any objection on their part in that regard, the Court of First Instance (Second Chamber, Extended Composition) takes the view that the two cases should be joined for the purpose of giving judgment.

Forms of order sought

35 The applicants claim, in both cases, that the Court should:

— annul the contested decision; and

— order the Commission to pay the costs.

The applicant in Case T-394/94 further requests the Court to prescribe measures of organisation of procedure and measures of inquiry, in accordance with Articles 64 and 65 of the Rules of Procedure, and order production of all the relevant files and documents available to the Commission.

36 The United Kingdom claims that the Court should:

— annul the contested decision; and

— order the Commission to pay the costs, including those of the United Kingdom.

37 The Kingdom of Denmark, the Kingdom of Sweden and the Kingdom of Norway claim that the Court should:

— annul the contested decision.

38 The Maersk companies claim that the Court should:

— annul the contested decision; and

— order the Commission to pay the costs of their intervention in so far as such a decision lies within the discretion of the Court.

39 The Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs; and

— order the Kingdom of Denmark, the United Kingdom, the Kingdom of Sweden, the Kingdom of Norway and the Maersk companies to contribute to the Commission's costs.

40 The French Republic contends that the Court should:

— dismiss the applications.

41 Air France contends that the Court should:

— dismiss the applications; and

— order the applicants to pay the costs, including those incurred by Air France.

Substance

42 In support of their applications the applicants raise several pleas in law, which may be classed in two groups. In the pleas in the first group (I), they claim that the Commission breached the rules relating to the administrative procedure provided for under Article 93(2) of the Treaty by failing to obtain sufficient information and/or to provide the parties concerned, including the applicants, with sufficient information to enable them to be properly heard and effectively exercise the rights conferred on them by Article 93(2) of the Treaty and Article 62(1)(a) of the EEA Agreement. They also criticise the Commission for not having called on independent experts to assess whether the contested aid was compatible with Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement and claim that it failed to take all necessary steps to verify whether the information provided by the French authorities and Air France was well founded.

43 In the pleas in the second group (II), the applicants claim that the Commission committed a number of errors in the application of Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement. It is claimed in this connection that the Commission breached the principle of proportionality applicable in matters of State aid by (A) wrongly authorising Air France to purchase 17 new aircraft, (B) wrongly authorising the financing of operating costs and operational measures of Air France, (C) incorrectly classifying the securities issued by Air France between 1989 and 1993, (D) misconstruing Air France's debt/equity ratio and (E) wrongly failing to require the sale of disposable assets of Air France. The applicants further claim that the Commission wrongly formed the view that the aid was intended to facilitate the development of an economic activity without affecting trading conditions to an extent contrary to the common interest. Their criticism in this connection is principally directed at 12 of the 16 conditions of authorisation imposed by the decision authorising the aid. Finally, the applicants question, in several respects, whether Air France's restructuring plan is appropriate and submit that the Commission wrongly concluded that the Plan was such as to restore the economic viability of Air France. In those various contentions, the applicants also argue that the Commission provided inadequate reasoning for the contested decision. Finally, the applicant in Case T-394/94, British Midland Airways Ltd ('British Midland'), claims that there has been a breach of Article 155 of the Treaty.

I — *The pleas alleging irregularities in the conduct of the administrative procedure*

Summary of the parties' arguments

44 The applicant in Case T-394/94 argues, in substance, that the administrative procedure under Article 93(2) of the Treaty is adversarial and that the Commission ought therefore to have provided the parties concerned with sufficient information to enable them to appreciate fully the potential effect that the aid might have on them. In the circumstances, the Commission's communication of 3 June 1994 was inadequate. In particular, the Commission:

— did not explain how the sum of FF 20 billion was calculated;

— failed to indicate, in regard to the acquisition of 17 new aircraft, what types of aircraft would be acquired or what types of aircraft the fleet would comprise;

— did not provide a copy of the restructuring plan;

— predicted a 30% or 33.3% increase in productivity without explaining the basis of such calculation;

— did not provide details of the cost of the proposed voluntary redundancies;

— failed to provide details of Air France's assets and to explain the breakdown between core and non-core assets;

— did not give any valuation of the Méridien hotel chain;

— did not give details of the value of Air France's shareholding in Air Inter, Sabena or others, or explain why these were not considered to be non-core assets;

— did not provide details of Air France's proposed route network so as to enable its possible effects on competition to be calculated;

— did not give details of proposed 'new products' referred to by Air France, so as to enable an assessment of their effect on competition;

— did not have Air France's annual accounts at the time when the contested decision was taken;

— failed to explain why it did not insist on the disclosure of essential information necessary for the adoption of a reasoned decision on the compatibility of the aid with the common market;

— did not take subsidiaries — in particular Air Inter — into account, as the restructuring plan concentrated solely on Air France; and

— did not explain how the proposals for Air France to continue expansion plans could be reconciled with the aims of the Treaty, particularly in the light of the failure of the two earlier capital injections of FF 5.8 billion.

45 In the observations which it submitted to the Commission during the administrative procedure, British Midland had already raised most of the abovementioned points when it requested the Commission *inter alia* to show it the restructuring plan submitted by Air France, on the ground that it would otherwise not have sufficient information to comment meaningfully on the planned aid.

46 The applicants in Case T-371/94 also take the view that the information in the communication of 3 June 1994 was inadequate. Greater precision in the communication regarding Air France's intention to increase frequencies on profitable routes, develop long-haul routes, abandon marginal routes and focus on routes where growth prospects were good would have enabled the applicants to assist the Commission in assessing this aspect of the restructuring plan. In particular, they claim, the Commission did not set out Air France's justification for the need to purchase 17 new aircraft, so that the applicants could not submit the necessary information which would have enabled the Commission to consider that aspect of the case carefully and impartially.

47 They also point out that the communication makes no mention of the unit of measurement referred to as 'equivalent revenue passenger kilometre' ('ERPK'). The contested decision confronted them for the first time with this unit, which was tailor-made for Air France and applied to the calculation of their own presumed current and forecast productivity.

48 The applicants further submit that the Commission ought to have verified the French version of the communication regarding the passage relating to the possible overcapitalisation of Air France. The transfer of ORAs (obligations remboursables en actions — bonds redeemable into shares) and TSDIs (titres subordonnés à durée indéterminée reconditionnés — repackaged perpetual floating-rate notes) 'from the side of the debts into the equity', in the English version, was rendered in French by a transfer 'du passif vers l'actif'. This translation error must have made it more difficult for third parties using the French version to submit pertinent comments.

49 Finally, they consider that, in view of the complexity of this case, the Commission ought to have been assisted by independent experts in airline economics, finance and business. As is clear from Article 2 of the contested decision, which provides for the involvement of independent consultants before the second and third tranches of the aid are released, the Commission itself recognises the indispensability of having outside experts to verify the proper implementation of the restructur-

ing plan. It thus accepts implicitly that it has insufficient expertise to do so on its own.

50 The applicants in both cases take the view that the Commission, in adopting the contested decision, demonstrated an unseemly degree of haste, incompatible with proper respect for their fundamental rights or for those of the other parties concerned. The contested decision was taken only 16 working days after the date by which interested parties had to submit their comments, an exceptionally short time in which to examine, deliberate upon and resolve the complex issues raised by the planned aid in issue. The period between the date on which the procedure under Article 93(2) of the Treaty was opened (3 June 1994) and the date on which the contested decision was adopted (27 July 1994) was 37 working days and thus much shorter than the average period in similar cases.

51 The Kingdom of Denmark pointed out at the hearing that it had unsuccessfully requested the Commission, during the administrative procedure, to send the French Government's response to the communication of 3 June 1994 to the other Member States, so as to enable them to submit their observations before the Commission took its decision.

52 The Commission counters by stating that the procedure under Article 93(2) of the Treaty is not adversarial *vis-à-vis* interested third parties. Such parties are not entitled to be treated identically to the addressee of the final decision. The Commission refers to the case-law on competition, according to which the procedural rights of complainants are not as far-reaching as the right to a fair hearing enjoyed by the companies which are the object of the Commission's investigation.

53 With regard to the communication opening the procedure under Article 93(2), the Commission stresses that its sole aim is to obtain from persons concerned all infor-

mation required for its guidance with regard to future action. In the present instance, the communication of 3 June 1994 stated all the aspects in regard to which it wished to receive observations in order to be able to state its views with regard to the planned aid notified by the French authorities. In that communication, it provided all the information necessary to enable the parties concerned to express their views.

54 More generally, the Commission considers that it can only provide the information which is in its possession at the time the communication is issued, which is not irrelevant and which is not covered by the obligation of professional or commercial secrecy. Moreover, the purpose of a communication under Article 93(2) is not to express a concluded view but to raise questions. As regards the comprehensive information which, in the applicants' view, ought to have been included in the communication of 3 June 1994, the Commission states that most of the points raised were either covered by the obligation of commercial secrecy or did not raise doubts in regard to which it would have required additional information.

55 As regards the time taken for consideration of the case, the Commission points out that the aid plan in issue was notified on 18 March 1994 and that the contested decision was taken on 27 July 1994, 131 days later. The time which elapsed between those two dates was approximately the same as in similar cases (Commission Decision 91/555/EEC of 24 July 1991 on aid to be granted by the Belgian Government in favour of the air carrier Sabena (OJ 1991 L 300, p. 48) ('the Sabena decision'), Commission Decision 94/118/EC of 21 December 1993 concerning aid to be provided by the Irish Government to the Aer Lingus group (OJ 1994 L 54, p. 30) ('the Aer Lingus decision') and Commission Decision 94/698/EC of 6 July 1994 concerning increase in capital, credit guarantees and tax exemption in favour of TAP (OJ 1994 L 279, p. 29) ('the TAP decision')). Moreover, Article 10(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) ('Regulation No 4069/89'), according to which a decision declaring a notified concentration to be compatible with the common market should be made within four months, confirms that such a period is reasonable.

56 Finally, the Commission considers that there is no legal obligation on it to have recourse to outside experts before reaching its decisions.

Findings of the Court

General aspects

57 As a preliminary consideration, it must be borne in mind that the disputed aid plan was officially notified by the French authorities to the Commission, which, once it had decided to open the procedure provided for under Article 93(2) of the Treaty, was under an obligation to give 'notice to the parties concerned to submit their comments' before it reached a decision on the matter.

58 The purpose of that provision of Article 93(2), it should be pointed out, has been held by the Court of Justice to be to oblige the Commission to take steps to ensure that all persons who may be concerned are notified and given an opportunity of putting forward their arguments (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17) and to allow the Commission to be fully informed of all the facts of the case before taking its decision (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13).

59 With more particular regard to the Commission's duty to inform interested parties, the Court of Justice has ruled that the publication of a notice in the *Official Journal of the European Communities* is an appropriate means of informing all the parties concerned that a procedure has been initiated (*Intermills* v *Commission*, cited above, paragraph 17), while also pointing out that 'the sole aim of this communication is to obtain from persons concerned all information required for the

guidance of the Commission with regard to its future action' (Case 70/72 *Commission* v *Germany* [1973] ECR 813, point 19). This Court has followed that case-law, which confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted under Article 93(2) of the Treaty (Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256).

60 It follows that, far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been instituted are recognised as having (see, to that effect, Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraphs 19 and 20, concerning competition, and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 46), 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.

61 There may be two reasons for restricting the extent of the right to participate and to be informed which interested parties enjoy in the context of the administrative procedure instituted under Article 93(2) of the Treaty.

62 First, where — as in the present instance — a Member State notifies the Commission of planned aid and submits supporting documentation, and the relevant Commission departments subsequently hold a series of meetings with officials from the Member State in question, the amount of information in the Commission's possession may already be relatively extensive, leaving outstanding only a small number of doubts which information supplied by the parties concerned may dispel. In so far as they relate to the details of the planned aid, to the economic, financial and competitive position of the recipient undertaking and to its internal operations, the discussions between the Member State and the Commission will inevitably be more thorough than those conducted with the parties concerned. While providing such parties with general information on the essentials of the planned aid, therefore, the Commission may confine itself to concentrating its communication in the

Official Journal on those aspects of the Plan concerning which it still harbours doubts.

63 Second, the Commission is required, under Article 214 of the Treaty, not to disclose to interested parties information of the kind covered by the obligation of professional secrecy, in particular information relating to the internal operations of the recipient undertaking. In that regard, the position of interested parties is not distinguishable from that of complainants in competition cases who, according to the case-law of the Court of Justice, may not receive documents containing business secrets (*BAT and Reynolds* v *Commission*, cited above in paragraph 60, paragraph 21).

64 The limited nature of the abovementioned rights to participate and to be informed, in so far as they relate solely to the administrative procedure, is not at variance with the Commission's duty under Article 190 of the Treaty to provide, in its final decision authorising planned aid, sufficient reasons which must address all the essential complaints which parties directly and individually concerned by that decision have made either on their own initiative or as a result of information supplied by the Commission. Thus, even on the assumption that the Commission may, in a particular case, validly prefer to use other sources of information and thereby reduce the significance of the participation of interested parties, it is not thereby released from its obligation to include an adequate statement of reasons in its decision (see paragraph 96 below).

65 It is in the light of the principles set out above that the Court must examine the alleged irregularities which are claimed to have vitiated the course of the administrative procedure, it being understood and undisputed that the applicants, the interveners supporting them and ACE, which all opposed authorisation of the disputed aid plan during the administrative procedure before the Commission, must be treated as parties concerned for the purposes of Article 93(2) of the Treaty, as construed by the Court of Justice in paragraph 16 of *Intermills* v *Commission*, cited above in paragraph 58.

The communication of 3 June 1994

66 With regard, first, to the allegedly inadequate nature of the communication of 3 June 1994, it must be noted that the communication deals with:

— Air France's economic and financial situation prior to the drafting of the aid plan, in particular the previous restructuring plans and capital injections and its accumulated losses;

— the 'particular ... topics' on which the new restructuring plan focuses;

— the projected aid amount of FF 20 billion; and

— the main doubts expressed by the Commission at that stage of the procedure concerning in particular the productivity gains of Air France, the structure of the Air France group, the competitive position of Air France and the possibility of its being overcapitalised.

The Court takes the view that such information was sufficient to enable the parties concerned to present their arguments effectively before the Commission.

67 As regards the view taken by the applicants in Case T-371/94 that the ERPK unit of measurement, Air France's air network and its future development and the reasons justifying the acquisition of 17 new aircraft ought also to have featured in the communication, the Commission's reply to the effect that it did not entertain any doubts on those specific points is sufficient to justify the absence in that communication of any reference to those matters; that, however, does not mean that the applicants may not ask the Court to examine whether the Commission's final

decision is adequately reasoned in regard to those matters or whether it contains manifest errors of assessment or of law.

68 With regard to the complaint raised by the applicant in Case T-394/94 that there was no notification of the numerous details mentioned above (see paragraph 44 above), the Commission is justified in invoking the obligation of business secrecy which prohibited it from disclosing commercially sensitive information on Air France to that airline's competitors. In particular, the restructuring plan — at the stage prior to its approval by the Commission and to the start of its implementation — contained such information, and it was clearly not a matter for competitors to evaluate, and compare with their own management measures, each of the restructuring measures envisaged by Air France. Were the position otherwise, competitors would be able to interfere in the internal restructuring of Air France and to attempt to 'dictate' the measures which they might see fit for that company, after having obtained valuable information on their competitor. Such an analysis is not gainsaid by the fact that other interested parties, such as ACE (p. 27, final paragraph, of its observations), have apparently been able to obtain this restructuring plan. That fact cannot lead the Commission to infringe Article 214 of the Treaty.

69 It should be added that Air France's annual accounts for 1993 were published in the *Bulletin des Annonces Légales Obligatoires* of 17 June 1994, at p. 10207 (point 319 of Air France's statement in intervention in Case T-371/94), and were thus available to the parties concerned. Those parties cannot therefore criticise the Commission for not having disclosed the definitive figures in its communication of 3 June and cannot argue that it took its final decision without knowledge of that information.

70 Finally, the allegations that the Commission failed to obtain essential information before adopting its final decision and did not sufficiently check all relevant aspects of the case amount to no more than general assertions and assumptions unsupported by any concrete evidence. The Commission was thus entitled simply to reply that it had indeed obtained all useful and necessary information which was the subject of detailed verification on its part. Furthermore, those allegations in

fact concern not the stage of the communication of 3 June 1994 but the later stage of the contested decision. The same is true of the final two heads of complaint raised by the applicant in Case T-394/94 (see paragraph 44 above), which are in reality directed against the legality of the contested decision and concern the statement of reasons and the assessment of the merits therein. They will for those reasons be examined below in a separate context.

The time taken for consideration of the case

71 The applicants take the view that, given the complexity of the disputed aid plan, the period which the Commission gave itself for examining that plan before adopting the contested decision was too short. It must first be pointed out in this regard that there is nothing in the Treaty or in Community legislation requiring decisions on State aid adopted at the conclusion of the procedure under Article 93(2) of the Treaty to comply with a fixed period. Furthermore, assuming that the Commission acted with excessive haste and did not give itself sufficient time to examine the disputed plan, such conduct could not, by itself, justify annulment of the contested decision. To entail annulment, such conduct would have to involve a breach of specific rules governing procedure, the duty to provide reasons or the internal legality of the contested decision. Consequently, without its being necessary to express a view on the relevance of the Commission's decision-making practice in regard to concentrations, this contention must be rejected.

The need for external experts

72 The complaint that the Commission failed to seek assistance from external experts when drafting the contested decision is manifestly lacking any foundation, since no provision of the Treaty or of Community legislation imposes any such obligation on it. It should be added that the Commission was, in any event, relatively well informed on the air transport sector before it adopted the contested decision. In

that connection, it had already familiarised itself with the air transport situation, which was dealt with, in particular, in the report entitled 'Expanding Horizons' published at the beginning of 1994 by the 'Comité des Sages' (Committee of Wise Men), in the programme 'The way forward for civil aviation in Europe', and in the publications of the International Air Transport Authority (IATA) and the Association of European Airlines (AEA). In addition, the Commission had adopted other decisions within the air transport sector, such as the Sabena, Aer Lingus and TAP decisions (cited above in paragraph 55). Finally, nothing in the present case indicates that the Commission had need of external expert assistance.

The translation error

73 The error in the French text of the communication of 3 June 1994, pointed out by the applicants in Case T-371/94, is so obvious that those familiar with the air sector would readily have been aware of it. It is clear that loan bonds cannot, according to accounting principles, be transferred 'du passif vers l'actif' ('from the side of the debts into the equity' in the English text of the communication), but must be classified, exclusively on the liabilities side, either as equity or as debt.

74 In any event, the Commission expressly pointed out, in the relevant passage of its communication, that it had still to examine in detail the classification of the bonds in question. Its assessment was thus not yet definitive in that passage, including the point distorted by the abovementioned error. That error cannot therefore affect the legality of the administrative procedure, since the crucial question in that regard is solely whether the final decision was also affected by that error and the applicants have not even alleged that to have been the case.

The participation of other Member States

75 The plea submitted by the Kingdom of Denmark, that the Commission should have forwarded to the other Member States the French Government's reply to the communication of 3 June 1994, must be dismissed as inadmissible since it was not raised by the applicants. In view of the fact that interveners must, under Article 116(3) of the Rules of Procedure, accept the case as they find it at the time of their intervention and that their submissions in an application to intervene are, under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, limited to supporting the submissions of one of the main parties, the Kingdom of Denmark is not, as an intervener, entitled to raise that plea in law (see, to the same effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 19 to 22).

76 In any event, the text of Article 93 of the Treaty does not require the Commission to forward to the other Member States observations which it has received from the Government of the State seeking authorisation to grant aid. On the contrary, it follows from the third subparagraph of Article 93(2) that the other Member States may be involved in a specific case of aid only where that case has, at the request of the State concerned, been submitted to the Council.

Conclusion

77 In the light of the foregoing, the procedure under Article 93(2) of the Treaty followed in the present case was not vitiated by any defect and the pleas in law relating thereto must therefore be dismissed.

II — *The pleas alleging errors of assessment and errors of law committed by the Commission in breach of Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement*

General aspects

78 In the contested decision, the Commission examined the legality of the disputed aid in the light of Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement. In that examination, it found that a genuine restructuring of Air France would be in the common interest, that the amount of aid did not appear to be excessive and that the aid would not affect conditions of trade to an extent contrary to the common interest.

79 It has consistently been held that the Commission enjoys a broad discretion in the application of Article 92(3) of the Treaty (see, for instance, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraphs 17 and 24, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18, and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 49). Since that discretion involves complex economic and social appraisals, the Court must, in reviewing a decision adopted in this context, confine itself to verifying whether the Commission complied with the 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 misuse of powers (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 11, and the case-law cited therein). In particular, it is not for the Court to substitute its own economic assessment for that of the author of the decision (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 23). The Court takes the view that this case-law is equally relevant to the examination under Article 61(3)(c) of the EEA Agreement.

80 In the present cases, the Commission points out that the applicants' contentions are in part based on events occurring after the contested decision was adopted. In

reply, the applicants argue that some of those subsequent events form part of a continuing and uninterrupted succession of facts of which the Commission should have been aware. Furthermore, certain subsequent facts illustrate clearly the comments submitted by the applicants during the administrative procedure.

81 Here, it must be borne in mind that, in the context of an action for annulment under Article 173 of the Treaty, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1, paragraph 74) and cannot depend on retrospective considerations of its efficacy (Case 40/72 *Schroeder* v *Germany* [1973] ECR 125, paragraph 14). 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 (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, and Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33).

82 It is in the light of the above principles that the substantive pleas and arguments here raised by the applicants — which challenge the assessments as to whether the aid was proportionate, as to the impact of that aid on the civil aviation sector within the EEA, and as to the appropriateness of the restructuring plan accompanying the disputed aid — must be examined.

The contentions based on breach of the principle of proportionality applicable in regard to State aid

83 In these contentions, the applicants and the interveners supporting them claim that the Commission authorised aid in an amount exceeding the restructuring require-

ments of Air France. These contentions are based essentially on the judgment in *Philip Morris* v *Commission* (paragraph 17, cited above in paragraph 79), in which the Court of Justice ruled that Member States could not be permitted to make payments which would improve the financial situation of the recipient undertaking 'although they were not necessary for the attainment of the objectives specified in Article 92(3)'.

A — The contention that the Commission was wrong to authorise the purchase by Air France of 17 new aircraft

Summary of the parties' arguments

84 The applicants consider that it was disproportionate to approve aid the purpose of which was to permit Air France to purchase 17 new aircraft. The Commission, they claim, was clearly wrong in concluding that the amount of aid could not be reduced by cancelling or postponing the orders placed by Air France for a value of FF 11.5 billion. The costs of the periodically necessary renovation of the fleet, being an investment in capital assets, in principle form part of an airline's operating costs. Such renovation must be carried out without State intervention. In any event, the acquisition of new aircraft was not essential for Air France.

85 The applicants in Case T-371/94 also claim that the Commission provided an inadequate statement of reasons in that regard, even though it had been informed during the administrative procedure that the purchase of 17 new aircraft was not an essential element in Air France's restructuring plan and ought therefore to be cancelled. The Commission failed to consider seriously the third-party comments filed in response to its communication of 3 June 1994. The applicant in Case T-394/94 and the Maersk companies, in intervention, argue generally that the Commission neglected to provide a proper statement of reasons by failing, in par-

ticular, to deal properly with the detailed submissions made to it by third parties during the administrative procedure.

86 The Commission stresses that it was necessary for Air France to acquire the 17 new aircraft. It refers to the wording of the contested decision, which states that Air France's high operating costs were partly due to the considerable diversity of its fleet, rationalisation of which was envisaged within the framework of the restructuring plan (contested decision, OJ pp. 75 and 76). Far from rejuvenating the fleet, the Plan merely slows down its ageing. New jet aircraft are significantly more fuel-efficient, comply with environmental protection regulations and have low repair and maintenance costs. Finally, they have a greater passenger appeal.

87 So far as its obligation to state reasons is concerned, the Commission takes the view that the contested decision is in accordance with Article 190 of the Treaty. It is sufficient for the decision to set out the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the Commission to its decision may be understood (Case 24/62 *Germany* v *Commission* [1963] ECR 63, at p. 69). It is not required to discuss all the issues of fact and law which have been raised by every party during the administrative procedure (see, for example, Joined Cases 209/78 to 215/78 and 218/78 *Heintz Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 66). Finally, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the need for information of the undertakings to whom the measure is addressed. In the Commission's view, the conditions laid down in the case-law referred to above were fully complied with in the contested decision, which, in 17 pages of the Official Journal, sets out all the relevant issues of fact and law surrounding this case and summarises the objections raised by third parties during the administrative procedure. In particular, the Commission denies that it failed to take account of the observations submitted during that procedure. Those observations were duly considered and conveyed to the French authorities for their comments.

Findings of the Court

88 In view of the arguments put forward by the applicants, it is first necessary to ascertain whether the contested decision contains an adequate statement of reasons in regard to the authorisation of Air France's purchase of 17 new aircraft. It must first of all be pointed out in this regard that, in the light of the settled case-law to the effect that any absence of a statement of reasons may be raised by the Court itself of its own motion (Case 18/57 *Nold* v *High Authority* [1959] ECR 41, at p. 52, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraphs 24 and 25, and Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 129), the Court invited the applicants and the interveners supporting them to lodge the observations which they had submitted to the Commission during the administrative procedure in their capacity as parties concerned within the meaning of Article 93(2) of the Treaty, to the extent that those observations were not yet included in the case-file (see paragraph 33 above).

89 In line with the settled case-law of the Court of Justice, the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its supervisory jurisdiction (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, and the case-law there cited).

90 So far as concerns the notion of 'persons concerned' within the meaning of the above case-law, the Court of Justice has ruled, in a case involving a Commission decision refusing to authorise an aid plan drawn up by a Member State for the benefit of a State-controlled undertaking, that the requirement of a statement of reasons must be assessed on the basis, in particular, of the interest which those to whom the measure is addressed 'or of other parties to whom it is of direct and individual concern', within the meaning of Article 173 of the Treaty, may have in receiving explanations (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19).

91 The Court of Justice has subsequently ruled that an undertaking in competition with an undertaking receiving State aid must be regarded as a 'party concerned' within the meaning of Article 93(2) of the Treaty and must, in that capacity, be considered to be directly and individually concerned by the Commission decision authorising payment of the aid in question. In so doing, the Court of Justice also pointed out that the parties concerned within the meaning of Article 93(2) had already been defined as the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (Case C-198/91 *William Cook* v *Commission* [1993] ECR I-2487, paragraphs 24 to 26, and the case-law there cited).

92 The requirement to provide reasons for a decision taken in regard to State aid thus cannot be determined solely on the basis of the interest which the Member State to which that decision is addressed may have in obtaining information. Where a Member State has obtained from the Commission what it was seeking, namely authorisation for its planned aid, its interest in having a reasoned decision addressed to it may be greatly reduced, in contrast to that of competitors of the beneficiary of the aid, in particular where it has received sufficient information during the negotiations with the Commission through, *inter alia*, exchange of correspondence before the authorising decision was taken.

93 In the present instance, it is common ground that the applicants, the Maersk companies, as interveners, and ACE are parties concerned within the meaning of Article 93(2) of the Treaty and that the contested decision is of direct and individual concern to them within the meaning of the fourth paragraph of Article 173 of the Treaty, given that their market position is significantly affected by the aid measure which it authorises (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 25).

94 According to settled case-law, the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (*Delacre and Others* v *Commission*, cited above

in paragraph 89, paragraph 16 and the case-law there cited). While the Commission, in the statement of reasons for a decision, is not required to discuss all the issues of fact and law raised by interested parties during the administrative procedure (Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 39), it must none the less take account of all the circumstances and all the relevant factors of the case (Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, hereinafter 'the *Bremer Vulkan* judgment', paragraph 32) so as to enable the Court to review its lawfulness and make clear to the Member States and the persons concerned the circumstances in which the Commission has applied the Treaty (*Publishers Association*, cited above, paragraph 39).

95 It should be added that the Commission adopted the contested decision pursuant to Article 92(3) of the Treaty, in an area in which it enjoys a broad discretion (see paragraph 79 above). Since the Court of Justice has ruled that the Commission's discretion carries with it a duty to examine carefully and impartially all relevant aspects of the individual case (Case C-269/90 *Hauptzollamt München-Mitte* v *Technische Universität München* [1991] ECR I-5469, paragraph 14), review of that obligation requires a sufficiently precise statement of reasons in order to enable the Court to be satisfied that it has been complied with.

96 It is thus necessary to ascertain whether the statement of reasons in the contested decision indicates clearly and unequivocally the Commission's reasoning, particularly in view of the essential complaints concerning the assessment of the contested aid plan put to the Commission during the administrative procedure by British Airways, TAT, Koninklijke Luchtvaart Maatschappij ('KLM'), SAS, Air UK, Euralair, British Midland and by ACE, in particular on behalf of Euralair and Maersk, by the Kingdom of Denmark, the United Kingdom, the Kingdom of Sweden and the Kingdom of Norway (the 'parties concerned').

97 On an overall reading of the observations lodged with the Court, it transpires that some of those parties had, in particular, insisted before the Commission on the unacceptable nature of the acquisition of 17 new aircraft for FF 11.5 billion, as provided for in the restructuring plan. Since, in the face of the crisis generated by overcapacity, all airline companies not in receipt of subsidies were compelled to cancel or postpone orders for new aircraft at the beginning of the 1990s, Air France, it was argued, could not escape such an obligation. The decision to invest FF 11.5 billion in acquiring aircraft would increase additional capital requirements and consequently Air France's debts. In view of its disastrous financial situation, it would not be justified in using receipts from the sale of other assets for the purpose of such financing. In order to ensure uniformity within the Air France fleet, provided for in the restructuring plan, it would have been more appropriate to modify existing aircraft.

98 In particular, TAT (p. 18 of its observations) and the United Kingdom (p. 6 of its observations) stressed that the investment represented by the acquisition of 17 new aircraft concerned Air France's short-term operational activities, not its restructuring. It was normal modernisation designed to maintain the company's competitiveness. Such a measure should be financed through an undertaking's own resources and not through State aid. In this case it was inevitable that, contrary to the requirements of the case-law and the Commission's decision-making policy, the contested aid would be used to finance the purchase of those aircraft. Such aid should be classified as operational aid, not compatible with the requirements of Article 92(3)(c) of the Treaty. In that context, reference was made to the judgments in *Deufil* (cited above in paragraph 79) and in Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and Glaverbel* v *Commission* [1988] ECR 1573, and to Commission Decision 90/70/EEC of 28 June 1989 concerning aid provided by France to certain primary processing steel undertakings (OJ 1990 L 47, p. 28).

99 In that regard, the Court notes that the Commission pointed out, in the contested decision, that one of the factors affecting the Air France group's operating performance was its fleet mix, which comprised too many different types of aircraft (24 different types or versions), contributing to the high operating costs (for example, particularly high maintenance costs resulting from the large number of different spare parts and different qualifications for flying and ground personnel). As of

31 December 1993, the group's fleet consisted of 208 aircraft (Air France's operating fleet consisted of 145 aircraft), with an average age of 8.6 years (contested decision, OJ, p. 75).

100 With regard to the 'particular ... topics' on which the restructuring plan focused, the Commission pointed out that it was intended to adjust the number of new aircraft to be delivered during the restructuring period from 22 to 17. The corresponding investment would thus be FF 11.5 billion (contested decision, OJ, p. 75). As for the capital necessary for this investment, the Commission noted the postponement of aircraft orders, which, at the end of the restructuring period, would increase the average fleet age to some 9.3 years. Any further delay in fleet investment would simply mean a further deterioration of this figure which could harm Air France's competitiveness and endanger the viability of the restructuring (contested decision, OJ, p. 82).

101 In examining whether the aid was proportionate to the needs of restructuring (contested decision, OJ, p. 83), the Commission took the view that, apart from the aid, Air France had three ways of improving its financial standing through its own efforts, one of which was to postpone its aircraft orders. Since the company had already postponed a number of orders, further postponement would take the average fleet age beyond 10 years, which was too high for an airline aiming at regaining its competitive strength (contested decision, OJ, p. 85).

102 The reasoning, as thus stated, indicates clearly and unequivocally why the Commission considered that it was vital, in the specific case of Air France, to proceed with the purchase of 17 new aircraft. It includes the grounds of justification regarded by the Commission as being fundamental, namely the need for Air France to have a fleet of a reasonable average age, the fact that the number of aircraft to be acquired was only a fraction of that originally envisaged and the fact that the planned investment would serve to make Air France's fleet more uniform and thus lead to a reduction in operating costs. The Commission thereby provided an adequate response to the first branch of the observations submitted by the parties concerned during the administrative procedure.

103 In the second branch of their observations, the parties concerned classified part of the contested aid as operating aid prohibited by the case-law in so far as it was intended to finance purely operational activities of Air France, namely refurbishing of its fleet aircraft as operating assets.

104 It must be noted in that regard that, in *Deufil* (cited above in paragraph 79), the Court of Justice approved the Commission's reasoning that investment in normal modernisation intended to maintain an undertaking's competitiveness should be carried out using the undertaking's own financial resources, and not through State aid (paragraphs 16 to 19). In *Exécutif Régional Wallon* (cited above in paragraph 98), the Court of Justice treated the Commission's line of reasoning — to the effect that investment intended for the renovation and technical modernisation of a production line, which had to be carried out periodically, could not be regarded as designed to facilitate the development of certain economic activities within the meaning of Article 92(3)(c) of the Treaty — as comprehensible and falling within its power of appraisal (paragraphs 31, 32 and 34).

105 Referring to that case-law, the parties concerned pointed out the risk that the amount of aid authorised might become excessive if part of it was not used for Air France's restructuring *stricto sensu*. In *Philip Morris* (cited above in paragraph 79, paragraph 17), the Court of Justice ruled that Member States were not entitled to make payments which would improve the financial situation of the recipient undertaking 'although they were not necessary for the attainment of the objectives specified in Article 92(3)'.

106 The parties concerned thus raised the possibility of an error of law, namely a breach of the principle of proportionality laid down, with specific reference to State aid, by Article 92(3) of the Treaty. This Court takes the view that it was

essential to consider that contention when assessing the aid plan in issue. The Commission was thus under an obligation to reply to it in the grounds of the contested decision.

107 In this connection, the Commission took the view, in the contested decision, that investment in fleet renewal was necessary for the viability of Air France's restructuring (contested decision, OJ, p. 82) and that postponement of orders for new aircraft would take Air France's average fleet age beyond 10 years, a level too high for an airline company aiming at regaining its competitive strength (contested decision, OJ, p. 85). Investment in fleet renewal in an amount of FF 11.5 billion, which features among the 'particular ... topics' on which the restructuring plan focused (contested decision, OJ, p. 75), was thus regarded by the Commission as forming an integral part of Air France's restructuring.

108 The Commission confirmed that point of view before the Court by declaring that the acquisition of 17 new aircraft was justified 'within the framework of the implementation of the Plan' (point 40 of the rejoinder in Case T-371/94). Moreover, according to the Ernst & Young report submitted by the Commission (Annex 2 to the defence in Case T-371/94), the purchase of the aircraft constituted '... an integral element of its plan to rationalise its fleet ... This investment is a key element of [the] Plan' (point 22 on page 22 of the Report).

109 Regarding the detailed arrangements for financing that investment, the contested decision indicates that the implementation of the restructuring plan was to be financed through the increase in capital and sale of non-core assets, from which Air France hoped to realise some FF 7 billion, in particular the sale of a number of aircraft expected to generate some FF 4.1 billion, the sale of spare parts (FF 1.2 billion), a building (FF 0.4 billion) and the Méridien hotel group (contested decision, OJ, p. 76). The contested decision adds that the French authorities gave an undertaking to ensure that, for the duration of the Plan, the aid would be exclusively used by Air France for the purposes of restructuring the company (contested decision, OJ, pp. 78 and 79).

110 In its assessment of the viability of the restructuring plan, the Commission stated that the aid in question was aimed at financing the implementation of the Plan and restructuring the finances of Air France (contested decision, OJ, p. 82). In summary, it was satisfied that the aid granted to Air France was both necessary and proportionate to enable the company to accomplish successfully its restructuring plan and return to viability (contested decision, OJ, p. 86). Finally, condition of authorisation No 6 required the French authorities to ensure 'that ... the aid is used exclusively by Air France for the purposes of restructuring the company' (contested decision, OJ, p. 89).

111 As is clear from that reasoning, the contested decision took the view that, while it would serve to reduce Air France's indebtedness, the State aid in dispute was also intended to finance the achievement of the restructuring plan, also financed by the disposal of assets. At the same time, the Commission also considered that investment in fleet renewal was in itself a vital factor in restructuring Air France. It thus appears that the contested decision acknowledged that the aid was intended to finance the fleet investment involving the acquisition of 17 new aircraft. In any event, the decision did not preclude the possibility that the aid might be used, at least in part, for the purpose of financing such investment. The only independent financial means at Air France's disposal designed to contribute to financing this investment, namely the disposal of assets, was expected to realise only FF 7 billion, whereas the costs of the investment in question amounted to FF 11.5 billion.

112 Although such a purchase, accompanied by the disposal of old aircraft, clearly constitutes a modernisation of Air France's fleet, the contested decision did not comment on the relevance, asserted by the parties concerned, of the *Deufil* and *Exécutif Régional Wallon* judgments (cited above in paragraphs 79 and 98). The Commission thus failed to specify whether it would tolerate, exceptionally, the financing in question because it considered that case-law to be irrelevant in the specific circumstances of the present context or whether it intended to depart from the actual principle laid down therein.

113 A statement of position by the Commission was all the more necessary in the light of its own decision-making practice reflecting its opposition in principle to all

operating aid intended to finance normal modernisation of installations. The Commission considers that investments intended for such modernisation cannot be treated as restructuring and must for that reason be financed out of the own resources of the companies concerned, without any State intervention (Commission Decision 85/471/EEC of 10 July 1985 on an aid granted by the Federal German Government to a producer of polyamide and polypropylene yarn situated in Bergkamen (OJ 1985 L 278, p. 26, at p. 29); Commission Decision 89/228/EEC of 30 November 1988 on Decree-Law No 370/87 of 7 September 1987 of the Italian Government, subsequently converted into Law No 460 of 4 November 1987 on production and marketing, including new standards for the production and marketing of wine sector products (OJ 1989 L 94, p. 38, at p. 41); Commission Decision 92/389/EEC of 25 July 1990 concerning the State aid provided for in Decree-Laws No 174 of 15 May 1989 and No 254 of 13 July 1989 and in draft Law No 4230 regularising the effects produced by the abovementioned Decree-Laws (OJ 1992 L 207 p. 47, at p. 51)).

114 It follows that the grounds of the contested decision do not make it clear that the Commission did in fact examine whether, contrary to the above case-law and its own decision-making practice, the modernisation of the Air France fleet could be partially financed by aid earmarked for restructuring of the company — and, if so, for what reasons.

115 That finding is not invalidated by the details produced before the Court by the French Republic and Air France with regard to the investments in aircraft of FF 11.5 billion envisaged in the restructuring plan. In so far as those interveners have indicated that the amount of FF 11.5 billion was divided into three tranches — FF 7.6 billion for the purchase of 17 aircraft, FF 3 billion for the purchase of spare parts, and FF 0.9 billion for aeronautical work — it is clear that the aeronautical work and the spare parts serve, in the same way as the new aircraft, to modernise the company.

116 Admittedly, the Commission did subsequently argue, during the present proceedings, that the contested aid was intended solely to reduce Air France's indebtedness and not for the purchase of the 17 new aircraft, since fleet investment was to be financed exclusively by Air France's operating profits. However, that reasoning, developed by the Commission's agents before the Court, not only does not feature in the contested decision but is even contradicted by the reasoning therein to the effect that the aid was intended to finance, at least in part, the implementation of the restructuring plan featuring the modernisation of Air France's fleet. As the Court of Justice ruled in its judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 66 to 68, the operative part and the statement of reasons of a decision — which must be reasoned under Article 190 of the Treaty — constitute an indivisible whole, with the result that it is for the college of Commissioners alone, in accordance with the principle of collegiate responsibility, to adopt both the one and the other, any alteration to the statement of reasons going beyond simple corrections of spelling or grammar being the exclusive province of that college.

117 Those considerations based on the principle of collegiate responsibility are equally relevant to the decision here under challenge, which also had to be reasoned pursuant to Article 190 of the Treaty and by which the college of Commissioners exercised the discretion reserved to it, to the exclusion of any other body, in the application of Article 92(3) of the Treaty. The arguments presented by the Commission's agents before the Court therefore cannot be upheld (see also, in this connection, *Bremer Vulkan*, cited above in paragraph 94, paragraphs 47 and 48).

118 The same applies, *a fortiori*, with regard to the explanations provided before the Court by Air France and the French Republic, intervening in support of the Commission, which argue (i) that it was impossible to cancel or postpone the orders for the 17 new aircraft because they were firm contractual commitments, failure to comply with which would have involved the imposition of penalties, (ii) that, of the 34 aircraft whose resale was envisaged in the restructuring plan, seven were new machines and that the proceeds from their resale would correspond to seven new aircraft not yet acquired, (iii) that of the 17 new aircraft, seven would be immediately resold without being commissioned, and (iv) that the total operating

resources of Air France were fixed at FF 19.2 billion in the restructuring plan, thus sufficing to cover the investment expenses involved in fleet renewal. Those assertions are not covered by collegiate responsibility and therefore cannot mitigate the defective reasoning by which the contested decision is vitiated.

119 It might be added, should any further reasoning be necessary, that, assuming them to be admissible, the explanations presented to the Court, to the effect that application of the measures envisaged by the restructuring plan were intended to produce a cash flow enabling Air France to meet its operating and investment costs, are in any event contradicted by the reasoning in the contested decision, from which it is clear that the financial stability and profitability of Air France were not expected to be restored until the end of 1996 (contested decision, OJ, p. 75).

120 It follows from all of the foregoing that the reasons given in the contested decision do not satisfy the requirements of Article 190 of the Treaty in so far as the purchase of 17 new aircraft is concerned.

B — The contention that the Commission wrongly authorised the financing of operating costs and operational measures of Air France

Summary of the parties' arguments

121 The applicants in Case T-371/94 submit that the Commission failed to consider whether the aid was indispensable for the restructuring of Air France, rather than simply necessary to finance the expansion of its operations and the modernisation of its equipment. In their opinion, Article 92(3)(c) of the Treaty does not permit operational aid intended to modernise the operations of its beneficiary.

122 They submit that the only structural costs that will arise from the implementation of the restructuring plan relate to the 5 000 voluntary redundancies, the precise amount attributable to which remains open to debate since the contested decision does not contain any information on that point. The costs which may arise from the other measures envisaged by the restructuring plan should be considered as operating costs, in particular the marketing policy to win back customers and the launching of Euroconcept and Première Club. It seems probable that Air France will also use the aid to finance other operational measures not expressly contemplated in the restructuring plan. In particular, it is significantly undercutting fares on routes between the EEA and non-member countries.

123 Those applicants state that they have evidence that Air France's introduction of a new class on medium-haul routes and its introduction of the new class on long-haul routes by the autumn of 1995 were costing it FF 150 million and approximately FF 500 million respectively, as is apparent from two press articles published in March 1995. They accordingly take the view that the operating costs incurred before the end of 1996, for example through the introduction of the two new classes, will have been financed from the contested aid.

124 The applicant in Case T-394/94 also takes the view that the aid would be used to make massive investments in Air France's new products, such as its 'Club Class' operation. In that context, the applicants in Case T-371/94 point out that Air France enjoys a 'margin of safety' (contested decision, OJ, p. 85) which it could use in order to support and modernise its operations. The aid is sufficiently excessive to allow Air France to consider recapitalising its subsidiary Jet Tours or transferring part of the aid to its subsidiary Air Charter.

125 The applicants in both cases take issue with the Commission's argument that the contested aid is intended solely to reduce Air France's financial charges by lowering its rate of indebtedness and is not intended to finance its operating costs. They submit that the mere possibility of the aid's being used to sustain and modernise Air France's operations is sufficient to render it incompatible with Article 92(3)(c) of the Treaty. In support of that argument, they refer to the judgment in Case

C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 10 and 14, to the effect that it is not necessary to establish that the State funds granted are specifically and expressly intended to attain a precise objective; it is sufficient to observe that, in any event, the receipt of those funds enables other resources to be released in order to arrive at the same result.

126 The applicants in Case T-371/94 add that the Commission failed to explain the difference between the amount of the contested aid and the amount which would have been required to implement the previous 'PRE 2' programme or the amount of FF 8 billion which, before the adoption of the contested decision, had been indicated as necessary for implementing the restructuring plan. The Commission, they argue, also failed to consider whether and to what extent the restructuring undertaken by other airlines without financial assistance from the State showed that the free operation of the market would have led Air France to restructure its operations without intervention by the public authorities.

127 At the hearing, those applicants pointed out that the restructuring aid had to be linked to each measure envisaged. The Commission ought to have imposed conditions as to the manner in which the aid was to be used. It is, they argue, unacceptable to admit a general balance as to the aid granted overall 'for the requirements of Air France'.

128 The Commission states that it assessed the coherence and effectiveness of the restructuring plan and evaluated the appropriateness of the amount of aid needed to allow Air France to implement it successfully. In doing so, it does not have to address issues alien to the intrinsic features of the Plan, even less other airlines' experiences.

129 It adds that the aid authorised was intended solely to reduce Air France's financial charges through reduction in its level of indebtedness. Contrary to the applicants' allegation, it was not to be used to finance Air France's operating costs. Imple-

mentation of the drastic measures provided for in the restructuring plan, including the sale of assets, was expected to produce a cash flow enabling Air France to meet its operating and investment costs. However, that would not have sufficed to meet Air France's financial charges. Without reduction of its level of indebtedness, Air France could not survive. At the end of 1996, Air France was expected to be able to meet all its costs, both operational and financial.

130 The Commission points out that the restructuring plan's operational improvements were expected to generate FF 5 billion over its course. That amount should enable Air France to meet its operating costs, but not payment of principal and interest. With the aid, Air France's financial charges were expected to decrease from FF 3.2 billion in 1993 to FF 1.8 billion in 1996 (contested decision, OJ, p. 75). Referring to the Ernst & Young report (Annex 2 to the defence in Case T-371/94), the Commission states that Air France's debt was to be reduced by FF 18.9 billion and adds that, without the aid, Air France's net loss forecast for 1996 would have been FF 694 million, whereas with the aid it was expected to record a net profit of FF 457 million. The risk of overcapitalisation was to be averted by the fact that the approved aid was payable in three tranches.

131 The judgment in *Italy* v *Commission* (cited above in paragraph 125), the Commission considers, lends no support to the applicants' argument. In that case, the Court of Justice held that capital injection by the State could constitute aid, given the continuous operating losses by the undertaking in question which were made up by the State concerned, and in the absence of any restructuring programme. The Court of Justice was there concerned with the contention advanced by the government involved that the funds in question did not constitute State aid. The passages cited by the applicants address only that issue, whereas the applicants here rely on the Court's dictum in order to support their very different allegation that the Commission applied an incorrect legal test to establish that the aid to Air France was indispensable.

132 The French Republic and Air France dispute the view that the contested aid — although designed to reduce Air France's debt burden and not to cover part of its

operating costs — none the less benefits its operation. To accept such a position would be tantamount to prohibiting all aid for restructuring purposes because it would always be possible to argue that aid targeted at a particular reorganisation objective takes the place of operating resources which would have been used for that purpose were it not for the aid. It is, they argue, necessary to draw a clear distinction between aid for restructuring which contributes to improving the operating conditions of the undertakings concerned, and which may be perfectly compatible with the common market, and mere operating aid or prolonged rescue aid which as a rule cannot be compatible.

Findings of the Court

133 In so far as the applicants claim that the Commission has enabled Air France to transfer aid to certain of its subsidiaries and consider it likely that Air France will globally finance its operating costs, their arguments are too vague to be upheld, being limited to mere surmises unsupported by specific facts.

134 Nor can the argument based on the previous 'PRE 2' restructuring plan be accepted. That plan encountered opposition from the unions and staff of Air France and for that reason could not be put into effect. In those circumstances, there was no obligation on the Commission to take account, for purposes of comparison, of aspects of a restructuring plan that had been unsuccessful. The same applies with regard to the amount of FF 8 billion mentioned before the contested decision was adopted. Since this was not the figure officially forwarded by the French authorities to the Commission under the restructuring plan formally submitted, the Commission was under no obligation to take it into account.

135 While there can be no grounds for denying that the Commission was entitled to compare the restructuring measures envisaged by Air France with those taken by

other airline companies, the fact remains that the restructuring of a company must be targeted at its own specific problems and that the experiences of other undertakings, in other economic and political contexts and at other times, may be irrelevant.

136 In so far as the applicants further contend that the aid ought to have been divided into different tranches, each linked to an individual restructuring measure, the Court finds that such an approach would necessarily have revealed the cost of each measure and thereby divulged Air France's internal operational structures. Such information is, at least for a certain time, confidential and must be kept secret from the public — in particular, from Air France's competitors. In those circumstances, the mechanism of subsequent checks established by Article 2 of the contested decision, particularly in conjunction with condition of authorisation No 6, must be regarded as adequate to ensure that Air France would not be overcapitalised through using the aid for purposes other than its restructuring.

137 As regards the applicants' argument that the only true restructuring measure in the disputed plan is that relating to reductions in Air France's staff (5 000 voluntary redundancies) and that all the other measures are in reality of a purely operational nature, it must be borne in mind that, as has been found above in paragraphs 110, 111, 116 and 117, the contested aid is intended to finance, at least in part, the restructuring of Air France and the assertion that the aid was used exclusively to settle its debts must, in the absence of any mention in the text of the contested decision, be discounted. It is therefore necessary to examine the structural nature of the various measures to which the applicants refer.

138 It must be stressed that, as is evident from the case-file, Air France has no factories or industrial plants involving manufacturing processes capable of being technically restructured. The activities of such a company are centred essentially around the supply of passenger and freight transport and the means used for that supply.

Restructuring is thus only validly possible as regards the structure of that supply and of the company organisation on which it is based.

139 That being so, the Commission could reasonably treat the shedding of 5 000 jobs, together with the reorganisation of Air France into 11 operational centres responsible for their financial results, as structural measures. This appears less certain of the commercial initiatives (Euroconcept, Club Class and Première Club) and the alterations to the route network, given that Air France is thereby merely following market trends, without making any change to the actual structures of the company. Such measures therefore appear to be purely operational and to concern solely the running of Air France.

140 However, and without its being necessary to decide whether the case-law and decision-making practice referred to in paragraphs 98 and 113 above are relevant, it should be borne in mind that Air France's restructuring plan was to be financed by an increase in capital, by means of the aid, and by the disposal of assets from which Air France expected 'to realise some FF 7 billion' (contested decision, OJ, p. 76). In the light of the relatively modest figures set out in this connection by the applicants in Case T-371/94 (FF 150 million and FF 500 million), the Court takes the view that the Commission was entitled to accept that those measures would be covered by revenue deriving from Air France's sale of its own assets and from current operating revenue.

141 In this context, it is necessary to reject the line of argument based on the judgment in *Italy* v *Commission* (cited above in paragraph 125), to the effect that the aid was 'fungible' in the sense that its receipt enabled Air France to release other operating resources which, instead of being used to repay its debts, could then serve to finance the measures mentioned above. Since the case in question concerns investment and operating measures on a normal scale which every airline company must reasonably adopt in order to be able to maintain its operational activities in the face of market competition, the French Republic and Air France were right to

point out that such a theory of 'fungibility' would in fact amount to a prohibition of any restructuring aid and would, in the final analysis, force the beneficiary undertaking to cease its operational activities.

142 It is true that a different conclusion might be reached with regard to the investment of FF 11.5 billion defined in the contested decision as a 'fleet investment' (contested decision, OJ, p. 75). The Court is not, however, in a position to examine the issues underlying that problem, because the contested decision is not reasoned on this substantive point (see paragraphs 111 to 120 above). As regards Air France's pricing practice on routes outside the EEA, allegedly financed by the aid, examination of the arguments on this issue presupposes an analysis of the competitive situation of Air France on these routes. That analysis will be made in a different context (see paragraphs 259 to 280 below).

143 It follows that, subject to that final reservation, the contention that the Commission wrongly authorised the financing of operating costs and operational measures must be dismissed.

C — The contention that the securities issued by Air France between 1989 and 1993 were misclassified

Summary of the parties' arguments

144 The applicants in Case T-371/94 submit that, under the principle of proportionality, State aid cannot be so significant as to grant the beneficiary a better debt/equity ratio than its competitors. In this case, the Commission misclassified the ORAs, TSDIs and TSIP-BSAs (titres subordonnés à intérêts progressifs assortis de bons de souscription d'actions — progressive-rate notes with equity warrants)

issued by Air France from 1989 to 1993 in computing Air France's debt/equity ratio in 1996. According to the applicants, a correct classification of those securities would have shown Air France's debt/equity ratio to be far better than that of any other airline.

145 In the contested decision, they claim, the Commission concluded that, for the purpose of calculating Air France's debt/equity ratio, the ORAs represent 'quasi-own capital'; however, it wrongfully assumed that the 1993 ORAs — and likewise the TSIP-BSAs — would be replaced by conventional debt because, under its Decision 94/662/EC of 27 July 1994 concerning the subscription by CDC-Participations to bonds issued by Air France (OJ 1994 L 258, p. 26), they had to be reimbursed as constituting prohibited State aid. But Air France was not obliged and had not committed itself to replace the 1993 ORAs by conventional debt. Further, the cash at its disposal pursuant to its receipt of the aid should make it in practice unnecessary for Air France to replace the proceeds of the 1993 ORAs and TSIP-BSAs by additional liquidity.

146 The applicants consider that developments since the adoption of the contested decision illustrate their proposition. According to a press release, on 5 April 1995 the Commission ordered France (not Air France) to deposit the sum of FF 1.5 billion in a blocked account pending the outcome of the proceedings before the Court of Justice and Court of First Instance concerning the annulment of Decision 94/662. As a result, Air France will continue to benefit from the proceeds of the ORAs and TSIP-BSAs issued in 1993 at least until the judgment of the Court of Justice or Court of First Instance, that is to say, during most of the restructuring period.

147 The applicants submit that the ORAs and TSIP-BSAs, along with part of the proceeds from the issue of the TSDIs, should in fact have been included in the equity component of Air France's debt/equity ratio because they represent funds permanently available to it during its existence.

148 With more particular regard to the TSDIs, the applicants stress that subscribers are reimbursed by a trust in which Air France has placed part (25%) of the original proceeds from the issue of the TSDIs, while a significant portion of those proceeds (75%) is permanently retained by Air France. Unlike a debt, which is extinguished by reimbursement by the borrower, the TSDIs continue legally to exist even after reimbursement of the capital sum. The Commission itself has stated, moreover, in its communication of 3 June 1994 (OJ 1994 C 152, at p. 8), that 'automatic' repayment of the TSDIs is assured through a bank fund, that a repayment obligation would become effective for Air France only in the event of liquidation of the airline, and that, in the Commission's analysis of Air France's financial situation in 1992, the TSDIs were, with the French Government's consent, included in the equity. In the applicants' view, the TSDIs are funds that are at Air France's permanent disposal and thus provide it with a competitive edge over competing airlines. They add that if only that part of the proceeds from the issue of the TSDIs that is permanently retained by Air France were considered as equity, it would have a significant effect on the debt/equity ratio for 1996, which would then be 0.76: 1, as opposed to 1.12: 1.

149 The applicants also claim that the Commission misunderstood the financial concepts involved in the classification of the financial instruments at issue. They argue in this regard that, in the case of both the TSDIs and the TSIP-BSAs, interest payments are subordinated to Air France's results and may be suspended. The applicants add that the criterion relating to the convertibility of the instruments is inadequate in so far as the Commission indicates that the TSIP-BSAs will be equity in due course 'provided the market conditions enable the owner to exercise the BSA'. The Commission thereby failed to realise that the BSA (equity warrant) is a separate, additional, detachable and independent right, the holder of which may or may not be the holder of the TSIP (progressive-rate note). The latter is not convertible because it is a perpetual subordinated note. The concept of 'convertibility' is likewise inapplicable to the TSDIs, since they are perpetual subordinated notes that may be reimbursed in the event of the liquidation of Air France. Finally, the applicants argue that the Commission's consideration of the rights which the ORAs, TSDIs and TSIP-BSAs confer on their holders is without pertinence.

150 The Commission first points out that it emphasised, in the contested decision, the ambiguous financial nature of the instruments themselves (contested decision, OJ, p. 84). It then states that, under Decision 94/662, the amounts paid for subscription to the ORAs and TSIP-BSAs issued in April 1993 were to be repaid by Air France, and that the value of those instruments should therefore be regarded as debt. In respect of the 1991 ORAs, they should be regarded as equity, since they would inescapably be converted, in due course, into shares, whereas the TSDIs issued in 1989 and 1992 should be considered as debt, since they are redeemable after 15 years and no conversion into shares may take place (contested decision, OJ, p. 85).

151 In so far as the applicants refer to its decision of 5 April 1995 (see paragraph 146 above), the Commission points out that this decision, which was subsequent to the date of the contested decision, has no bearing on the classification of the securities in question. It adds that, as long as there is a legal duty to repay the amounts of the ORAs and TSIP-BSAs, it is justified in holding that these amounts are replaced by conventional debt.

152 With regard to the TSDIs, the Commission stresses their repackaged nature. The fact that part of the proceeds from the issue of the TSDIs is retained by Air France has no bearing on their qualification. That view is corroborated by the opinion of the Conseil Supérieur de l'Ordre Français des Experts-Comptables (Governing Board for Certified Public Accountants in France). It is the obligation to repay the principal amount which matters. The Commission points out that the net financial flow between Air France and the Trust with which part of the funds are deposited will be nil at the end of 15 years. The loan represented by the TSDIs is actually repaid by the extinction of the Trust and the resulting extinction of Air France's liability. The entire amount raised by the issue of the repackaged TSDIs will thus be repaid by Air France at the expiry of the 15-year period. The amount of the proceeds from the issue of the TSDIs which is not deposited in the Trust is not permanently retained by the issuer. That amount corresponds to the issuer's liability to pay interest on an annual basis during 15 years on the whole amount of the TSDIs. In the Commission's view, the insistence of the applicants that the issuer permanently retains part of the proceeds from the issue of the repackaged TSDIs is based on a subjective analytical approach which would make any loan capable of being regarded as an equity injection.

153 Even if payment of interest could be postponed in the case of both the TSDIs and the TSIP-BSAs, the Commission takes the view that Air France still remains under an obligation to pay the interest accrued in respect of those amounts. In other words, payment of interest would only be deferred. As for the applicants' submissions regarding the rights which the various financial instruments confer on their holders, the Commission points out that the contested decision did not attribute any particular significance to the nature of the rights which those instruments did or did not confer on holders. Overriding consideration was given to the compulsory conversion of bonds into shares.

154 On the matter of repackaged TSDIs, Air France points out that the accounting profession only turned its attention to identifying their nature at the end of 1991. The French Commission des Opérations de Bourse (Stock Exchange Committee), in a statement released on 6 March 1992, opposed the inclusion of TSDIs as equity (capitaux propres). Practitioners were aware from the end of 1993 of a draft opinion by the Ordre Français des Experts-Comptables classifying the TSDIs as debt. The position of its Governing Board was not finalised until 7 July 1994 along those lines.

Findings of the Court

155 It must first be noted that, in the contested decision, the Commission, in assessing whether the aid was proportionate, pointed out that Air France's debt/equity ratio was strongly influenced by the classification of a number of bonds issued by the company, the ratios varying considerably according to whether those bonds were classified as equity or debt (contested decision, OJ, p. 83). The Commission went on to outline the amounts and characteristics of the financial instruments issued by Air France during the five years preceding the contested decision, namely the ORAs issued in December 1991 and April 1993, the TSDIs issued in June 1989 and May 1992, and the TSIP-BSAs issued in April 1993 (contested decision, OJ, pp. 83 and 84). Finally, it set out the criteria distinguishing equity from loan capital on the basis, in particular, of the provisions applicable in French law, of the Fourth Community Directive on the annual presentation of company accounts, and of the opinion of the Comité Professionnel de Doctrine Comptable (Professional Committee on Accounting Policy) (contested decision, OJ, pp. 84 and 85).

156 The parties are all in agreement on the classification of ORAs as equity ('capitaux propres' or 'fonds propres'), since these securities will never be reimbursed but must be converted into shares. Moreover, the Commission did in fact make such a classification in the contested decision (contested decision, OJ, p. 85).

157 With more particular regard to the ORAs issued by Air France in April 1993 and subscribed by the company CDC-Participations, it must be recalled that the Commission, in Decision 94/662, ordered these to be repaid on the ground that they constituted illegal State aid. Although the French Republic challenged that decision before the Court of Justice (Case C-282/94) and Air France brought an action before the Court (Case T-358/94), the bringing of these proceedings did not have any suspensory effect requiring the funds corresponding to the ORAs to be repaid by Air France. Furthermore, that Commission decision has become definitive, since the time-limit for an appeal against the judgment of the Court of First Instance of 12 December 1996 in Case T-358/94 *France* v *Commission* [1996] ECR II-2109 dismissing the action brought against that decision has expired and Case C-282/94 was removed from the Register of the Court of Justice by order of 17 April 1997.

158 In that context, it is of no relevance that Air France may, until the present judgment has been delivered, have benefited from the value represented by those ORAs. The availability of capital during a certain period does not amount to a criterion distinguishing equity from debt. All capital which an undertaking may have available to it must always be classified in the undertaking's balance sheet, necessarily under 'liabilities', either as 'debt', when it has to be repaid, or as 'equity', when it remains permanently available to the undertaking. In view of the fact that the ORAs in question had to be reimbursed with effect from 27 July 1994, the Commission was correct in classifying them as debt.

159 The same applies with regard to the TSIP-BSAs issued in April 1993, which were also the subject of Decision 94/662. It is consequently unnecessary for the Court to rule on their classification in principle.

160 So far as the repackaged TSDIs are concerned, the parties have submitted a number of specialist financial and accountancy reports concerning their classification. The applicants refer to the report compiled by Professor Pene (Annex 40 to the application and Annex 16 to the observations on the interventions), while the Commission and Air France rely respectively on the reports of Ernst & Young (Annex 2 to the statement of defence, with a note dealing specifically with repackaged TSDIs in Annex A, and the annex to the rejoinder) and of Professor Vermaelen (Annex 7 to Air France's statement in intervention). The Commission also refers to the opinion of the Conseil Supérieur de l'Ordre des Experts-Comptables, approved on 7 July 1994 (pp. 18 and 19 of Annex B to the Ernst & Young report forming Annex 2 to the statement of defence).

161 It follows from the expert reports relied on by each side that classification of the repackaged TSDIs involves complex economic and financial assessments. The Commission has for that reason a broad discretion in such matters and the Court may criticise its decision in that regard only if a manifest error of assessment is identified. It does not appear that the Commission wrongly regarded the mechanism for the reimbursement of the TSDIs as being the decisive factor — apart from the impossibility of converting them into shares — governing their classification as debt.

162 That conclusion is not invalidated by the fact that payment of interest on those TSDIs may be suspended in the event of poor financial results for Air France. The classification of a financial transaction as a loan cannot be called into question by the fact that the conditions of remuneration are, in one particular respect, disadvantageous for the subscriber.

163 Nor, finally, is it gainsaid by the fact that the Commission initially tended to classify the TSDIs as 'equity' (communication of 3 June 1994, OJ 1994 C 152, at p. 8). As Air France has pointed out before the Court, this change in approach reflects the changing classification of TSDIs between 1991 and 1994 within the accountancy profession itself. In this context, it should be borne in mind that the Conseil Supérieur de l'Ordre Français des Experts-Comptables, in its opinion of 7 July 1994 — thus, immediately before the contested decision was adopted — took the definitive view that repackaged TSDIs constituted debt. The Court considers that

the Commission cannot be criticised for having accepted, for purposes of classifying these French securities, the definitive opinion of the French body representing the profession competent in this area.

164 Since the Commission did not commit any manifest error of assessment in regard to the classification of the securities issued by Air France, the present contention must be rejected.

D — The contention that Air France's debt/equity ratio was misconstrued

Summary of the parties' arguments

165 The applicants in Case T-371/94 take the view that Air France's forecast debt/equity ratio for 1996 showed that its debt burden would be reduced to a level far below that of its competitors. In calculating that ratio at 1.12: 1 and stating that it was above the average for civil aviation, in which the figure of 1.5: 1 was regarded as acceptable, the Commission misinterpreted the report compiled by KPMG — an international consultancy firm — and IATA referred to in the contested decision (contested decision, OJ, p. 85). That report shows, in fact, that the projected debt/equity ratio for Air France was below the ratio considered optimal and considerably below the actual average mentioned therein for 1992 (2.3: 1 or 2.1: 1, depending on the method of calculation). The excessive nature of the aid is all the more evident if one contrasts Air France's debt/equity ratio (1.12: 1) with the average debt/equity ratios (2.57: 1 in 1992 and 3.17: 1 in 1993) recorded in the IATA publication 'Airline Economic Results and Prospects' (Annex 12 to the reply).

166 The excessive nature of the aid granted to Air France cannot, they argue, be rendered proportionate simply by reference to other financial ratios such as the inter-

est cover ratio. The Commission's finding, in the contested decision, that Air France's interest cover ratio for 1996 was expected to be 2.44: 1, and thus very close to the average ratio of 2.42: 1 achieved by its competitors in 1993 (contested decision, OJ, p. 85), is therefore irrelevant. Furthermore, that ratio is incomplete, limited as it is to reflecting an undertaking's ability to use its operating profits to pay interest charges; in addition, the criterion retained by the Commission for the selection of the panel of airlines used to compare Air France's 1996 ratio remains unclear.

167 The applicants add that the Ernst & Young report (Annex 2 to the statement of defence), on which the Commission relies, itself states that Air France could have achieved the theoretically optimal debt/equity ratio of 1.5: 1 with aid amounting to only FF 15.25 billion at maximum. It is therefore surprising that the same report attempts to justify Air France's receipt of FF 20 billion on the ground that there is no particular reason for Air France to have an 'average' debt/equity ratio.

168 Furthermore, any comparison between debt/equity ratios is of questionable value. In that regard, the report compiled by KPMG and IATA states that there is significant variation in how debt/equity ratios are calculated and that it is therefore difficult to make meaningful comparisons between airlines. Finally, it is not clear whether the Commission's calculation of Air France's debt/equity ratio is based on gross or net figures and there is no explanation as to how those figures are constituted.

169 Moreover, the Commission wrongly limited its analysis to a snapshot in 1996, a year in which aid was still to be given, without considering its effects on Air France's financial status after the aid period, by which time the aid would have helped to make Air France vastly stronger, in financial terms, than its competitors. In the applicants' view, the Commission should have made a dynamic analysis of the effect of the aid, beyond the restructuring period, on Air France's competitive position in relation to its competitors when determining whether the aid was not

excessive. The applicants' projections indicated that the aid would contribute to place Air France in a far stronger financial position in relation to its competitors than that suggested by the ratios on which the Commission relies in the contested decision.

170 Referring to the Ernst & Young report, the Commission considers that the contested capital injection was calculated to be the minimum amount sufficient for Air France to restore its financial equilibrium. So far as concerns the debt figure used to calculate the debt/equity ratio, the Commission confirms that, according to a consolidated trend in financial analysis, it used a net figure. The debt/equity ratio was therefore not inflated by the use of a gross debt figure.

171 The Commission points out that the debt/equity ratio of 1.12: 1 was not the only factor taken into consideration in the contested decision in assessing the proportionality of the aid to the needs of Air France's restructuring, since the interest cover ratio was also important. There was no requirement that Air France's 1996 debt/equity ratio should have been the average ratio in the civil aviation sector. It was, the Commission argues, sufficient that it should have been within reasonable range of 1.5: 1.

172 The Commission notes that it did not use the interest cover ratio in order to render proportionate aid which Air France's debt/equity ratio allegedly showed to be disproportionate. The relevance of the interest cover ratio cannot be doubted. It is a measure of the company's ability to pay its financial charges, the purpose of the disputed aid being specifically to redress Air France's burden of financial charges. The Commission adds that the reference, in the contested decision, to the 1993 interest cover ratio of Air France's competitors is merely illustrative of a ratio sustained by healthy airlines.

173 The Commission finally stresses that it also considered other financial ratios. With regard to return on equity, the Commission points out that the Ernst & Young report suggested only that this ratio provided an additional indicator of the level of aid required to allow Air France to restore its economic viability. That the amount of aid authorised was the minimum required was established on the basis of various projected financial ratios.

174 Air France refers to the Sabena and Aer Lingus decisions (cited above in paragraph 55) and to Commission Decision 94/696/EC of 7 October 1994 on the aid granted by Greece to Olympic Airways (OJ 1994 L 273, p. 22) ('the Olympic Airways decision'), by which the Commission authorised State aid in the civil aviation sector. It points out that the debt/equity ratios of those companies on completion of their restructuring plans were expected to be similar to or even better than that of Air France. They therefore reflected a proportion of equity equal to or even greater than Air France's. The Commission thus accepted ratios of 1.25: 1 (Sabena), 0.75: 1 and 0.41: 1 (Aer Lingus) and 0.78: 1 (Olympic Airways).

Findings of the Court

175 It should be stressed that the problems relating to Air France's financial ratios, in particular its debt/equity ratio, give rise to highly technical financial and accounting questions, as is corroborated by the parties' references to seven expert reports in support of their contentions, namely those of Ernst & Young (Annex 2 to the statement of defence and the annex to the rejoinder), of Professor Pene (Annex 40 to the application and Annexes 9 and 10 to the reply), of Professor Vermaelen (Annex 7 to the statement in intervention of Air France), and of Doctor Weinstein (Annex 1 to the statement in intervention of the United Kingdom).

176 In that connection, it must be noted that the consultants Lazard Frères fixed the amount required to recapitalise Air France, within the context of its restructuring, on the basis of its forecast revenues and costs and in regard to its future profit-

ability (contested decision, OJ, p. 75) and that this amount was accepted by the Commission in the exercise of its discretion. It should be added that this latter information was, at least while the restructuring plan was being drawn up and during its implementation, extremely sensitive and confidential, particularly in regard to airline companies competing with Air France. Consequently, it is not for the applicants, nor indeed for the Court, to question the actual principle of the need for Air France to obtain FF 20 billion to attain the objectives of restructuring and settlement of debts that were laid down.

177 Since the calculation of FF 20 billion must be accepted as the starting-point for reviewing whether the amount of aid was proportionate, the question whether that financial injection had any bearing on Air France's financial ratios may be reduced, in principle, to a simple mathematical operation.

178 It should be noted in that regard that the consultants Lazard Frères analysed the impact which the disputed aid would have on Air France's financial ratios, stressing the need to take account of capital structure ratios, capacity to service debts, and return on equity (contested decision, OJ, p. 84). It was after examining those figures that the Commission arrived at the debt/equity ratio of 1.12: 1, stating that 'this ratio appears to be above average for the civil aviation industry, where 1.5 is considered to be an acceptable debt-equity ratio' (contested decision, OJ, p. 85).

179 That comparison between the two debt/equity ratio figures is based on a study carried out by KPMG in association with IATA. That study (Annex 45 to the application in Case T-371/94), drawn up in August 1992, includes the following passage (pp. 26 and 27):

'Debt-to-equity ratios

...

Airline executives were asked their views on an optimal debt-to-equity ratio for an airline. Responses range from 0.5: 1 to 4: 1; however, it is unclear whether these responses include or exclude long-term operating leases in the debt amounts. The average of the responses received indicate an optimal debt-to-equity ratio of 1.5: 1.

Airline executives were then asked to provide their airlines' debt-to-equity ratios, both on the bases of including and excluding long-term operating leases in debt. The average debt-to-equity ratio of airlines responding is 2.3: 1 including long-term operating leases in debt and 2.1: 1 excluding long-term operating leases from debt.

...

There is significant variation in how debt-to-equity ratios are calculated and it is therefore difficult to make meaningful comparisons between airlines. ...'

180 As is clear from that text, the figures established by the investigation conducted within the civil aviation industry are not very representative. Having regard to the 'significant variation' seen in the method of calculating debt/equity ratios, the discrepancy between the figures 1.12: 1, 1.5: 1, 2.1: 1 and 2.3: 1 cannot *per se* be described as significant for the purpose of establishing that the Commission failed to understand correctly the relationship between Air France's financial situation and the average in civil aviation.

181 That being so, it does not appear that the 1.12: 1 ratio forecast for the end of 1996 was disproportionate, having regard to the above figures ranging from 0.5: 1 to 4.1: 1 and to the ratios of 1.25: 1, 0.78: 1, 0.75: 1 and 0.41: 1 approved by the Commission in its Sabena, Olympic Airways and Aer Lingus decisions (cited above in

paragraphs 55 and 174). The same applies with regard to Air France's interest cover ratio, which the Commission indicated would amount in 1996 to 2.44: 1, thus very close to the 2.42: 1 average ratio achieved by its competitors in 1993 (contested decision, OJ, p. 85).

182 For the reasons given in paragraph 176 above, the contention that the Ernst & Young report itself considered that FF 15.25 billion would be sufficient for Air France to reach the optimum debt/equity ratio of 1.5: 1 cannot be upheld. It might be added, should any further reasoning be necessary, that, as the Commission has pointed out, the passage in that report cited by the applicants (p. 21, footnote 21) merely corrects their calculation of the amount required to arrive at the ratio of 1.5: 1, that amount being, according to Ernst & Young, FF 15.25 billion and not FF 13.9 billion. The Ernst & Young report continues, moreover, by pointing out that there is in any event no particular reason why Air France's debt/equity ratio should be 1.5: 1.

183 The Commission rightly states that the IATA Report entitled 'Airline Economic Results and Prospects', to which the applicants refer, reproduces the average debt/equity ratios of more than 30 airline companies worldwide, including Iran Air, Royal Air Maroc and Tunis Air, which are hardly similar to Air France in terms of industrial and financial structure, and which are not in real competition with it. The Commission was therefore not obliged to compare Air France's debt/equity ratio with those of the airline companies covered by that report.

184 In so far as the applicants expressed uncertainty, in their application, as to whether the calculation of Air France's debt/equity ratio was based on gross or net figures, it need merely be noted that the Commission pointed out, in its defence, without being contradicted by the applicants, that what it took into account was a net figure, so that the debt/equity ratio was not inflated by the inclusion of gross debt. Finally, the Commission was under no obligation to calculate Air France's debt/equity ratio beyond the restructuring period, which was the only reference period

for compliance by the French Republic and Air France with the greater part of the conditions governing authorisation of the aid.

185 Since the Commission did not commit any manifest error of assessment in the calculation and consideration of the financial ratios mentioned in the contested decision, the present contention must be rejected.

E — The contention that the Commission wrongly failed to require Air France to sell disposable assets

Summary of the parties' arguments

186 The applicants argue that the Commission was manifestly wrong in concluding that the level of the contested aid could not be reduced by Air France's disposing of any assets other than those provided for under the restructuring plan. The principle of proportionality, they submit, requires an undertaking intending to restructure to use all its own resources before it can rely on State aid. The Commission ought therefore to have required Air France to create liquidity by disposing of all its non-core assets, regardless of the amounts thus raised. Had it done so, the amount of the aid could have been much lower.

187 The applicants stress in that regard that the Air France group includes 103 companies involved in travel-related activities distinct from air transport, such as leisure travel, catering, aircraft maintenance, information systems and freight forwarding, including companies as important as Groupe Servair and Jet Tours, which achieved turnovers in 1993 of FF 2.6 billion and FF 2.4 billion respectively. Its interests also cover activities as unrelated to air transport as cheese manufacturing.

More than 20% of Air France's turnover, they argue, is attributable to activities unrelated to air transport. In addition, Air France has shareholdings in 20 airlines.

188 The sale of a number of Air France's shareholdings in other companies, in particular Air Inter and Sabena, might, the applicants believe, have been sufficient to obviate the need for much of the aid. Without the disputed aid, Air France would, like any loss-making parent company, have looked to its subsidiaries, including Air Inter, to contribute to limiting its losses. To illustrate their point, the applicants have derived values for Air France's interests in eight airlines (Air Charter, Air Inter, Sabena, MEA, Austrian Airlines, Tunis Air, Air Mauritius and Royal Air Maroc) and one other company (Servair). In aggregate, they value those shareholdings at between FF 3.1 billion and FF 6 billion.

189 So far as Air Inter is concerned, the applicants pointed out during the hearing that its claimed utility to Air France was in fact very circumscribed. Air Inter's role, they submitted, was limited to attracting passengers from the French provinces to Air France's 'hub' at Charles de Gaulle Airport for international flight departures. Air France could have achieved the very same result either by using its own aircraft or by concluding cooperation agreements with other companies, including Air Inter. The applicants accordingly take the view that Air Inter is not an indispensable asset for Air France's operations.

190 The applicants state that Air France's 37.5% shareholding in Sabena could be valued at BFR 6 billion. That shareholding was purchased in 1992, which, in the applicants' view, suggests that it could hardly be considered vital for Air France, which had operated without it for many years. Moreover, Sabena's chairman declared in public in September 1994 that Air France should dispose of its shareholding. The applicants point out that they informed the Commission at the administrative procedure stage of the existence of significant evidence that there

was no longer any basis for an alliance between Air France and Sabena. They refer in that connection to a press article which appeared in June 1994 (Annex 46 to the application), suggesting that the Belgian company wanted Air France to relinquish its holding.

191 Moreover, Air France paid one-quarter of the sum due for its holding in Sabena, they claim, within days of the contested decision's being adopted. It was clear that Air France would rely on the aid to compensate for that payment, given its shortage of liquidity. The Commission should have prevented Air France from paying that outstanding amount, since aid authorised for restructuring purposes may not be used for the acquisition of shareholdings in other companies. Had it been prevented from making that payment, Air France would doubtless have found it necessary to dispose of its shareholding in Sabena as part of its restructuring effort.

192 The applicants stress that they are not requiring Air France to dispose of assets which are undeniably part of its core business. They do, however, submit that Air France should have been compelled to sell, in particular, assets which it itself described as non-core assets in its 1993 Annual Report. Referring to a press article, the applicants add that Air France was apparently considering, in September 1994, the sale of some assets which, one month earlier, the Commission had considered ineligible for disposal, such as its shareholding in Groupe Servair or in Amadeus, a computerised reservation system. That fact alone must vitiate the Commission's finding that Air France did not need to sell other assets because none could have raised significant sums of money.

193 In reply to the Commission's assertion that the identity of other assets of which Air France intended to dispose could not be revealed on grounds of confidentiality, the applicants contend that the Commission's practice is in fact to make such disclosure when it requires undertakings to sell assets as a condition to, for example, its approval of concentrations under Regulation No 4064/89, cited above in paragraph 55. Thus, the Commission required the sale of identified assets in

Decision 91/403/EEC of 29 May 1991 declaring the compatibility of a concentration with the common market (Case No IV/M043 — Magneti Marelli/CEAc) (OJ 1991 L 222, p. 38) and in Decision 92/553/EEC of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No IV/M.190 — Nestlé/Perrier) (OJ 1992 L 356, p. 1). Furthermore, even if Air France's non-core assets could not have been sold prior to authorisation of the aid, the Commission could have required the placing of assets to be sold with a trustee, for instance an investment bank, which could have arranged for their sale. The applicants refer, by way of example, to the Crédit Lyonnais case (OJ 1995 C 121, p. 4), in which a new structure was created, namely the Consortium de Réalisations, a wholly-owned subsidiary of Crédit Lyonnais, which was to buy Crédit Lyonnais' assets intended to be sold off or liquidated. Likewise, in the present context, Air France's shareholding in Sabena could have been transferred to a bank, which would have been able to advance money pending sale to a third party.

194 At the hearing, the applicants also stressed that, so long as the contested decision did not require specific assets to be sold, Air France had no interest in selling assets during the restructuring period because such a sale would have involved a reduction in the aid granted. That view, they argued, has been confirmed by subsequent developments, which have allowed Air France to 'counterbalance' the sale of its shareholding in Sabena with the loss of income resulting from the fact that it had sold fewer aircraft than had been envisaged. This, the applicants submitted, proved that the sale of non-core assets ought to have been evaluated by the Commission from the outset.

195 The Kingdom of Denmark states that, in its Aer Lingus decision (cited above in paragraph 55), the Commission required Aer Lingus to dispose of its non-transport assets in order to contribute to its restructuring in an amount greater than that of the aid received. The Kingdom of Denmark also points out that Air France did in fact sell its shareholding in the Czech company CSA. It does not understand why Air France could not also sell its shareholdings in Sabena or Air Inter.

196 The United Kingdom argues that the Commission should have seriously considered the possibility that Air France could dispose of its interest in Sabena. Such a sale would not necessarily have precluded the continuance of the joint marketing arrangement between the two companies. Many airlines have joint marketing arrangements without its being considered necessary for each airline to have a substantial minority shareholding in the other. Nor does the Commission explain why Air France could not dispose of its interest in Air Inter, *a fortiori* since Air France's control of Air Inter is the result of a relatively recent acquisition. Finally, some of the companies belonging to the Air France group, such as Groupe Servair, are very profitable and could therefore have realised a substantial price on sale. Others are loss-making, so that their sale or winding-up could be expected to provide a substantial reduction in the losses of the Air France group and a corresponding reduction in the need for aid.

197 The Kingdom of Norway considers that the Commission failed to require Air France to sell all of its non-core assets. Such disposal is an important element in a restructuring plan not only because of its contribution to the liquidity of the company concerned, but also in order to reduce its costs, restore its corporate identity and realign its activities. In this case, it argues, many of Air France's activities are peripheral to the essential activities of an airline. British Airways, SAS, KLM and other international airlines have adopted measures to contract out services that could be obtained more cheaply from independent third parties. Those airlines have disposed of numerous non-core assets, even though the proceeds of each individual sale may have been insignificant.

198 The Commission denies that it failed to take account of the opportunities available to Air France for divesting itself of certain of its interests. After examining Air France's various shareholdings, it reached the conclusion that sale of the assets as contemplated by the Plan would be adequate within the framework of its restructuring. However, no evaluation was made of Air France's interests in Sabena or Air Inter since their sale was not part of the restructuring plan and those interests could be regarded as core assets of Air France.

199 At the hearing, the Commission pointed out that, since the essential element in the activities of Air France and Air Inter was air transport, there could be no shadow of a doubt that Air Inter represents an essential asset of Air France. Air Inter's significance for Air France stems from the fact that, in contrast to other airlines, Air France does not have a national network. That is why the Commission accepted that Air Inter was indeed an essential asset for Air France, which ought not to run the risk of seeing Air Inter pass under the control of competitors. Air France added that the commercial synergism with Air Inter was vital for its survival, control over a domestic network being essential for a major airline. Air France needed Air Inter in order to benefit from flight connections within the domestic network to feed its long-haul flights. Moreover, all major European airlines control their domestic networks and thus prefer to have a majority shareholding in those networks rather than enter into commercial agreements with them.

200 The Commission emphasises that Air France's disposal of assets was considered with due regard to its overall interests and strategy. It was thus satisfied that the disposal of assets contemplated by Air France was adequate. In that context, the sale of assets by other airline companies in other circumstances and at other times is not relevant to addressing the issue of which assets had to be disposed of by Air France. The nature and extent of various airline companies' interests render comparisons futile.

201 The Commission adds that the identity of other assets and interests which Air France intended to dispose of could not be revealed, since such disclosure would have interfered with, and could have been detrimental to, the conduct of negotiations then taking place in respect of such assets. Moreover, the contested decision did not prohibit the disposal of other assets. Market conditions may change and create incentives to dispose of assets and interests not envisaged by the restructuring plan or affect the price of those whose disposal was provided for therein. In verifying whether the aid was proportionate to the needs of restructuring, the Commission emphasised (contested decision, OJ, p. 86) that the amounts to be paid could be adjusted, as necessary, in order to take account of the development of Air France's financial situation following, *inter alia*, the sale of assets.

202 The applicants' reference to the Commission's power under the Merger Regulation is irrelevant since mergers affect the very structure of the market in question. Nor, similarly, is the applicants' case advanced by their reference to the possibility of placing assets to be sold with a trustee charged with arranging their sale. In anti-trust matters the control of a company is the very issue, whereas here it is not. As for the Consortium de Réalisations established by the Crédit Lyonnais plan, the Commission points out that it is a wholly-owned subsidiary, the operation being an exercise in the internal reorganisation of a group.

203 In any event, no part of the contested aid was intended to be used by Air France to pay the last instalment for its shareholding in Sabena. The aid was authorised in order to reduce the burden of Air France's financial charges. It would, moreover, have been unlawful to induce Air France not to honour its contractual obligations *vis-à-vis* Sabena and thereby encourage a breach of contract.

204 The French Republic and Air France point out that Air France's holding in the share capital of Sabena was one of its essential strategic assets. In July 1994 everything suggested that renegotiation of the agreement to acquire that holding would entail a very serious loss for Air France and would place Sabena in a difficult position. According to the interveners, it was only in October 1994 that the Belgian Government announced its decision to recapitalise Sabena. In July 1994, neither Air France nor the French Government knew what the Belgian Government intended to do in that regard. Since Air France could not meet the increase in capital recommended by the Belgian Government, the latter proposed a purchase of Air France's holding, while a new partnership between Sabena and Swissair was contemplated.

205 Air France states that a number of its non-core assets had already been sold in connection with the first stages in implementing the Plan. Thus, its holding in the Czech airline CSA was sold on 25 March 1994. Similarly, the holding of Servair (75% held by Air France) in the share capital of Saresco, and consequently of its subsidiary engaged in cheese manufacture, was sold off. The sale of the Méridien

hotel group, which had actually taken place in the interim, involved 20 out of the 103 companies in the group. It is clear from the contested decision that other sales were contemplated under the Plan. The expected timetable for the sales and the estimated amount to be raised from them were provided to the Commission for all non-core assets with significant value. However, those assets were not explicitly identified in the decision for obvious reasons of confidentiality.

206 Air France stressed at the hearing that, although not an air-transport activity, the Amadeus computerised reservation system was essential for all of the group's core activities. Contrary to the applicants' insinuations, Air France's holding in Amadeus had not been sold and it had no intention of selling it.

207 As for Servair, Air France confirmed, also at the hearing, that its sale was envisaged under the restructuring plan. Receipts from the sale of Servair were included in the financial projections and were thus taken into account for the purpose of reducing the amount of recapitalisation. However, such information had to remain confidential in order for the sale of Servair to be negotiated at the best possible price and in view of the risk of social unrest to which this news would certainly have given rise at Servair, which would have seriously jeopardised the quality of Air France's in-flight service, highly dependent as it was on this essential supplier of airline meals. The follow-up to Servair's sale was examined in detail by the Commission and its experts when the second and third aid tranches were authorised.

208 With regard to the other assets such as Air Charter and Jet Tours, Air France pointed out on the same occasion that they unquestionably form part of its strategic assets. Furthermore, the sales of Jet Tours and Air Charter would have provided Air France with insignificant receipts. Finally, the sales of Air France's minority shareholdings in Royal Air Maroc, Austrian Airlines, Tunis Air, Air Mauritius and Aéropostale were examined in detail by the Commission. Such sales

could not have produced significant receipts and would not have had any effect on the amount of the recapitalisation.

Findings of the Court

209 In its examination of the disputed aid, the Commission formed the view that the restructuring of Air France, the largest French air carrier and one of the three largest in Europe, would contribute to the development of the European air transport industry by improving its competitiveness and was therefore in the common interest (contested decision, OJ, p. 83). The Commission thus indicated that it was not pursuing a policy of completely dismantling the Air France group, but preferred to maintain Air France in its position as one of the major European airline companies, alongside Lufthansa and British Airways. Since it involves complex assessments of economic policy, the exercise of the discretion which the Commission enjoys under Article 92(3)(c) of the Treaty, and which resulted in the adoption of the contested decision, may be open to censure in the present context only if there was a manifest error of assessment or an error of law, *a fortiori* in the light of the fact that the Commission took care to ensure, by spreading payment of the aid over three tranches, that developments in Air France's financial situation could be monitored, enabling it, if necessary, to adapt the amounts to be paid (contested decision, OJ, p. 86).

210 It was within the context of the exercise of its discretion that the Commission specified only a limited number of non-core assets — the Méridien hotel group, a building, old aircraft and spare parts (contested decision, OJ, pp. 75 and 76) — which Air France was required to dispose of in order that the amount of aid could be limited to FF 20 billion.

211 Consequently, the argument which the Kingdom of Denmark derives from the Aer Lingus decision (cited above in paragraph 55), in which the Commission required the aid beneficiary to sell all but its core assets, and the Kingdom of Norway's

reference to the examples of British Airways, SAS, KLM and other international airlines which, as part of their restructuring, disposed of numerous assets unrelated to air transport, are both irrelevant. The circumstances of restructuring are conditioned by the specific situation of the undertaking in question alone. The fact that the companies referred to may have been persuaded or required, within the factual context of their own restructuring, to dispose of numerous assets cannot therefore in itself cast any doubt on the decision taken by the Commission, in the specific situation prevailing in July 1994, to maintain Air France as one of the three major European airline companies and to authorise it to retain the greater part of its assets.

212 Consequently, the Commission was entitled to treat the following three categories as being assets of which Air France could not dispose: first, those essential to the present and future operation of the company as an air carrier; second, those used in cooperation strategies, control of which it was necessary to prevent falling into the hands of a competitor; finally, those relating to activities closely linked to the operations of a major airline. As is clear from the case-file, the Commission classified such assets — in particular, Air Charter, Air Inter, Sabena, Amadeus and Jet Tours — as non-disposable.

213 Air Charter, it need merely be noted, is, like Air France, active within the air transport sector itself. It thus belongs to one of the core activities of Air France. While it is true that Air Charter has specialised in charter air travel, that is to say, a market distinct from scheduled air transport, these are but two aspects of the same air transport activity, the division of which into two separate companies ultimately reflects no more than an internal allocation of functions. It follows that the Commission was entitled to form the view that Air Charter constituted an essential component of Air France's air transport activity.

214 So far as Air Inter is concerned, it must be borne in mind that, in the contested decision, the Commission indicated that the French Government had undertaken

to ensure that Air France would be the sole beneficiary of the aid in question and to set up for that purpose a holding company to control both Air Inter and Air France (commitment No 1). The Commission considered that this commitment lessened its doubts as to the secondary effects of the aid because it prevented Air France from using the aid to subsidise the activities of Air Inter. Basing itself on information received concerning the future structure of the holding company and on the corresponding commitment given by the French authorities, the Commission took the view that the beneficiary of the aid was Air France together with its subsidiaries, including Air Charter (contested decision, OJ, pp. 81 and 86).

215 It is common ground that, in contrast to Lufthansa and British Airways, Air France did not have a domestic network before it assumed control of Air Inter in 1990. The Commission was therefore quite entitled to form the view that this control — exercised, during the restructuring period, by the holding company arrangement described above — was essential for the present and future operations of Air France because its loss could have had a serious effect on Air France's feeder traffic, the responsibility of Air Inter. Air Inter's activities concentrate essentially on air transport within French metropolitan territory. This internal French market provides substantial passenger traffic to Air France's centre of operations at Paris Charles de Gaulle Airport ('Paris (CDG)'). In those circumstances, it is obvious that Air France could not run the risk of seeing Air Inter, following its disposal, come under the influence of a competing company and of thereby losing a substantial portion of its feeder traffic.

216 Nor could Air Inter's direct link to Air France have been validly replaced by its transfer to a bank and the simultaneous conclusion of commercial agreements relating to that feeder traffic with Air Inter or other companies. The applicants have not established that such a solution could have excluded the risk that Air Inter might be absorbed by a competing company, thereby compromising the operation of Air France's feeder traffic. So far as the conclusion of such agreements with other airline companies is concerned, suffice it to note that, in July 1994, Air Inter's competitive position on the domestic French market was so strong that Air France, which was seeking to restructure and recover profitability, could not have been required to replace its well-established relations with Air Inter by contracts

with companies still lacking infrastructures on the French market comparable to those of Air Inter.

217 In addressing the applicants' argument that Air France could itself organise its own feeder traffic, particularly within the domestic French network, it is necessary to note that the restructuring plan for Air France envisaged an operating fleet of 146 aircraft and did not specifically earmark that fleet for such feeder traffic. On the contrary, it was particularly on long-haul routes that this plan envisaged growth in Air France's supply, which presupposed intensified use of its fleet in that sector. On that view, the provision of services on the domestic market was essentially a matter for Air Inter, which had to use its own aircraft for that purpose. It was not for the Commission to order Air France to concentrate on the domestic market, since such a measure would have risked weakening its position on international flights.

218 With regard to Air France's shareholding in Sabena, it must be accepted that, at the time, Air France had only a minority (37.58%) holding in the Belgian company. That fact, however, does not mean that its holding did not constitute an important strategic element in Air France's air transport activities. Note should be taken of the decision of 5 October 1992 (Annex 24 to the applicants' observations on the interventions in Case T-371/94), in which the Commission stated that it would not oppose the protocol agreement signed by Air France, Sabena and the Belgian State, which conferred on Air France, via the company Finacta, a 37.58% holding in Sabena (with 37.5% of the voting rights).

219 That decision, which was available to any interested party (see the communication in the *Official Journal of the European Communities* of 21 October 1992 (OJ 1992 C 272, p. 5)), noted *inter alia* that:

— Finacta, controlled by Air France, was to approve the appointment of the chairman and vice-chairman of Sabena (with a right of veto) and could block

decisions of Sabena's governing board involving changes in strategy, business planning, investment plans and industrial cooperation plans;

— the chairmen of Air France and Sabena were required to act jointly in the event of major difficulties involving the functioning of their governing bodies or strategy implementation;

— the basic lines of Sabena's future strategy had been determined in conjunction with Air France.

220 In that 1992 decision, the Commission classified Sabena, in substance, as a joint venture controlled by the Belgian State and Air France, the latter having rights going considerably beyond those normally conferred on minority shareholders and the possibility of controlling Sabena's market conduct. Regarding the purpose of the agreement, the Commission pointed out that it was designed to develop cooperation between Air France and Sabena and to promote all possible synergism between the two partners, in particular to create an intra-Community network centred on Brussels Airport (Zaventem).

221 In the light of that decision of 5 October 1992, of which the parties concerned are deemed to have been aware, the Commission could reasonably form the view that it was necessary to prevent Air France's holding in Sabena, which constituted an instrument of strategic alliance for Air France, from being relinquished in such a way that a competitor could assume the privileged position previously occupied by Air France.

222 The United Kingdom's view that the shareholding could have been replaced by cooperation agreements, it need merely be noted, fails to take account of the special nature of the holding in question, which, although a minority shareholding, gave Air France controlling power over Sabena's commercial conduct and thus went beyond the influence that a contractual partner might normally exercise. The

United Kingdom has failed to demonstrate that Air France could equally have attained such a privileged position without its holding in Sabena. The special nature of the alliance between Air France and Sabena also precludes any comparison with the sale, which in fact took place in March 1994, of Air France's holding in the Czech company CSA.

223 It is true that, shortly after the contested decision was adopted, Air France paid FF 170 million to cover the final instalment of the purchase price for its holding in Sabena. There is, however, nothing to justify the view that the disputed aid was earmarked and used for that purpose. As the French Republic and Air France have indicated, that payment was the result of contractual obligations dating from 1992, and thus prior to the authorisation of the aid (see the Commission's decision of 5 October 1992, cited above in paragraphs 218 and 219). Those obligations, as the French Government has pointed out before the Court, envisaged a schedule for payments to be made by Air France in 1992, 1993 and, for the final instalment, between 15 July and 31 July 1994. The existence of that final payment obligation on Air France could not reasonably have meant, alone, that aid intended to release Air France from its debts and to restructure the company had to be blocked, even only partially. Furthermore, in view of the relatively modest amount, that payment did not exceed normal investment limits. The Commission was consequently entitled to accept that it would be covered by resources deriving from the sale of assets by Air France and by revenue from its current operations (see paragraphs 140 and 141 above).

224 It is also established that Air France's holding in Sabena was subsequently sold for FF 680 million (Commission communication concerning the third tranche of restructuring aid to Air France, approved by the Commission on 27 July 1994 (OJ 1996 C 374, p. 9, at p. 14)). However, as the French Republic and Air France have stressed, without being contradicted, it was not until October 1994 that the Belgian Government, the majority shareholder in Sabena, decided that a recapitalisation of Sabena was necessary, which *de facto* excluded Air France, unable as it was to follow this recapitalisation. Moreover, Air France's disposal of its holding in Sabena was not finalised until July 1995. The Court therefore finds that, on the date when the contested decision was adopted, the Commission had no indication that Air France was seriously considering ending its alliance with Sabena and

disposing of its shareholding. In those circumstances, the Commission was not under any obligation to infer from the press rumours, to which the applicants have referred, of the impending acquisition by Swissair of the shareholding in question, that, by July 1994, Air France no longer regarded its holding in Sabena as an important strategic element in its air transport activity.

225 It should be added that the Commission expressly indicated, in its decision of 21 June 1995 authorising payment of the second tranche of the disputed aid (communication published in OJ 1995 C 295, p. 2 and p. 5), that the financial implications of a sale of this shareholding would be taken into account in the context of its decision on payment of the third tranche of the aid. The legality of those decisions, which are subsequent to that here being challenged, cannot be examined in the context of the present litigation, which concerns solely the legality of the decision of 27 July 1994.

226 With regard to a possible sale of Amadeus, it must be pointed out that this asset constitutes Air France's computerised reservation system. Air France has explained that it had given Amadeus responsibility for all its ticket reservation operations, that it was completely dependent on that system for ticket distribution and that such a system was vital for the development of its air transport activity, which is why the vast majority of airline companies used a similar system. The Court finds that, in those circumstances, the Commission was reasonably entitled to consider that Amadeus was a non-disposable asset of Air France inasmuch as it involved an activity which is closely linked to the operations of any major airline company.

227 The same applies with regard to Air France's holding in Jet Tours, which operates in the tourism sector. Tourism is an economic sector connected, at least in part, to the air transport sector. The Commission could therefore consider Jet Tours as an asset designed to bring tourist customers to both Air France and Air Charter, and was thus entitled to conclude that Air France ought not to be forced to dispose of it.

228 Nor may the applicants criticise the Commission for not having required Air France to sell all of its minority shareholdings in other airline companies such as Tunis Air, Air Mauritius, Royal Air Maroc and Austrian Airlines. In view of the relative insignificance of such sales, a full disposal by Air France of its shareholdings in those companies would not have had any essential direct effect on its restructuring plan.

229 With regard to Air France's statement during the hearing that the disposal of other assets not specifically mentioned in the contested decision, such as that of Groupe Servair, was envisaged in its restructuring plan, and with regard to the possible confidentiality of such information, it must be noted that the proceeds from those sales, although intended to jointly finance implementation of the restructuring plan, were not to be automatically deducted from the amount of aid of FF 20 billion regarded as necessary and authorised by the contested decision. Moreover, even the FF 7 billion which Air France hoped to realise on the sale of Méridien, one building and 34 aircraft served merely to limit the aid to FF 20 billion, and not to reduce this amount. It was only when it came to payment of the second and third tranches of the aid that the Commission reserved the right to take account of Air France's overall financial situation by having regard to sales of assets effected in the interim. The Court takes the view that the financial questions raised in connection with those sales, including questions touching on their proportionality and confidentiality, can therefore be examined only in the light of the decisions dealing with those second and third tranches. The present litigation does not concern the legality of those decisions.

230 The applicants' argument that Air France itself, in its 1993 Annual Report, defined a series of its assets as 'non-core activities', put forward in the context of their claim that those assets should have been sold, is factually wrong. It is only the English translation of that report which contains the wording relied on by the applicants (pp. 26 and 27; Annex 4 to the application in Case T-371/94), whereas the French text refers to Air France's 'activités non aériennes' ('non-air activities') and thus does not contain any value judgment on the assets in question. Since Air France is a French company, it is obvious that the authoritative version of its annual report is that drafted in French.

231 Since the Commission did not commit any manifest error in refraining from requiring Air France to dispose of the assets designated by the applicants and the interveners supporting them, that contention must be rejected.

232 It follows from all of the foregoing that, subject to paragraphs 84 to 120 above, all of the contentions alleging breach of the principle of proportionality applicable in regard to State aid must be rejected. The applicants and the interveners supporting them have been able to defend their rights and the Court has been able to exercise its power of judicial review. Consequently, apart from the authorisation of the purchase of 17 new aircraft, the contested decision complies in this regard with the requirements of Article 190 of the Treaty, and the claim that the reasoning was inadequate must therefore be rejected.

The contentions that the Commission erred in considering that the aid was intended to promote the development of economic activity and would not adversely affect trading conditions to an extent contrary to the common interest

A — The contention that the Commission wrongly authorised aid intended for the development, not of an economic activity, but of a particular undertaking

Summary of the parties' arguments

233 In its application, the applicant in Case T-394/94 argues that the disputed aid benefits a particular undertaking and does not contribute to the development of an economic activity. In authorising it, the Commission clearly sought to ensure the survival of Air France as a paramount consideration, instead of weighing that

objective against the detrimental effects which the aid would have on Air France's competitors and on the Community air transport market.

234 The Commission considers that the applicant's allegations are clearly devoid of any substance. In the contested decision, it emphasised that it had to take into account the development of a sector as a whole and not only that of the recipient of the aid. It then extensively investigated whether the aid could benefit from the derogation provided for by Article 92(3)(c) of the Treaty.

Findings of the Court

235 In the case of an undertaking on the scale of Air France, which is one of the three largest European airline companies, genuine restructuring will have the effect of facilitating the economic development of the European civil aviation sector (see, to a similar effect, the Opinion of Advocate General Van Gerven in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, at p. 1630, point 17). Consequently, this contention cannot be upheld.

236 Furthermore, the applicant expressly acknowledged, in its reply, that it was not alleging that aid paid to a single undertaking was illegal in itself, adding that numerous instances of aid granted to individual undertakings are justified because they are of benefit to sectors considered as a whole.

237 In so far as the applicant claims that the Commission unilaterally favoured Air France by taking account only of the positive aspects of its restructuring and overlooking its negative aspects, its arguments will be examined below in their appropriate context.

B — The contention that the Commission wrongly authorised aid which adversely affected trading conditions to an extent contrary to the common interest

Summary of the parties' arguments

238 The applicants take the view that the aid affects trading conditions to an extent contrary to the common interest. It serves to lower Air France's costs artificially and thereby shifts the burden of cost adjustment on to unsubsidised airlines. The applicants point out that the Commission itself took the view, in *France* v *Commission* (cited above in paragraph 79, paragraph 44), that the artificial maintenance in existence of a company weakens the competitive position of other producers which have had to carry out the necessary reorganisation of their activities without the benefit of State aid. In its judgment in that case (paragraph 50), the Court of Justice upheld the Commission's decision refusing to authorise State aid on the ground that it had reduced the competitiveness of other manufacturers within the Community, at the risk of forcing them to withdraw from the market even though they had previously been able to continue their activities by virtue of restructuring financed by their own resources. The applicants also refer to the Opinion of Advocate General Sir Gordon Slynn in *Germany* v *Commission* (cited above in paragraph 58) and to paragraph 26 of the judgment in *Philip Morris* (cited above in paragraph 79), to the effect that the Commission, when applying Article 92(3)(c) of the Treaty, must take account of the Community context, in particular the overall position in the sector in question.

239 The applicant in Case T-394/94 emphasises that the contested decision confirms that the aid in question distorts competition within the EEA. It points out that, in its observations submitted to the Commission in the course of the administrative procedure, it had suggested that the Commission should undertake an analysis of each geographical market affected by the aid, namely the individual routes on which the air carriers concerned were in direct competition. It considers that argument to be supported by the judgment in *France* v *Commission*, cited above in paragraph 79, at paragraph 50, where the Court of Justice stated that the effect of

the aid on all competitors of the beneficiary undertaking had to be examined. The applicant states that it is in competition with Air France on the routes between London and Nice, London and Paris, and Glasgow and Paris. However, the Commission concluded that any adverse effects on trading conditions were acceptable. By so doing, it favoured Air France, a public-sector undertaking, over the applicant, an independent private-sector undertaking. Consequently, the Commission discriminated in such a way as to involve distortion of competition to an extent contrary to the common interest (Case 304/85 *Falck* v *Commission* [1987] ECR 871, paragraph 27).

240 In the same context, the applicant in Case T-394/94 alleges that the Commission infringed Article 190 of the Treaty by failing to provide adequate reasoning to support its view that the aid does not affect trade to an extent contrary to the common interest and to reply properly to the observations which the applicant filed during the administrative procedure. The applicants in Case T-371/94 also submit that the Commission failed to consider seriously the third-party comments filed in response to its communication of 3 June 1994. Before the Court, they have produced detailed examples listing individual routes with the estimated market shares of the various airline companies competing on those routes (point 21 and footnotes 33 to 42 in the application in Case T-371/94).

241 Likewise, the Maersk companies take the view that the Commission should have given greater consideration to the effect of the aid on small and medium-sized carriers operating on regional routes. It thus failed, they claim, to address the adverse effect of the disputed aid on competition in regional air services. They state in this regard that they operate the route between Lyon and Birmingham and wished, from 16 October 1995, to operate between Billund and Paris (CDG). The effects of State aid, they consider, are apparent not only in the narrow market served by the carrier receiving the aid, defined by reference to city pairs, but also in a wider passenger market and on indirectly competing routes.

242 The indirect effects of the contested decision on smaller carriers operating either feeder services to the main hubs, from which the major carriers operate, or on indirectly competing routes is illustrated by reference to the service operated by Maersk between Birmingham and Lyon. This route competes indirectly with, and is competitively influenced by, the London (Heathrow) to Paris route, as well as the Birmingham-Paris route. Air France's load factor on the Birmingham-Paris route was, according to the figures for 1992, merely 32%, compared with 61% for its competitors. Efficient airlines may be forced off routes or even precluded from developing new routes if the presence of a State-subsidised airline causes diminishing rates of return.

243 They add that the Commission did not sufficiently consider the effect which the disputed aid would have on potential competition in the air-transport sector. That view is illustrated by the Copenhagen-Paris route, on which Air France's load factor, according to the figures for 1992, was a mere 49%, compared with 61% for its competitors. Although the full effect on potential competition cannot be measured, it is evidenced by Maersk's decision, at the time when the contested decision was adopted, to postpone plans to introduce a service between Billund and Paris (CDG).

244 The Kingdom of Sweden also takes the view that the disputed aid increases the pressure on competing regional airlines to abandon marginal routes. Such companies can suffer severe adverse effects from measures taken by one of the biggest market participants, even if they are limited as a whole, while other larger companies are not affected to the same extent.

245 At the hearing, the Swedish and Norwegian Governments stated that the Scandinavian airline companies competing with Air France on routes between France and the main cities in Scandinavia also have internal routes which suffer from low

frequency because of an extremely low population density but which are necessary in the interests of the economic development of outlying regions. Such routes are extremely vulnerable to any distortion of competition by State aid granted to a large competitor such as Air France. The major companies are only rarely interested in peripheral routes. Distortions in competition on high-density routes could therefore lead to a reduction in, or the disappearance of, services to outlying regions. This, they argue, would adversely affect the common interest in ensuring that there are adequate air connections even in outlying regions of the EEA.

246 The applicant in Case T-394/94 points out that there is no evidence from the contested decision that the Commission discharged its duty to weigh the interest in ensuring Air France's survival against the inevitable adverse effect on competition caused by the injection of the massive amount of FF 20 billion in aid. The Commission has at no time explained why it considered that the beneficial effects of the restructuring plan were sufficient to outweigh its adverse effects, limiting itself to merely examining the beneficial effects of the aid for its beneficiary.

247 It points out that Air France has accumulated large losses during recent years, despite the injection of FF 5.8 billion in aid authorised by the Commission. In view of the continued and increasing losses made by Air France, the Commission should, it argues, have noticed in retrospect that its investigations, based at the time on information supplied by Air France, were fundamentally flawed. In contrast to Air France, most of its competitors, unsubsidised and independent airlines, have had to adopt radical cost-cutting and restructuring measures in order to be able to adapt to a rapidly changing commercial environment within the liberalised market. These necessary survival measures could be taken only by means of making substantial reductions in workforce, abandoning non-profitable routes, cancelling orders for new aircraft, withdrawing investment in other airlines and selling non-core assets. For example, the applicant embarked on a serious cost-cutting campaign involving *inter alia* shedding jobs and abandoning non-profitable routes, including that between Edinburgh and Paris, which continues to be operated by Air France.

248 The Kingdom of Denmark and the United Kingdom add that the Commission ought to have compared Air France with other companies which have restructured with or without State aid. Only by so doing could the Commission have built up a picture of the market and the companies operating on it, which is a precondition for a proper exercise of its discretion. The experience of some of Air France's competitors demonstrates what can be achieved to restore the viability of a major international airline without State aid. Thus, British Airways withdrew from 16 international routes, sold a large number of aircraft and reduced its workforce by 13 500 in the 1980s. In the case of Lufthansa, restructuring has necessitated a 17% reduction in the number of employees since 1992.

249 The applicants, the Kingdom of Denmark and the United Kingdom take the view that the 16 conditions to which the Commission made approval of the aid subject are ineffective and therefore incapable of preventing the aid from having adverse effects on trading conditions to an extent contrary to the common interest. They stress that the conditions are limited to the duration of the restructuring plan, that is to say, they were to last until the end of 1996, whereas the aid will continue to have effects on Air France and the air transport market beyond that period. The error in limiting application of the conditions to the duration of the Plan is illustrated by the merger between Air France's European operations and those of Air Inter proposed for early 1997. The Commission's action in laying down such conditions to be complied with by the French Government, instead of subjecting the restructuring plan to detailed examination is, it is argued, contrary to the rules governing the Commission's exercise of its discretion in this area. The Commission could not avoid carrying out itself the assessment which Community law requires by instead laying down a number of conditions.

250 The applicants and the interveners supporting them stress, in particular, that it is possible for Air France to circumvent the conditions of authorisation which the contested decision imposes on the French State. For example, the holding company controlling Air France and Air Inter could allow Air Inter, which is not subject to those conditions, to adopt measures which Air France is prohibited from adopting. Were the contested decision not to be annulled, any recipient of State aid

would be in a position to set up subsidiaries or sister companies in order to avoid the conditions of authorisation and to continue to operate on the market without any restriction.

251 The Commission considers that the applicants wrongly assimilate aid which distorts competition and affects trade between the Member States, within the meaning of Article 92(1) of the Treaty, to aid which adversely affects trading conditions to an extent contrary to the common interest, within the meaning of Article 92(3)(c). It states that it at no time considered that the disputed aid would not distort competition or affect trade. However, such aid does not necessarily constitute aid adversely affecting trading conditions to an extent contrary to the common interest. In the Commission's view, the applicants are proceeding on the premiss that any effort by Air France to survive will harm its competitors. That proposition, it argues, is unsustainable on a proper interpretation of Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement.

252 In *France* v *Commission*, cited above in paragraph 79, the Commission took the view that the authorised aid was a rescue measure which, moreover, did not satisfy the criteria laid down for that type of aid. Such considerations, the Commission stresses, are absent in the present context. The aid here being contested is not a rescue measure, but is effectively linked to a genuine restructuring plan. There is therefore no inconsistency between the Commission's position in *France* v *Commission* and its position here.

253 The Commission adds that the passage from Advocate General Sir Gordon Slynn's Opinion in *Commission* v *Germany* (cited above in paragraph 58) referred to the question whether the aid involved could be regarded as an aid to facilitate the development of certain economic activities, and not to the question whether it adversely affected trading conditions to an extent contrary to the common interest. Likewise, the excerpt from the judgment in *Philip Morris* (cited above in paragraph 79) relates to the first requirement of Article 92(3)(c) of the Treaty and not to the adverse effect on trading conditions.

254 The Commission states that it did examine whether the aid could be considered to be compatible in accordance with Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement. For the reasons given in its decision, it was in a position to conclude that the aid could benefit from the derogation provided for and, provided that certain commitments were respected and certain conditions satisfied, was compatible with the common market. It explained in the contested decision that, in analysing the effects of the aid within the EEA, it took into account the increased liberalisation of air transport following adoption of the 'third package' and was satisfied that the negative effects of the aid would not be reinforced through the use of exclusive rights or privileged treatment in favour of Air France.

255 The Commission submits that some of the commitments which it obtained from the French Government were unprecedented or of unparalleled stringency. No other government had undertaken to privatise a company which was the beneficiary of aid (commitment No 2) and never before had restrictions been imposed on pricing freedom (commitment No 9). The Commission also points out the fact that only half the total amount of the aid could be paid immediately, payment of the balance in two tranches being subject to compliance with a number of conditions and to Commission authorisation (Article 2 of the contested decision). Furthermore, the French Government undertook not to grant to Air France any new appropriation or any other form of aid (commitment No 5) or to interfere with its management for reasons other than those connected with its status as a shareholder (commitment No 4).

256 In response to the criticism, voiced by the Maersk companies, that it excluded the role of small and medium-sized air carriers from its analysis, the Commission stresses that its examination was not confined to the major European carriers. In ascertaining that the aid would not adversely affect trading conditions to an extent contrary to the common interest, it had to ensure, in particular, that it was not used to undercut prices and that capacity was not increased to an extent greater than market growth. Those concerns applied to all Air France's competitors and to the European civil aviation sector as a whole.

257 Regarding the argument that it failed to examine the adverse effect of the aid on competition in regional air services, the Commission submits that the interveners have failed to provide any evidence whatever to substantiate their claim that the aid discourages the development of services to and from regional airports. Concerning the alleged effects of the aid on a market wider than that actually operated by Air France, on indirectly competing routes and on potential competition, the Commission states that the allegations are without foundation. It does not know what Maersk's postponement of their plans to introduce a Billund-Paris service may demonstrate. Their hesitation, the Commission submits, is more likely to have resulted from British Airways' entry on the Copenhagen-Paris route in 1993, immediately seizing 18% of the market. On a general level, the Commission takes the view that the contested decision satisfies the requirements of Article 190 of the Treaty as regards the evaluation of the impact of the aid on trading conditions.

258 Air France considers that everything in the contested decision goes to show that the effects of the aid were assessed in a Community context. The Commission analysed the situation of the European aviation industry, its prospects and the effects of the aid on Air France's competitive situation, taking into account the increased liberalisation in air transport. Finally, the very object of the commitments entered into by the French Government was specifically to prevent Air France from being able to use the aid to the detriment of its competitors.

Findings of the Court

1. As regards the statement of reasons

259 In the light of the contentions of the applicants and the interveners supporting them, it is appropriate first to ascertain whether the contested decision is adequately reasoned with regard to the assessment of the effects of the aid on the companies competing with Air France and on the relevant air routes. The Court called on those applicants and interveners to submit the observations which they

had lodged with the Commission during the administrative procedure in their capacity as parties concerned within the meaning of Article 93(2) of the Treaty (see paragraph 33 above).

260 In accordance with what was considered in paragraphs 89 to 96 above, therefore, the Court must examine whether the statement of reasons in the contested decision indicates clearly and unequivocally the Commission's reasoning, particularly in view of the essential complaints concerning the assessment of the contested aid plan in regard to its effects which the parties concerned drew to the Commission's attention during the administrative procedure.

261 On a complete reading of the observations submitted at the Court's request, it transpires that some of those parties had, in particular, insisted that the Commission should assess the effects of the aid on the airline companies in competition with Air France and on the different air routes concerned. It was asserted that the aid would allow companies belonging to the Air France group to continue to exploit their dominant position on the domestic French market. Furthermore, since the relevant geographical market in the air transport sector consists of routes which users consider to be substitutable, that is to say, city-to-city routes, the issue of substitutability ought to be analysed. Other more competitive companies might be able to take up routes previously served by Air France. The Commission, it was argued, should also be attentive to the effects of the aid on the situation of small airline companies, which often depend on a number of specific routes. Receipt of State aid by a major carrier such as Air France could affect the competitive balance on these routes.

262 A number of the parties concerned stressed the impact which the contested aid would have on competition on international routes outside the EEA. It was claimed that Air France had advertised aggressively in the Netherlands by offering very low rates for flights via Paris to, *inter alia*, Hong Kong, Singapore, Jakarta, Tokyo, Cape Town and Johannesburg (KLM, observations, p. 1). Air France was in competition on 8 of the 20 international routes on which competition was fierc-

est (United Kingdom, observations, p. 6). The other Community companies present on extra-Community routes were affected by reason of the potential substitutability between, for instance, Rome and London for a flight to New York. There was thus competition on all routes between Europe and North America and between Europe and the Far East. British Airways, for example, was in competition with other companies in regard to flights from Rome to New York and from Paris to New York. The domestic market was too small for many European companies. Consequently, extra-Community routes were vital for their long-term survival, and many therefore relied in large measure on transatlantic traffic (pp. ii, 57 and 58 of the Lexecon Report on the competitive impact of State aid on the European airline industry, presented by British Airways during the administrative procedure and forming Annex 17 to the application in Case T-371/94).

263 The Commission, it must be borne in mind, was itself aware of the problems raised by the effects which the aid would have on the competitive position of Air France, and had indeed already declared, in the communication of 3 June 1994, that it was necessary to examine those effects with regard to international and domestic routes on which Air France competed with other European carriers, adding that Air France's restructuring plan did not include an analysis of the network and its future development (OJ 1994 C 152, at p. 8).

264 In the contested decision, the Commission, when considering whether the aid affected conditions of trade to an extent contrary to the common interest, pointed out that it had stated, when the administrative procedure was instituted, that it had to analyse the effects of the aid on Air France's competitive position on both international and domestic routes on which it was in competition with other European companies. The Commission further stresses that the French Government had undertaken, for the duration of the restructuring plan,

— not to increase the number of aircraft in Air France's operating fleet beyond 146 (commitment No 7);

— not to increase Air France's supply beyond the level reached in 1993 for routes between France and the other EEA countries (commitment No 8);

— to ensure that Air France would not apply tariffs below those of its competitors for an equivalent supply on the routes that it operated within the EEA (commitment No 9);

— not to grant preferential treatment to Air France in the matter of traffic rights (commitment No 10);

— to ensure that Air France would not operate more scheduled routes between France and the other EEA countries than it did in 1993, that is to say, 89 routes (commitment No 11);

— to limit the supply of Air Charter to its 1993 level (commitment No 12) (contested decision, OJ, pp. 79, 86, 88 and 89).

265 The Commission considers that those commitments, expressed as conditions governing authorisation of the aid, involved severe limitations on capacity, supply and pricing freedom for Air France, and that such limitations were necessary to prevent the aid being used to transfer the airline's difficulties to its competitors. The commitments prevented Air France from pursuing an aggressive price policy on all the routes which it operated within the EEA (contested decision, OJ, p. 86).

266 With more particular regard to the effects which the aid might have on the domestic French market, the Commission also points out that:

— the French authorities undertook to modify, in accordance with Decision 94/290/EC of 27 April 1994 on a procedure relating to the application of

Council Regulation (EEC) No 2408/92 (Case VII/AMA/II/93 — TAT — Paris (Orly)-London) (OJ 1994 L 127, p. 22), the traffic distribution rules for the Paris airport system in such a way as to make them non-discriminatory (commitment No 15);

— the French authorities undertook to ensure that the work required to adapt the terminals at Orly South, reserved for international traffic, and Orly West, reserved for domestic traffic, would not affect competitive conditions to the detriment of the airline companies operating there (commitment No 16);

— it adopted, on 27 April 1994, a decision under which France was required to authorise Community carriers to exercise their traffic rights on routes between Paris (Orly) and Toulouse and between Paris (Orly) and Marseilles at the latest by 27 October 1994 (contested decision, OJ, pp. 87 and 88).

267 On a reading of its reasoning as thus stated, it is clear that the Commission did not examine the competitive position on a 'route-by-route' basis, although such an examination had been proposed by the parties concerned and envisaged by the Commission itself. Instead of analysing in detail the effects which the aid would have on the various routes served by Air France, the Commission chose to impose on the French State the 16 conditions governing authorisation of the aid set out in Article 1 of the contested decision. It thus took the view that those conditions were appropriate and sufficient to ensure that the effects of the aid on the civil aviation sector coming within the scope of Article 92 of the EC Treaty and Article 61 of the EEA Agreement would not be contrary to the common interest.

268 It should be pointed out that the conditions relating to the maximum number of Air France's aircraft (No 7), the prohibition of conferring preferential treatment on Air France in the matter of traffic rights (No 10) and the limitation on Air Charter's supply (No 12), the scope of which had no geographical limits, cover in any event the extent of the EEA. The conditions regarding Air France's supply (No 8), its pricing practices (No 9), the maximum number of routes operated (No 11), the traffic distribution rules for the Paris airport system (No 15) and the renovation work at the two Orly terminals (No 16) specifically cover the geographical market

within the EEA, including the domestic French market. The Commission expressly stated that, in its opinion, those conditions limited Air France's freedom and prevented it from pursuing an aggressive price policy 'on all the routes operated by the French carrier within the European Economic Area' (contested decision, OJ, p. 86).

269 In the context of the reasoning given for the decision, the Court takes the view that this manner of addressing the problem indicates that the Commission did in fact concentrate on the competitive situation within the EEA, it being understood that the question whether the above conditions governing authorisation are in fact sufficient and appropriate to that end falls within the examination of the substance. Even if the statement of reasons did not follow the observations of the parties concerned, who had suggested carrying out a 'route-by-route' examination, it shows clearly that the Commission considered it appropriate to use the mechanism of the 16 conditions of authorisation imposed on the French State in place of such an examination. The parties concerned could thus identify the Commission's reaction to their observations, determine whether the approach adopted by the Commission was well founded, and defend their interests before the Community judicature by challenging the full and adequate nature of the mechanism of the 16 conditions with regard to the competitive position obtaining within the EEA.

270 It must, however, be held that the statement of the grounds of the contested decision does not contain the slightest indication as to Air France's competitive position outside the EEA. First, there is no analysis of Air France's international network, taking account of the routes on which it is in competition with other airline companies based within the EEA. Second, the conditions of authorisation relating to the level of Air France's supply (No 8), its pricing practices (No 9), and the maximum number of routes operated (No 11) do not cover the connections which Air France operates or intends to operate to non-EEA countries, that is to say, long-haul — in particular transatlantic — flights. From the Commission's point of view, Air France — financially strengthened by the aid authorised — was thus entirely free to extend its capacity, increase the number of its connections, and to apply tariffs as low as it wished on international routes outside the EEA.

271 However, Air France's restructuring plan expressly envisaged the development of long-haul flights and an increase in frequencies on profitable routes, and the French authorities had announced a 10.2% increase in Air France's supply on long-haul flights (contested decision, OJ, pp. 76 and 77). In addition, the parties concerned had drawn the Commission's attention, first, to the problem of defining the relevant market in regard to air transport, which, in their view, consisted of those specific routes which users regarded as substitutable, second, to the fact that Air France had attempted, by means of an advertising campaign, to attract customers in the Netherlands for flights via Paris to non-EEA destinations, Air France thereby itself demonstrating that such flights were largely substitutable by means of appropriate feeder traffic, and, third, to the vital character of such flights for the long-term survival of several European companies.

272 It should be added that, in its decision of 5 October 1992 (Air France/Sabena, cited above in paragraphs 218 and 219), the Commission defined the relevant market as regular air transport connecting two geographical areas, that is to say, a bundle of air routes, provided that there was substitutability between the routes making up that bundle, such substitutability resulting from different factors such as, in particular, the length of the routes, the distance separating the various airports at the extremities of each of the routes making up the bundle, or the frequency of flights on each route (point 25). Consequently, the Commission concluded, in regard to connections between Europe and French-speaking countries in Sub-Saharan Africa, that the relevant market could be defined as a bundle of routes between all of the EEA departure points, on the one hand, and each of the individual destinations in Africa, on the other (point 39).

273 The Court takes the view that, having regard to that decision-making practice and bearing in mind the observations which the parties concerned made in that connection, the Commission was obliged to set out its views on the problem of non-EEA air routes served by Air France, the beneficiary of the authorised aid, in competition with other companies within the EEA. As the Court of Justice held in *Bremer Vulkan* (cited above in paragraph 94, paragraphs 53 and 54), information as to the situation on the markets in question, in particular the positions of the undertaking benefiting from the aid and of competing undertakings, constitutes an essential element in the reasoning of a decision relating to the compatibility of projected aid with the common market within the meaning of Article 92 of the Treaty.

Although that judgment was delivered in relation to Article 92(1), this Court holds that such a statement of reasons is also required under Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement in regard to the question whether the aid adversely affects trading conditions to an extent contrary to the common interest.

274 Since it did not extend conditions of authorisation Nos 8, 9 and 11 to non-EEA routes served by Air France, the Commission was required to assess — in its examination of the relevant market — the potential substitutability of the non-EEA flights operated, for example, from Paris, London, Rome, Frankfurt, Copenhagen, Amsterdam or Brussels, and thus the potential competition, in regard to those flights, between the airline companies whose hubs are situated in any of those cities.

275 The importance of such a statement of reasons is illustrated by the figures which the applicants in Case T-371/94 have submitted to the Court, without being challenged, for the purpose of demonstrating that a large portion of the turnover and operating profits of British Airways, SAS and KLM is realised on routes to non-EEA destinations, in particular on connections to the United States, Canada, Africa, the Middle East, India and the Far East (application, paragraph 212 and footnote 282). As the Court of Justice accepted in *Bremer Vulkan* (cited above in paragraph 94, paragraph 34), such factors occurring after the date on which the contested decision was adopted may be taken into consideration as illustrating the obligation to state reasons devolving on the Commission. In any event, a number of the parties concerned had already pointed out to the Commission that routes outside the Community, and in particular transatlantic routes, were vital for the survival of many European companies and that competition on those routes was the fiercest of all.

276 In addition, it is obvious that an increase in Air France's capacity and its leadership in terms of low tariffs on a given non-EEA route from its hub at Paris (CDG) Airport may have repercussions on feeder traffic to that hub. If the economic significance of the Paris hub increases at the expense of other hubs within the EEA, the feeder traffic to Paris will increase proportionately and, consequently, at the

expense of the feeder traffic to those other hubs. The argument of the parties concerned regarding the situation of the small airline companies, frequently dependent on a few specific routes, thus appears to be fundamental, and the Commission ought therefore also to have set out its views in this regard. By way of illustration, it should be added that, as British Midland pointed out during the hearing before the Court, without being challenged, 30% of its passengers have been inter-line passengers travelling to other destinations on long-haul routes. Consequently, the Commission was not entitled to ignore the position of the small companies engaged in feeder traffic.

277 The problem posed by the non-EEA routes and associated feeder traffic cannot be regarded as being resolved by the combined effect of conditions of authorisation No 7 (limitation on the number of Air France's aircraft) and No 9 (restriction on the price leadership of Air France in feeder traffic within the EEA), or by Air France's duty to attain the objectives of its restructuring. If it is true that it is the non-EEA routes which are the most profitable, Air France will have every interest in using the greatest number of its aircraft on the most profitable international routes, without in any way compromising the success of its restructuring. As for feeder traffic, suffice it to note that nothing obliges Air France to assume responsibility for this itself, since such traffic towards the Paris hub can be assured by any airline company distinct from Air France, such as Air Inter, which is not subject to the conditions of authorisation imposed by the Commission (see paragraph 215 above); the economic significance of condition No 9, in so far as it covers the feeder traffic ensured by Air France within the EEA, thus appears insignificant in relation to the global problem posed by non-EEA routes.

278 Finally, while condition of authorisation No 12 imposes absolute limits of supply on Air Charter, which thus also relate to routes outside the EEA, the economic significance of Air Charter with 17 aircraft is so minimal in relation to that of Air France that the existence of this condition is not, by itself, such as to compensate for the lack of reasoning in regard to the position of Air France on these routes. The same goes for condition of authorisation No 10 prohibiting the French authorities from granting preferential treatment to Air France in the matter of traffic rights. While this condition is also directed at rights relating to non-EEA

routes, it can benefit only those airline companies capable of profiting by it. These are, in substance, companies from non-member countries and French companies such as Air France, Air Inter, Air Charter, Air Liberté, Corsair, AOM, TAT and Euralair, in the event of their wishing to serve these routes from and to France. In contrast, other European companies which, in competition with Air France, operate non-EEA routes essentially from their own hubs outside France benefit from condition No 10 only to an insignificant extent.

279 It is true that the Commission, Air France and the French Republic have argued during the present proceedings that traffic rights on non-EEA connections, in particular transatlantic connections, were governed by bilateral agreements and that a restriction imposed with regard to pricing, capacity and number of routes would have been detrimental to Air France by reducing its competitiveness on outside markets. They have submitted that such a restriction would have benefited only non-EEA companies and would therefore have been manifestly contrary to the common interest. That reasoning, however, as advanced by the agents of the Commission and the interveners before the Court, does not feature in the contested decision. It is thus a line of argument that is not covered by collegiate responsibility, and therefore cannot be accepted. Consequently, it cannot remedy the defective reasoning by which the contested decision is vitiated on this point (see paragraphs 116 to 118 above).

280 It follows from all of the foregoing that the statement of reasons in the contested decision does not satisfy the requirements of Article 190 of the Treaty so far as concerns the assessment of the effects of the aid on the competitive position of Air France in regard to its network of non-EEA routes and the associated feeder traffic. That defect in the statement of reasons means that the Court cannot examine whether the arguments put forward on those points are well founded (see paragraph 238 et seq. above). Nor, moreover, is the Court in a position to rule on the argument relating to Air France's pricing practices on its non-EEA network, allegedly operational measures financed by the aid (see paragraphs 142 and 143 above).

281 The Court is, however, able to examine whether the Commission's assessment of the effects of the aid on Air France's competitive position within the EEA can resist the substantive arguments advanced by the applicants and the interveners supporting them.

2. As regards the soundness of the reasoning

282 It must first of all be borne in mind that economic assessments pursuant to Article 92(3)(c) of the Treaty, in respect of which the Commission enjoys a broad discretion, must be made in a Community context (*Philip Morris*, cited above in paragraph 79, paragraph 24); this means that the Commission is under an obligation to examine the impact of the aid on competition and intra-Community trade (Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 136). In the present context, since the contested decision was also adopted pursuant to Article 61 of the EEA Agreement, the context to be examined, as defined by the above case-law, must be extended to the European Economic Area.

283 It should be added that, in its judgment in Case 47/69 *France* v *Commission* [1970] ECR 487, at paragraph 7, the Court of Justice ruled that, in order to determine whether aid adversely affects trading conditions to an extent contrary to the common interest, it is necessary to consider, in particular, whether there is an imbalance between the charges imposed on the undertakings concerned on the one hand and the benefits derived from the aid in question on the other. This Court concludes that the Commission is under an obligation, when examining the impact of State aid, to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, as it has itself pointed out in its *XIVth Report on Competition Policy* (1984, p. 130, point 202).

284 As to whether the Commission balanced those factors in the present instance, it must be noted in the first place that the contested decision traced the history of the various restructuring plans adopted by Air France since 1991 for dealing with its financial problems: CAP '93, under which Air France was granted FF 5.8 billion, PRE 1 and PRE 2 (contested decision, OJ, p. 74). The Commission thus took into account the background to the disputed plan, and in particular the FF 5.8 billion already paid as aid, when it assessed the possible positive and negative effects of the aid contested here.

285 In noting that the French Government was the majority shareholder in Air France (contested decision, OJ, p. 76) and in requiring the French authorities to begin the process of privatising Air France (Article 1(2) of the contested decision, OJ, p. 88), the Commission thus took account of the fact that Air France belonged to the public sector. The fact that the Commission approves aid paid to a public undertaking does not *per se* amount to discrimination against private undertakings in competition with the beneficiary of the aid. As is clear from paragraph 19 of the judgment in *Italy* v *Commission* (cited above in paragraph 125), the Commission must, even in the area of State aid, respect the principle of equal treatment as between public and private undertakings. It follows that the Commission could authorise the disputed State aid without discriminating against Air France's private competitors, provided that the aid did not adversely affect trading conditions to an extent contrary to the common interest.

286 Nor was the Commission obliged, in the present context, to compare the restructuring measures envisaged by Air France with those undertaken by other airline companies, nor, *a fortiori*, to require Air France's restructuring to be based on that of any other company (on this, see paragraphs 135 and 211 above). The adequacy of an undertaking's restructuring measures depends on its individual situation and on the economic and political context within which the measures concerned were adopted. In the present instance, the Commission found, when the contested decision was adopted in July 1994, that there had been some economic recovery within the European civil aviation sector, that the prospects for that sector were now reasonably favourable and that there was no structural overcapacity crisis (contested decision, OJ, pp. 81 and 82). On the basis of those factors, the restructuring measures envisaged by Air France and accepted by the Commission could justifiably be less severe than those undertaken by other airlines in the light of their specific situations and contexts.

287 Although, as has already been found above (paragraph 267), the Commission, in its examination of the impact which the aid might have on competition and trade within the EEA, did not assess the competitive position on a 'route-by-route' basis and thus did not examine the conditions for direct or indirect competition with other airline companies in regard to each of the routes actually or potentially served by Air France, it did none the less impose on the French State a series of conditions designed to limit Air France's margin of manoeuvre, particularly in regard to capacity, supply and pricing (see paragraphs 264 to 268 above).

288 The Court takes the view that the basic choice thus made by the Commission falls within its discretion in this area. First, the Commission may in principle make a decision authorising aid under Article 92(3)(c) of the Treaty subject to conditions for ensuring that authorised aid does not alter trading conditions to an extent contrary to the general interest (Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265, paragraph 55). Second, Air France, which is one of the three major European airline companies, operates throughout the EEA. The Commission was therefore entitled to form the view that the effects of the aid had to be assessed, not in relation to any one individual connection or specific region, but in relation to the EEA considered as a whole. It does not appear mistaken to cover, for that purpose, the whole of Air France's area of operations with a network of obligations designed to protect all of its actual or potential competitors against any aggressive policy which it might be tempted to pursue, *a fortiori* since the Commission reinforced the mechanism of the conditions of authorisation by requiring, in the third paragraph of Article 2 of the contested decision, that the fulfilment of those conditions be verified by independent consultants.

289 That conclusion is not gainsaid by the approach taken by the Commission in, *inter alia*, its decisions in Aer Lingus (cited above in paragraph 55, OJ 1994 L 54, at p. 39) and Olympic Airways (cited above in paragraph 174, OJ 1994 L 273, at pp. 30 and 35), in which it did assess certain specific routes served by the airline companies in question. For those two companies, which are relatively modest in size when compared with Air France, a particular route may be of fundamental

importance for their operations, thus justifying examination of the impact of aid granted to one of those companies being concentrated in that way, whereas the air network served by Air France within the EEA is more uniform in character.

290 In so far as the effectiveness of the conditions imposed on the French State has been challenged before the Court, with particular regard to the possibilities for Air France to circumvent those conditions, it must be noted that the legal and practical utility of such conditions of authorisation lies in the fact that, if the recipient undertaking were to fail to observe them, it would be for the Member State concerned to ensure proper implementation of the authorisation decision and for the Commission to assess whether it was appropriate to demand that the aid be repaid (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 128). It should be borne in mind that, in Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, paragraph 11), the Court of Justice held that, if a State does not comply with the conditions imposed by the Commission in a decision approving aid, the Commission is entitled, under the second subparagraph of Article 93(2) of the Treaty, to refer the matter directly to the Court of Justice by way of derogation from Articles 169 and 170 of the Treaty.

291 Having regard to the way in which the conditions underlying a decision to authorise aid thus operate, the mere assertion that one of those conditions will not be complied with cannot cast doubt on the legality of that decision (paragraph 128 of *AIUFFASS and AKT* v *Commission*, cited above in paragraph 290). In general, the legality of a Community act cannot depend on the possible existence of opportunities for circumvention or on retrospective considerations of its efficacy (*Schroeder* v *Germany*, cited above in paragraph 81, paragraph 14).

292 All the arguments challenging the legality of the contested decision on the ground that control of the implementation of the conditions of authorisation imposed on the French State would be ineffective, or that it would be possible for Air France to circumvent those conditions, must therefore be excluded from the Court's examination as having no bearing on the issue. In so far as it might subsequently transpire that those conditions have not been fully complied with or that Air

France has in fact succeeded in abusively circumventing them, it would in that case be for the Commission to envisage a possible reduction in the authorised amount when it came to the payment of the second and third tranches of the aid or to consider whether the French Republic ought to be required to recover in full or in part the aid paid.

293 Consequently, only those arguments alleging that the conditions of authorisation were inherently and manifestly inappropriate, and in particular legally inadequate in scope, may be capable of calling in question the legality of the contested decision.

294 The Court finds that, contrary to the argument advanced in this connection by the applicant in Case T-394/94, the Commission did not err in limiting the scope of most of the conditions to the duration of Air France's restructuring plan. It is clear that the restrictions imposed for the purpose of limiting the impact of the aid could not be of unlimited duration. In the specific circumstances here, it does not appear arbitrary for the duration of the conditions to end on completion of the implementation of the restructuring plan.

295 It is in the light of the above considerations that the arguments directed against a number of specific conditions of authorisation must now be examined. That examination will show conclusively whether the Commission, instead of authorising the aid and attaching several conditions of authorisation to its decision, ought to have decided that the aid adversely affected trading conditions to an extent contrary to the common interest.

296 Subject to that proviso, the argument that the method chosen by the Commission to examine what impact the aid would have on the common interest was mistaken cannot be upheld.

(a) Condition of authorisation No 1

297 This condition required the French authorities to ensure that 'the entire amount of aid shall benefit Air France alone. Air France means the Compagnie Nationale Air France, as well as any company of whose capital it holds more than 50%, with the exception of Air Inter. In order to prevent any transfer of aid to Air Inter, a holding company will be set up by 31 December 1994 which will have a majority shareholding in Air France and Air Inter. No financial transfer which does not form part of normal commercial relationships shall be made between the companies in the group, either before or after the actual setting up of the holding company. Accordingly, all transfers of goods and services between the companies shall be carried out at market prices; in no case may Air France apply preferential tariffs in favour of Air Inter'.

Summary of the applicants' arguments

298 The applicants submit that, by not including Air Inter in its assessment, the Commission committed an error which rendered the conditions governing the authorisation of the aid devoid of content. For example, the minimal reduction in capacity required of Air France was, they claim, greatly facilitated by the fact that Air Inter had unlimited possibilities for increasing its capacity. The Commission was wrong to consider that the holding company envisaged would prevent Air Inter from benefiting from the aid in any way. Air France and Air Inter form a single economic unit and must therefore be considered as a single undertaking for the purpose of applying the Community rules governing State aid. The change in structure between Air France and Air Inter from a parent-subsidiary relationship to that of two companies controlled by the same holding company does not alter this conclusion. At the same time, competition between Air France and Air Inter is inconceivable since they have identical economic interests.

299 In this context, the applicants in Case T-371/94, citing press articles published in August and September 1994, state that the chairman of the holding company was to be Mr Christian Blanc, who was also to remain chairman of Air France; 14 additional directors were to be chosen from among the directors and employees of Air France and Air Inter. The chairman of Air Inter was also to sit on the board of the holding company and had, moreover, been appointed chairman of Air France's new operating centre for its European activities, the 'Centre de Résultat Europe' (European Results Centre). Air Inter was to be merged into Air France's 'Centre de Résultat Europe' with effect from the end of the restructuring plan, that is to say, from 1 January 1997. In the interim, Air Inter was to begin operating some of Air France's European routes in its place. In addition, Air France and Air Inter were to hold shares in the same undertakings and had reinforced their cooperation in several areas. The Commission, they claim, had also identified Air Inter as a core asset of Air France that could not be sold off.

300 Those applicants submit that the fact that Air Inter belonged to the same group as Air France, and its announced merger with Air France, would have enabled Air Inter to 'bank' on the aid. Thus, Air Inter could reassure the banks that its funding would be relatively free of risk and that, following the merger, its obligations would be honoured by the new company.

301 In so far as the Commission, in the contested decision, imposed the condition that only normal commercial relationships could take place between the companies in the group, those applicants submit that this condition could not prevent Air Inter from benefiting from the contested aid. There are, they argue, many ways in which two companies within the same group, in particular when they have joint operations and subsidiaries, can exchange products and services under conditions inconsistent with those prevailing on the market, without any possibility of verification.

302 They point out in this context that French tax law, in particular the fiscal concept of the 'acte anormal de gestion' ('abnormal management act') relating to charges

that are deductible from the profits within a group of companies, did not provide any means for verifying that Air Inter would not benefit either directly or indirectly from the aid granted to Air France. Direct transfers and the financial advantages represented by commissions or preferential prices granted by Air France to Air Inter, in anticipation of the merger between the two companies, could not be regarded as abnormal management acts.

303 The applicants add that the condition imposed was of limited application in so far as it did not cover the transfer by Air France of European routes and valuable slots to Air Inter.

304 So far as the exchange of slots between Air France and Air Inter is concerned, those applicants state that such exchanges are frequent between airlines. An airport slot is an essential asset in an airline's ability to operate a route. There is therefore a market in which slots are bartered for other slots. There is, however, no 'market price'. Airlines forming part of the same group of companies may exchange slots in order to implement a group strategy. The strategy of the Air France group was for Air Inter to expand its operations outside France into Europe and beyond pending the merger scheduled for 1 January 1997. Air France could therefore very well provide Air Inter with a valuable peak-time slot for the operation of a particular route. The condition imposed by the Commission, seeking to hold Air France separate from Air Inter, was thus, they claim, ineffective.

305 In regard to all routes, Air Inter's ability to receive advance notice from Air France concerning the routes that Air France intended to relinquish provided it with a considerable advantage over independent competitors. It could thereby prepare its entry on a given route in time for the public announcement by Air France of its withdrawal from the route in question. Further, Air Inter's ability to benefit from the existing Air France infrastructure at the airports and in the countries concerned constituted an additional significant advantage over rival airlines wishing to begin operating such routes.

306 Those reasons, the applicants submit, explain how Air France could effectively transfer its routes to Air Inter. Their assertion, they argue, is illustrated by press articles published in September 1994, which reproduce official announcements by Air France (Annex 33 to the application). The applicants further submit that an agreement dating from 1992 between Air France and Air Inter provided for the transfer of Air France cockpit crew to Air Inter for all European routes that Air Inter was to begin operating. This, they submit, was not the sort of agreement that two independent EEA airlines would enter into.

307 In order to demonstrate the group strategy being pursued by Air France and Air Inter, the applicants refer to the 'ABC World Airways Guide' for June 1994, which lists the timetables of many airlines throughout the world. It lists Air Inter's flights under an 'AF' code. That use of the 'AF' code allows a route consisting of a domestic flight provided by Air Inter and an international flight provided by Air France to be presented as a seamless flight, thereby receiving priority in the computer reservation system.

308 The Maersk companies add that the subsequent behaviour of Air France and its group demonstrates a disregard for the commitment to keep Air Inter commercially and financially independent. The flight numbers of Air Inter were, for the purpose of coordinating the electronic reservation systems, to adopt the computer code of Air France; Air Inter was to adopt the name of the future European company of the group and offer its simplified product and its low tariffs on numerous European routes, departing mainly from Orly. In addition, Air Inter's price reductions are explicable only in the knowledge that in a few years' time all of its losses were to become absorbed in Air France's, which in the meantime would have received the benefit of the aid and would therefore be better placed to bear such losses.

309 The interveners also point out that Air France and Air Inter placed in operation, on 2 January 1995, the first aircraft in a new joint regional and feeder service under the banner 'Air France Air Inter Express'. As Air France's own documentation stated, this new joint approach expressed a common policy with a view to the

merger of the two companies. The fact that a degree of fleet integration has already occurred demonstrates not only the Commission's error in concluding that Air Inter would not be a recipient of the aid, but also the inadequacies of the measures designed to prevent any spill-over of the aid.

310 Further, airline companies undergoing restructuring will normally introduce cost-cutting programmes throughout their group to contribute to loss reduction. Air France, because of the contested aid, would have been able to avoid requiring such a contribution from Air Inter. Air Inter was thus able to finance the current expansion of its operations where, but for the aid, it would have had to implement austerity measures. It was thus at least an indirect beneficiary of the aid in question.

311 At the hearing, the applicants in Case T-371/94 pointed out that, according to condition No 1, the contested aid was intended for Air France and for any company of whose capital Air France held more than 50%. Those companies are thus deemed to benefit from the aid. However, none of them needed to be restructured or, if they did require restructuring, they did not submit any restructuring plan. Authorisation of the aid in favour of Air France and its 80 subsidiaries was therefore manifestly unlawful, particularly with regard to those subsidiaries operating within sectors unconnected with air transport.

312 The Commission, the French Republic and Air France contend that the arguments put forward are unfounded.

Findings of the Court

313 With regard to the arguments that condition of authorisation No 1 was inherently inappropriate on the ground that the failure to bring Air Inter within the scope of the contested decision ignored economic realities, in particular the economic unity

of Air France and Air Inter, it should be pointed out that the contested aid had the twofold purpose of contributing both to the settlement of Air France's debts and to the financing of its restructuring plan, expiring on 31 December 1996. In authorising the aid, the Commission was thus required to ensure that the attainment of those objectives would not be compromised by the relations between Compagnie Nationale Air France and Air Inter within the Air France group, in particular through the direct or indirect transfer of part of the aid to Air Inter. Furthermore, as has been stated above (paragraphs 214 to 216), the Commission was obliged to take account of the fact that Air Inter was an asset of strategic importance for Air France, with the result that the two companies could not be required to effect a total and definitive separation.

314 In those circumstances, the Court considers that, in the exercise of its broad discretion, the Commission was entitled to form the view that, once the mechanism of the holding company had been established, Air France and Air Inter would be two independent companies, both legally and financially, for the purpose of applying the specific rules governing State aid. That mechanism — in conjunction with the system of verification by independent consultants and the scheduling of payment of the aid in three tranches under Article 2 of the contested decision — could be treated as an adequate and appropriate means by which to guarantee that Air France would be the sole beneficiary of the aid and to transform the legal structure of Air France and Air Inter, which passed from the dependency structure of subsidiary and parent company to that of independent sister companies.

315 The separate legal and financial status of the two companies, for the purposes of the rules governing State aid, is not brought into question by the fact that they have subsidiaries and management staff in common, nor by their coinciding air-transport interests. Those are purely factual matters which could at most have led the Commission and the independent consultants to be particularly vigilant in their verification, under Article 2 of the contested decision, of the proper implementation of the restructuring plan and of the fulfilment of the conditions laid down for approval of the aid.

316 The same applies with regard to the merger of the two companies scheduled for 1 January 1997. Irrespective of the fact that the Commission did not, in July 1994, have any specific and detailed plan of such a merger, of which it could have taken account in the contested decision, the possibility of joining the Air France group at the end of the restructuring period was not at all confined to Air Inter. In that regard, Air Inter was indistinguishable from any other airline company independent of Air France for the purposes of the rules governing State aid. Furthermore, it is clear that Air France, in the same way as any other undertaking in receipt of State aid, had to be able to regain its operating freedom once the restructuring phase, with the concomitant restrictions imposed by the Commission, had been completed.

317 While it is true that the actual statement of reasons given in the contested decision does not deal with the *de facto* interdependence between Air France and Air Inter or the prospects of a possible merger between the two companies, the Court nevertheless takes the view that the reference to the holding company, the effect of which was to guarantee their legal independence *vis-à-vis* each other, made any further reasoning in that regard superfluous. Within the general structure of the decision, Air Inter is an autonomous company, excluded from benefiting from the aid. It must therefore be treated, as long as that autonomy lasts, in the same way as any other airline company not in receipt of the aid and independent of Air France.

318 So far as the exchange of routes and slots between Air France and Air Inter is concerned, it must be noted that such operations do not constitute a special feature of the relationship between those two companies. Rather, they are common practices in which all airline companies engage. Thus, as the French Government stated during the hearing without being challenged, in 1996, at Paris (CDG) Airport, Air France exchanged 50 slots with some 30 companies outside the Air France group, including two with British Airways, one with British Midland and one with KLM. No exchanges were made with Air Inter during the 1994/95 winter season; only one was made during the 1995 summer season, and four during the 1995/96 winter season. With regard to route exchanges, the French Government pointed out that the Paris-Dresden route was taken over by Lufthansa after Air France had abandoned it, while Jersey Air European took over the Paris-Glasgow route and Crossair the route between Bordeaux and Geneva.

319 In that context, it should be added that the possible transfer by Air France to Air Inter of profitable routes and slots in exchange for non-profitable routes and slots would have run counter to the restructuring as conceived by Air France itself in its Plan and would have jeopardised achievement of the operating and productivity objectives posited in the contested decision. The Commission was therefore entitled to form the view that the control mechanism introduced by Article 2 of the contested decision was adequate to cope with that unlikely scenario.

320 Regarding the argument that Air Inter was at least an indirect beneficiary of the aid, without which Air France would have had to call on Air Inter to contribute financially to its restructuring, it is important to bear in mind that the Commission was entitled to consider as justified, in the exercise of its broad discretion, the maintenance of the restructured Air France company at the level of the other two major European airline companies (see paragraph 209 above) and that Air Inter represented an important strategic, and hence non-disposable, asset of Air France (see paragraphs 214 to 216 above). Consequently, the Commission was entitled to take the view that Air France's position would be weakened if, instead of authorisation of the aid in conjunction with the establishment of the holding company described above, Air Inter had been required to mobilise its own capital or incur debts itself in order to contribute to the financing of Air France's restructuring. In those circumstances, Air Inter cannot be described as an indirect beneficiary of the aid.

321 The arguments based on the ineffectiveness of control of the implementation of condition of authorisation No 1 or on the possibility of its circumvention by Air France are not such as to affect the actual legality of the contested decision since they relate only to the phase after that decision was adopted or even after the period of Air France's restructuring (see paragraph 292 above). For the same reason, all the references by the applicants and the interveners supporting them to the conduct of Air France and/or Air Inter after the contested decision had been adopted must be discounted (see paragraph 81 above).

322 As for the problems of control raised with regard to French tax law, suffice it to state that, far from being restricted to the concepts of such law, the independent consultants — on whom Article 2 of the contested decision imposed the task of

verifying the proper implementation of the restructuring plan and fulfilment of the conditions laid down for approval of the aid — were free to monitor the soundness of the legal and financial separation between Air France and Air Inter in accordance with the economic, financial and accounting methods which they considered to be appropriate. Implementation of the 1992 agreement providing for the transfer of cockpit crew from Air France to Air Inter, during the period of validity of the conditions of authorisation imposed by the contested decision, would obviously have to comply with those conditions, in particular condition No 1, under which all provisions of services between Air France and Air Inter had to be carried out at market prices, the monitoring of compliance with that condition falling within the phase subsequent to the contested decision.

323 Finally, in so far as it has been argued that condition of authorisation No 1 allowed aid to be paid to subsidiaries of Air France that were not under any obligation to restructure, suffice it to point out that condition of authorisation No 6 required that the aid be used exclusively by Air France 'for the purposes of restructuring the company', which prohibited subsidiaries not subject to restructuring from benefiting from it. As for Air Charter, which was, moreover, the subject of conditions of authorisation Nos 12 and 13, it should be noted that Air France's charter sector was covered by the contested restructuring plan (p. 22 of the Plan). The Court takes the view that, in the exercise of its broad discretion, the Commission was entitled to confine itself to that general rule, reinforced by the control mechanism in Article 2 of the contested decision, and to consider that only those essential matters which concerned Air France itself, Air Inter and Air Charter required more detailed rules.

324 It follows that the arguments directed against condition of authorisation No 1 must be rejected.

(b) Condition of authorisation No 3

325 This condition required the French authorities to ensure that 'Air France shall continue the process of implementing in full the Plan as communicated to the Commission on 18 March 1994, in particular as regards the following productivity

targets expressed by the indicator equivalent revenue passenger kilometre/employee for the duration of the restructuring plan:

— 1994: 1 556 200 equivalent revenue passenger kilometre/employee,

— 1995: 1 725 500 equivalent revenue passenger kilometre/employee,

— 1996: 1 829 200 equivalent revenue passenger kilometre/employee'.

326 It should be added that the Commission specified that the ERPK efficiency indicator represents revenue passenger kilometres and revenue tonne kilometres (converted to be comparable with passenger revenue yield, on the basis of one tonne kilometre being equivalent to 3.5 passenger kilometres) per employee. That indicator represents the total level of demand for an airline's services in terms of both passengers and cargo (contested decision, OJ, p. 83).

Summary of the applicants' arguments

327 The applicants take the view that the ERPK is a flawed unit of measurement. Due to the diversity in the nature of carriers' operations, it is very difficult to arrive at a single composite measure which can take account of all operational differences in a meaningful way. Ideally, therefore, a wide range of indicators should be used to measure performance in discrete areas of the airline business. The Commission, they argue, violated this elementary rule by assessing Air France's current and expected productivity on the basis of only one unit of measurement, namely the ERPK, which, to the applicants' knowledge, has never been used in the air transport sector.

328 The applicants state that they normally measure productivity on the basis of 'revenue tonne kilometres' ('RTK') or 'revenue passenger kilometres' ('RPK') per

employee, without combining the two units. A unit of measure such as the ERPK, combining passenger kilometres and tonne kilometres, would, they argue, double the importance of passengers. It is, moreover, a unit of measurement which combines entirely different services, namely the carriage of freight and the carriage of passengers. The higher the percentage of freight carried, the lower the unit costs, particularly when an airline operates all-cargo aircraft. This contributes to making an airline carrying cargo appear extremely efficient in comparison with an airline carrying passengers.

329 Furthermore, since the ERPK simply multiplies the number of passengers carried (including cargo converted into a number of passengers) by the number of kilometres flown, a simple way to boost an ERPK figure is to operate long-haul routes, thus providing an increased number of kilometres. According to the applicants, available statistics suggest that this is precisely what Air France is currently doing on transatlantic routes: it is boosting capacity, regardless of the fact that all other airlines are cutting theirs. Moreover, this unit of measurement says nothing of the profitability of an airline's activities because the multiplication of the number of passengers by the number of kilometres flown does not provide any indication of the resulting revenue and the cost of transporting the passengers. As a result, Air France could provide satisfactory results from the point of view of passengers multiplied by kilometres flown but disastrous yields.

330 Finally, even if the ERPK were a relevant unit of measurement, a number of factors place its reliability in question. First, in its communication of 3 June 1994, the Commission referred to Air France's productivity only in terms of 'available seat kilometres' ('ASK'). Subsequently, in Decision 94/662 (cited above in paragraph 145), the Commission measured Air France's productivity solely in terms of number of personnel per aircraft, passengers carried per employee, ASK per employee and RPK per employee. There is, finally, no consensus on what constitutes a 'correct' ratio between the yield of cargo and passenger operations.

331 The applicants also point out that Air France's productivity figures do not take account of services provided by personnel 'wet-leased' to Air France (that is to say, where Air France takes a lease of an aircraft and its crew) or subcontracted personnel. Productivity measured 'per employee' is, they argue, artificially inflated if persons not included among Air France's employees actually contribute to its productivity. Air France is currently wet-leasing aircraft and personnel from several companies. The ERPK per employee thresholds for payment of the three tranches of aid could well be satisfied merely through increased reliance on wet-leases or subcontracting arrangements, since the commitments imposed by the Commission do not cover such an eventuality. In this context, the applicants state that Air France wet-leased from TAT aircraft and complete crews, not just cockpit crews. Air France, they continue, has also wet-leased aircraft and crew from Air Littoral and Brit'Air and continues to do so.

332 The applicants argue, finally, that the productivity targets set by condition No 3 were too low compared to those already achieved by other airlines. In this context, they criticise the Commission for having merely compared Air France's productivity with that which seven other European airline companies were expected to achieve in 1996 (contested decision, OJ, p. 83). Those airlines include Alitalia and Iberia, which are experiencing serious difficulties and whose future is uncertain. The Commission also included among the seven two airline companies, SAS and Swissair, which fly, on average, much shorter routes than Air France and whose productivity thus appears unusually low. Only a comparison with companies having activities and flying distances similar to those of Air France would, they argue, be appropriate. To measure Air France's efficiency within the air transport sector, it would have been more meaningful to compare its expected productivity with that of 'healthy' airlines such as KLM, British Airways, SAS and Lufthansa. In any event, such a comparison was necessarily approximate since the Commission could not have had a precise idea of the continuing restructuring undertaken by the group of companies in question.

333 The Commission, the French Republic and Air France contend that the arguments put forward are unfounded.

Findings of the Court

334 Condition No 3 was not confined to requiring that productivity targets expressed in ERPK be achieved, but required the French authorities to ensure that Air France would pursue full implementation of its restructuring plan, the objectives in terms of ERPK being indicated only by way of specific example. Likewise, under Article 2 of the contested decision, payment of the second and third tranches of the aid was subject to, *inter alia*, actual implementation of the Plan for the undertaking and achievement of the planned results '(particularly as regards the profits and cost-effectiveness ratio as expressed in equivalent revenue passenger kilometre/employee ...)'. It follows that the improvement in Air France's overall productivity was not to be measured exclusively in terms of ERPK but also fell to be assessed in the light of other productivity improvement objectives referred to in the restructuring plan, in particular those concerning reductions in staff and investments, procurement savings, improvements in the use of working time and a salary freeze.

335 Once the significance of the ERPK/employee unit has thus been reduced to its proper dimensions, it must be seen as an indicator of physical productivity which counts both passengers and freight transported, taking account — through the use of the conversion coefficient 3.5 — of the economic reality under which the transport costs of one tonne of freight and staff requirements for that purpose are well below those of passenger transport, the situation being reversed with regard to the receipts from those two forms of transport. Far from doubling the importance of passengers, this unit of measurement thus makes it possible to ascertain whether a company is transporting more passengers and freight than previously, with the same number of employees, over distances which are globally the same or whether it is transporting the same number and quantity thereof with fewer employees, thus improving its physical productivity.

336 Admittedly, as the Commission itself has acknowledged before the Court, ERPK is not an infallible criterion in all circumstances. Thus, it is possible that the conversion coefficient of 3.5 may have varied during the period of Air France's restructuring. However, it is also true that ERPK is particularly appropriate for measuring the productivity of a company such as Air France, for which air freight represents a fundamental constituent element of its air transport activities, amounting to up to 40% of its total cabin load. In addition, it is the unit of measurement which Air France has traditionally used since 1978. In those circumstances, the Commission was justified in including ERPK among the other factors relevant to the company's productivity for the purpose of measuring the improvement in Air France's productivity.

337 This conclusion is not invalidated by any of the points raised by the applicants or the interveners supporting them.

338 With regard to the charge of inconsistency laid against the Commission in that the ERPK indicator does not feature in Decision 94/662 (cited above in paragraph 145), which was adopted on the same day as the decision here, it need merely be noted that Decision 94/662, unlike that here under challenge, concluded that the aid granted to Air France at an earlier period was incompatible within the meaning of Article 92(1) of the Treaty and refused to apply Article 92(3) in the absence of a proper restructuring plan on Air France's part. In those circumstances, there was no question, in that decision, of laying down productivity targets expressed in ERPK to be achieved by Air France.

339 Regarding the possibility that the ERPK figure might be artificially inflated simply by increasing the kilometres flown, the Commission has rightly pointed out that it would appear illogical for Air France, simply in order to cover more kilometres, to fly aircraft with an insufficient cabin load and thus, under the monitoring of the Commission and the independent consultants pursuant to Article 2 of the contested decision, compromise the overall success of its restructuring plan. Furthermore, the indicators used by the applicant companies for measuring their own

productivity, namely RTK and RPK, are open to the same risk of manipulation inasmuch as their multiplier is also the number of kilometres flown.

340 The same applies with regard to the argument concerning wet-leasing. While it is true that recourse to wet-leasing does make it possible to improve the ERPK/employee ratio in so far as the aircraft concerned help to increase ERPK without their crews being counted in the denominator of the ratio, such distortion will exist irrespective of the unit of measurement employed if it relates to the number of employees (ASK, RTK, RPK), and is thus not specific to ERPK. Moreover, wet-leasing is a current practice within the air transport sector, and Air France's situation does not therefore differ fundamentally in that regard from that of other European carriers. Finally, if Air France had in fact had recourse to numerous wet-leases, it would, while under the supervision of the Commission and the independent consultants, have been compromising the implementation of its own restructuring plan, which specifically envisaged a reduction in staff, better utilisation of its fleet and crews and a lowering of costs. The Commission was therefore justified in omitting to take account of wet-leases in this connection.

341 So far as concerns the argument directed against the choice of the seven airline companies selected for the purposes of a productivity comparison with Air France, the Court takes the view that the Commission was entitled to base its comparison on a relatively large number of companies in order to achieve, in so far as possible, a true and representative average for the sector. In so doing, it was not obliged to choose only those companies that were most efficient or specialised in long-haul transport, but could also include in its comparison other companies such as Alitalia, Iberia, SAS and Swissair by forming the view that such an approach took account of the complexity of air transport as a whole. Consequently, no manifest error of assessment has been established in the choice of seven airline companies.

342 Finally, the same applies with regard to the contention that the productivity targets set by condition No 3 were too weak. This is no more than a bare assertion,

unsupported by any concrete factors capable of establishing that the Commission committed a manifest error in this regard. In those circumstances, the Commission was entitled to confine itself to contradicting that assertion by stating that, in its opinion, the productivity targets were reasonable, adequate and achievable.

343 It follows that the arguments directed against condition of authorisation No 3 cannot be upheld.

(c) Condition of authorisation No 6

344 This condition required the French authorities to ensure that 'for the duration of the Plan, the aid is used exclusively by Air France for the purposes of restructuring the company and not to acquire new holdings in other air carriers'.

Summary of the applicants' arguments

345 In the view of the applicants, this condition was inherently defective, since the aid would have been used principally to sustain Air France's operations. The scope of the condition was also limited by the interpretation given to it by Air France. In its view, the ban on acquiring shareholdings in other airlines did not apply to paying for acquisitions agreed upon before the contested decision was adopted or to increasing existing shareholdings in other airlines, such as Sabena. Moreover, the requirement under Article 92(3)(c) of the Treaty that State aid be used solely for the restructuring of its beneficiary implies, of itself, that the beneficiary be

prevented from acquiring shares in airlines. The acquisition of shares in other airlines could not possibly be considered to constitute a restructuring measure.

346 The Commission contends that those arguments are unfounded.

Findings of the Court

347 As the Commission has stressed before the Court, the wording of this condition prohibited use of the aid both in order to acquire new holdings and in order to increase existing holdings. Concerning the argument relating to unlawful financing both of operational activities and of the final instalment of the purchase price for the holding in the share capital of Sabena, suffice it to recall that the arguments put forward in this regard have already been rejected (see paragraphs 137 to 141 and 223 above).

348 With regard, finally, to the allegedly redundant nature of condition No 6, even on the assumption that the prohibition of using aid to acquire holdings already features in Article 92(3)(c) of the Treaty, the usefulness of such a condition consists in enabling the Commission to refer the matter directly to the Court of Justice under the second subparagraph of Article 93(2) without first being required to initiate the procedure under the first subparagraph of Article 93(2) or under Article 169 (see paragraph 11 of *British Aerospace and Rover* v *Commission*, cited above in paragraph 290). Moreover, condition No 6 was not limited to prohibiting the acquisition of holdings, but further required that the aid be used exclusively for the purposes of restructuring Air France.

349 It follows that the arguments directed against condition of authorisation No 6 must be rejected.

(d) Condition of authorisation No 7

350 This condition required the French authorities to ensure that 'during the period covered by the Plan, Compagnie Nationale Air France does not increase the number of aircraft in its operating fleet beyond 146'.

Summary of the applicants' arguments

351 In the applicants' submission, the Commission was wrong to consider that this condition would be effective. It did not cover wet-leasing operations, through which Air France could increase the number of aircraft effectively at its disposal. The Commission also failed to take account of the fact that Air France could continue ordering new aircraft and expanding its fleet through Air Inter, not only because Air Inter's presence in the Air France group meant that there was a significant commonality of economic interests between the two companies but also because of their merger scheduled for early 1997. All the new aircraft ordered and received by Air Inter would therefore revert to Air France in 1997. Furthermore, there was nothing to stop Air France funding the acquisition of aircraft for Air Inter. The strategy of the Air France group, they argue, was to make Air Inter a European carrier. In this connection, the operation of specific routes which Air France had previously operated was being transferred to Air Inter. Such a mechanism was, in effect, tantamount to Air France's being able to increase its operational fleet beyond 146 by relying also on the fleet of its sister company, which remained unfettered by any commitments.

352 The Commission contends that those arguments are unfounded.

Findings of the Court

353 With regard to the possibility of recourse to wet-leases, condition No 7 also applied, as the Commission has stated before the Court, to aircraft leased with their crews. By imposing a limit on the number of aircraft in Air France's 'operat-

ing' fleet, this condition was directed not only at Air France's own aircraft but also at those which any other company might have made available to it for the purpose of operating them. In addition, it must be read in conjunction with Air France's restructuring plan, which, under the control of the Commission and the independent consultants pursuant to Article 2 of the contested decision, provided for the number of seats offered to be slightly reduced in comparison with 1993 (contested decision, OJ, p. 75).

354 So far as the references to Air Inter are concerned, suffice it to recall that, for the duration of Air France's restructuring, Air Inter had to be regarded as an independent company, that the commercial relations between the two companies were governed by condition of authorisation No 1, that any potential circumvention, by means of Air Inter, of the conditions imposed on Air France, whilst it might lead the Commission to seek recovery of the aid disbursed, is irrelevant to the legality of the contested decision, and that its possible merger with Air France concerned Air Inter in the same way as it would any other airline company independent of Air France (see paragraphs 292 and 313 to 315 above).

355 The arguments directed against condition of authorisation No 7 must accordingly be rejected.

(e) Condition of authorisation No 8

356 This condition required the French authorities not to 'increase, during the period covered by the Plan, the supply of Compagnie Nationale Air France beyond the level reached in 1993 for the ... routes ... between Paris and all destinations in the European Economic Area (7 045 million available seat kilometre) [and] between provincial airports and all destinations in the European Economic Area (1 413.4 million available seat kilometre). The supply could be increased by 2.7% each year, unless the growth rate of each of the corresponding markets is lower. However, if the annual growth rate of these markets exceeds 5%, supply could be increased beyond 2.7% by the amount of increase above 5%'.

Summary of the applicants' arguments

357 The applicant in Case T-394/94 claims that the Commission committed a manifest error of appreciation in concluding, in the contested decision, that the European air transport sector was not suffering from a structural overcapacity crisis. In so doing, the Commission apparently took no account of the fact that there was and is overcapacity, even though this was expressly confirmed by the 'Comité des Sages' in its report on the European civil aviation industry drawn up in January 1994 at the request of the Commission itself. In particular, the 'Comité des Sages' considered that overcapacity was due in part to the State aid which had been granted. The Commission's argument that overcapacity was merely a 'temporary phenomenon' is thus contradicted by the Commission's own sources.

358 The applicants take the view that, in a sector suffering from overcapacity, the compensation for State aid must be a reduction in the beneficiary's capacity, even if the market is growing. Such an obligation remains even if the overcapacity is only a temporary phenomenon. The applicants in Case T-371/94 consider that the notion of 'compensatory justification' is central to many Commission decisions, including those relating to State aid granted to car manufacturers dating from the 1980s, at a time when the car market was suffering from overcapacity but growing significantly (see, *inter alia*, Commission Decision 89/661/EEC of 31 May 1989 concerning aid provided by the Italian Government to Alfa Romeo, OJ 1989 L 394, p. 9). They add that the compensatory justification cannot be avoided simply because the market is growing, since one can never exclude the risk of a re-emergence of overcapacity. The Kingdom of Denmark expresses the view that a comparison with the Sabena, TAP, Aer Lingus and Olympic Airways decisions (cited above in paragraphs 55 and 174) makes it clear that these other cases all involved reductions in capacity imposed on the recipients of State aid.

359 The Commission, the applicants argue, was also wrong in stating — on the basis of statistics produced by IATA forecasting a 6% annual traffic increase — that the overcapacity in the air-transport sector might disappear by 1995. The statistics of IATA are unreliable and its forecasts frequently wrong. Moreover, traffic growth cannot be considered in isolation from the factors that cause it. In the air transport market, the current growth in traffic has been achieved largely by lowering prices and thus lowering yield below the level necessary for the survival of numerous airlines.

360 The applicants submit that Air France was able to use Air Inter to expand its capacity and market share without restrictions until their merger in 1997. They point out in this regard that, if it was unlikely that Air France would operate more domestic routes, this was a result of its strategic plan, which allocated the domestic network and certain European routes to Air Inter.

361 The applicants point out that the capacity limitations applied only to routes between France and non-French destinations within the EEA. With the exception of the Paris (CDG)-Nice route, Air France currently operates within the EEA only routes between France and other EEA countries. Since the entry into force of Council Regulation No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8), EEA air carriers have been free to operate on any route between two EEA Member States and to provide limited cabotage services within any Member State other than their own. As a result, they claim, Air France was completely unrestrained in regard to the capacity which it could offer on routes between two EEA Member States other than France and on domestic routes within an EEA Member State other than France.

362 It appears to the applicants that condition No 8 was not intended to cover capacity offered by Air France wholly within France. The capacity limitations, moreover,

were of little significance because 1993 — the reference year — was a peak in Air France's supply of capacity. Further, the condition applied only to passenger traffic. The Commission failed to explain why there was no limitation on Air France's capacity in connection with cargo traffic. Finally, the commitment concerning increases in capacity would not have prevented Air France from relying on wet leases to increase its capacity.

363 The applicants also claim that the Commission made a manifest error of assessment in linking the limitation on Air France's capacity to a decrease in its market share within the EEA. The Commission declared in the contested decision that, by limiting Air France's supply below market growth, 'its market within the European Economic Area' would decrease to the benefit of its competitors (contested decision, OJ, p. 87). According to the applicants, even in a situation where the maximum 2.3% (that is to say, 5% minus 2.7%) limitation on Air France's rate of increase in capacity applied, it was in a position to maintain its market share by little more than a 1% increase in its load factor. The United Kingdom also alleges the same manifest error of assessment, adding that it would follow from a 3.8% increase in the load factor (contested decision, OJ, p. 87) and an authorised increase of 2.7% in capacity that the number of Air France's passengers would be expected to grow by 6.6% (that is to say, 1.038 x 1.027 = 1.066), a figure in excess of the 5.5% projected annual market growth (contested decision, OJ, p. 77).

364 The Commission, the French Republic and Air France contend that those arguments are unfounded.

Findings of the Court

365 In stating, in the contested decision, that the European civil aviation sector was not affected by structural overcapacity, in so far as existing overcapacity was likely to be only a temporary phenomenon, the Commission relied essentially on IATA

statistics dating from 1993 and forecasting an annual increase in air traffic of 6% (contested decision, OJ, p. 82). IATA is an international body of world repute to which almost all airline companies belong and which regularly publishes traffic forecasts respected in the profession. The Commission was therefore entitled, without committing any manifest error, to rely on the figures published by that body in drawing its conclusion that there was no structural overcapacity.

366 That analysis is not contradicted by the report of the 'Comité des Sages', which, while it recommended in general terms that a reduction in capacity should be considered, did not express any views on whether the existing overcapacity was structural or temporary (Annex 13 to the application in Case T-394/94, pp. 18 and 22). Furthermore, as Air France pointed out before the Court, without being challenged, developments in air transport have confirmed the Commission's analysis, since overcapacity has been reabsorbed in the interim.

367 That being so, the finding that there was no structural overcapacity entitled the Commission to conclude that the state of the aviation industry did not require general capacity cut-backs (contested decision, OJ, p. 82). It necessarily follows that the Commission did not commit any manifest error of assessment by not imposing a reduction in the capacity of Air France or Air Charter. On this view, therefore, the Commission was not under an obligation to analyse, in regard to capacity, the air routes on which Air France and its subsidiaries were in competition with other European carriers, but could properly confine itself to imposing limitations on Air France's expansion, in so far as those limitations did not compromise the company's prospects of regaining its financial viability and competitiveness. Those considerations also apply to the freight sector, which, as has been confirmed above (paragraph 336), is a significant activity for Air France.

368 Having regard to Air France's special position as one of the three major European airline companies, the reference to capacity reductions made by other companies of much more modest dimensions, such as Aer Lingus, TAP, Sabena or Olympic

Airways, is irrelevant. The same holds true for the reference to the motor vehicle market in the 1980s, no evidence having been adduced to establish the specific relevance of that market to the analysis of the civil aviation sector for the years 1992 to 1994 and its medium-term prospects (1994 to 1997). As for the risk that Air Inter might be used to increase Air France's capacity, suffice it to recall that the two companies were to be regarded as mutually independent for the duration of Air France's restructuring. In regard, finally, to wet leases, the Commission has stated before the Court that any flight by an aircraft leased with its crew would be taken into account as an Air France flight for the purposes of condition No 8. The applicants noted that statement but did not challenge it.

369 Regarding the claim that condition No 8 was too restricted, it must be acknowledged that it covered only routes between France and other EEA countries and thus did not limit Air France's supply on routes between two EEA countries other than France, on routes within an EEA country other than France, or on domestic French routes. By confining itself to the France-EEA network, however, the Commission did not exceed the bounds of its broad discretion.

370 The Commission was entitled to leave the domestic French market out of account on the ground that Air France operated only one domestic route, since the French domestic carrier was then — and for the medium-term future — Air Inter and the exclusion of French domestic routes could thus have had no more than a negligible economic impact. The same applies with regard to the routes within any EEA country other than France, since — under Article 3(2) of Regulation No 2408/92 and Point 64. A, Chapter VI, of Annex XIII to the EEA Agreement (Transport — List provided for in Article 47) (OJ 1994 L 1, p. 422), as amended by Decision No 7/94 of the EEA Joint Committee amending Protocol 47 and certain Annexes to the EEA Agreement (OJ 1994 L 160, p. 1, at p. 87) — the EEA Member States were not required to authorise the exercise of cabotage rights prior to the end of Air France's restructuring period. Consequently, operation of such routes could be regarded as exceptional and economically insignificant. That consideration is equally relevant to the operation of routes between two EEA countries other than France, since the Commission was justified in discounting the economic significance of such an activity without any link with Air France's hub in Paris.

371 So far as concerns the claim that there was a failure to appreciate the effects that a limitation on Air France's capacity would have on the development of its market share, it must be acknowledged that the phrase featuring in the contested decision, to the effect that '[b]y limiting Air France's supply even below market growth its market within the European Economic Area will decrease, to the benefit of its competitors' (contested decision, OJ, p. 87), may appear mistaken in so far as the market share of an undertaking depends not on the volume of its capacity but on its degree of utilisation. It should, however, be borne in mind that Air France's supply — that is to say, capacity — was expressed in condition No 8 in terms of the number of seats available. By specifying that its supply was to be limited to within the forecast market growth, the Commission thus sought to restrict only Air France's prospects of sharing in that growth — in other words, its potential market share defined by the number of seats available. The Commission has explicitly stated before the Court that the limitations on supply imposed on Air France were in no way intended to prevent achievement of its restructuring plan, which envisaged an increase in productivity, it being possible for both productivity and effective market share to increase due to an improvement in the load factor. Returned to the context of the objectives served by Air France's restructuring, the contested phrase does not, therefore, express any manifest error on the Commission's part.

372 Finally, as regards the claim that the Commission allowed Air France the opportunity to exceed the forecast traffic growth of 5.5%, suffice it to note that the Commission has stated, without any challenge on this point, that the forecast increase of 3.8% in Air France's load factor related to the three-year restructuring period and was not an annual rate, this latter rate amounting approximately to 1.2%. Applying the method of calculation proposed by the United Kingdom, the number of Air France's passengers ought, consequently, to have increased by 3.9% (1.012 x 1.027 = 1.039), a figure below the forecast annual growth of 5%.

373 It follows that the arguments directed against condition of authorisation No 8 must be rejected.

(f) Condition of authorisation No 9

374 Under this condition, the French authorities were required to 'ensure that Air France does not, during the period covered by the Plan, apply tariffs below those of its competitors for an equivalent supply on the routes that it operates within the European Economic Area'.

Summary of the applicants' arguments

375 The applicants consider that the limitation imposed on Air France's pricing freedom was ineffective. The wording of the condition suggests that it applied only to Air France's existing routes, that is to say, those which it was operating at the time from Paris and the French regions to other destinations within the EEA, and vice versa. They submit that Air France was offering a panoply of promotional fares. In view of the fact that those fares already existed at the time of the contested decision, it is arguable that they were not covered by the condition. Since the contested decision, Air France has continued to offer similar promotions. In any case, airlines control their average fares not so much by increasing or decreasing fare levels as by controlling access by passengers to the different fare categories. Air France could thus undercut prices by allocating more seats to such promotional fares. Furthermore, the applicants submit, it is in many cases impossible for a third party to know what tariffs are charged by a competitor as they are secret. The products offered by carriers on the same route are also so varied and so difficult to compare with one another that it will be very difficult in most cases to establish that a given tariff is lower than another.

376 Air France, the applicants further argue, was not prevented from exerting downward pressure on prices by flooding a specific route with excess capacity, provided that it decreased its capacity on other routes. Finally, the condition under consid-

eration did not cover Air France's pricing of products or services in other air transport-related areas, such as aircraft maintenance. Nor is it clear whether the expression 'on the routes that it operates within the European Economic Area' covered the provision of charter services by Air Charter.

377 The Maersk companies add that, because of the imprecision of condition No 9, Air France was able to use the aid to introduce and subsidise the operation of more costly levels of service offered under the guise of an 'equivalent offer'. The recent announcement by Air France of a FF 500 million revamp of its long-haul service was a case in point. As a consequence, competitors who do not have the benefit of State aid must respond either by introducing higher levels of service or by reducing prices. The Kingdom of Sweden also points to the very broad scope of the terms 'price leadership' and 'equivalent offer', which give rise to legal uncertainty. Those terms, it argues, are not apt to thwart Air France's increasing the availability of discount prices in connection with the increases in capacity on specific routes.

378 The Commission contends that those arguments are unfounded.

Findings of the Court

379 In the first place, nothing in the wording of condition No 9 justifies the interpretation that it applied only to the routes served by Air France at the time when the contested decision was adopted. Rather, it follows from that wording that the prohibition of price leadership applied to all of the routes operated by Air France 'during the period covered by the Plan', which also covered new routes opened after the contested decision had been adopted.

380 Next, it must be noted that, by virtue of condition of authorisation No 1, Air Charter, as a company in which Air France held more than 50% of the capital, was also covered by condition No 9.

381 As for the alleged opportunities for Air France to dilute the conditions governing access to promotional prices and to flood certain routes with excess capacity, the Court takes the view that the Commission was entitled to regard those possibilities as unrealistic, given that Air France was obliged, under the supervision of the Commission and the independent consultants pursuant to Article 2 of the contested decision, to implement fully its restructuring plan, which provided, *inter alia*, for improvements in productivity.

382 The other arguments put forward are confined merely to allegations that condition No 9 could not be applied effectively and cannot therefore be considered in the present context (see paragraph 292 above).

383 Consequently, the arguments directed against condition of authorisation No 9 must be rejected.

(g) Condition of authorisation No 10

384 This condition required the French authorities not to 'grant preferential treatment to Air France in the matter of traffic rights'.

Summary of the applicants' arguments

385 The applicants take the view that the Commission was wrong to consider that this condition would be effective. Since the entry into force of Regulation No 2408/92 on 1 January 1993, the granting of traffic rights has become irrelevant in regard to international routes within the Community and, since 1 July 1994, within the EEA. Those rights are enjoyed automatically by EEA airlines. The applicants also accuse the French authorities of misapplying Regulation No 2408/92 and protecting the interests of Air France and Air Inter.

386 They submit that the condition in fact applied only to the operation of domestic routes. Even there, it was largely irrelevant because Air France operated only one domestic route and non-French EEA airlines did not have to obtain traffic rights in respect of the French domestic market. In any event, until 1 April 1997 those airline companies had only limited access to that market. In addition, on most of the lucrative routes Air Inter's rights were protected by the French authorities on the basis of Article 5 of Regulation No 2408/92, under which exclusive concessions on domestic routes could continue temporarily.

387 They contend that, even if the condition had been relevant, it would have been ineffective since the persons to whom the granting of traffic rights had been delegated were among the members of the board of directors of Air France or of the board of the holding company. This, in their view, engendered a risk of discrimination for competing air transporters which could not be averted by a mere commitment.

388 The applicants point out that Member States may require airlines to submit operating programmes for any specific route prior to the start of services. In France, the task of clearing or refusing to clear operating programmes is carried out by the head of the Direction Générale de l'Aviation Civile (Directorate-General for Civil

Aviation) and by the head of the Service du Trafic Aérien (Air Traffic Service). Those authorities may effectively prevent airlines from exercising their automatic traffic rights by illegally refusing to clear operating programmes. The events leading to and following the adoption of Commission Decision 94/290 (cited above in paragraph 266) illustrate this; the applicants refer to a number of letters from the above authorities containing such refusals.

389 In any event, Air France, the Direction Générale de l'Aviation Civile and the Service du Trafic Aérien all come within the general supervision of the Minister of Transport. The case-law of the Court of Justice confirms that such organic links between an undertaking competing on a market with other undertakings and the bodies regulating that market contravene Article 90 of the Treaty, in conjunction with Article 86, because of the very risk of discrimination inherent in such a situation (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraphs 51 and 52; Case C-69/91 *Decoster* [1993] ECR I-5335, paragraphs 12 to 22).

390 The Commission contends that those arguments are unfounded.

Findings of the Court

391 With regard to the allegations to the effect that condition No 10 is too limited, it should be noted that European airline companies must still obtain traffic rights for routes between the EEA and non-EEA destinations, which are not covered by Regulation No 2408/92. As the Commission has pointed out before the Court, Air France is in competition on those routes with other French airline companies such as TAT, Euralair, Corsair, AOM and Air Liberté. Condition No 10 was therefore relevant for that air traffic sector. The same applies with regard to the traffic covered by Regulation No 2408/92 in so far as, irrespective of actual traffic rights, the national authorities may, following a formal authorisation procedure, decide on the detailed rules for applying that regulation. Furthermore, the applicants and the

interveners supporting them have specifically claimed that the French authorities misapplied the provisions of that regulation for the purpose of protecting the interests of Air France and Air Inter.

392 It should be added that, while the principle of non-discrimination was the basis for requiring the French authorities not to accord preferential treatment to Air France, the usefulness of condition No 10 lay, as has already been stated above (paragraph 348), in the fact that it allowed the Commission to refer the matter directly to the Court of Justice without first being required to institute the procedure under the first subparagraph of Article 93(2) or under Article 169 of the Treaty.

393 The other arguments put forward refer to the risk that the French authorities, because of their close links with Air France, might have prevented other companies from asserting their traffic rights. They are thus confined to questioning whether condition No 10 could be effectively applied and cannot therefore be considered in the present context (see paragraph 292 above).

394 It follows that the arguments directed against condition of authorisation No 10 must be rejected.

(h) Condition of authorisation No 11

395 This condition required the French authorities to ensure that 'Air France does not operate, during the period covered by the Plan, more scheduled routes between France and the other countries in the European Economic Area than it did in 1993 (89)'.

Summary of the applicants' arguments

396 The applicants take the view that this condition was ineffective in so far as it provided a maximum cap but did not prevent Air France from opening new routes and closing others. Air France could also increase the number of routes it operated beyond the limit of 89 by means of wet leases, and the number of points served to and from France by introducing indirect routings via other Member States, as continuations of existing routes, the London-Paris route, for instance, becoming London-Paris-Rome. Air Inter, the applicants submit, was already beginning to serve European routes previously operated by Air France, with a view to the merger envisaged in 1997. As a result, Air France was in a position to open new routes up to the limit of 89; whenever it wished to open a new route, it needed only to hand over one of its existing routes to Air Inter, in the knowledge that all their European operations would in any event be merged in 1997.

397 Regarding the transfer of routes from Air France to Air Inter, the applicants recall the position stated by the director of the Air France group, as reported in a press article published in September 1994. According to that report, Air Inter was to recover a number of routes from Air France during the following two years: under its own designation, it was to operate flights to the Maghreb countries, the Iberian Peninsula, Great Britain and Ireland. The directors of the group considered themselves entitled to alter designations in this way, particularly since Air Inter was not affected by the same capacity limitations.

398 Finally, the applicants note that statistics compiled by the Official Airline Guide indicate that Air France operated only 64 routes within the EEA in May 1994. As a result, the Commission's acceptance of the limitation of Air France's network to 89 routes left it free to open 25 additional routes between France and other EEA States. Moreover, condition No 11 did not cover domestic French routes or routes between two EEA States other than France.

399 The Commission, the French Republic and Air France contend that those arguments are unfounded.

Findings of the Court

400 Regarding wet leases and extensions of existing routes, the Commission has stated before the Court that these two types of measure came within the ambit of condition No 11. The applicants noted that interpretation but did not challenge it.

401 So far as the reference to Air Inter is concerned, suffice it to recall that the conduct of that company, which was independent of Air France for the duration of its restructuring, is irrelevant in the present context, *a fortiori* since the allegations aired concerning the transfer of routes between Air France and Air Inter are based on a press article which appeared after the contested decision was adopted.

402 Regarding the exclusion of domestic French routes and routes between EEA States other than France, it is sufficient to point out that the Commission was entitled to take the view that the economic impact of those routes was so negligible that it could be discounted in the present context (see paragraph 370 above).

403 As to the fact that Air France could open new routes and close others, while respecting the maximum figure of 89 routes, the Commission has properly pointed out before the Court that it could not have sought to prevent Air France from reacting to market demand, provided that all the conditions of authorisation were complied with. Without such flexibility, the success of the restructuring plan designed to restore Air France's financial viability and competitiveness would have been compromised.

404 Finally, in so far as it has been contended that Air France was operating only 64 routes in the EEA in May 1994, with the result that the Commission's acceptance of a network of 89 routes authorised Air France to open 25 additional routes, the Court takes the view that the Commission did not exceed the limits of its broad discretion in accepting the number of routes which Air France had operated in 1993, just as it limited, under conditions of authorisation Nos 8 and 12 respectively, the supply of Air France and Air Charter to the level reached in 1993.

405 It follows that the arguments directed against condition of authorisation No 11 cannot be accepted.

(i) Condition of authorisation No 12

406 This condition required the French authorities to 'limit, during the period covered by the Plan, the supply of Air Charter to its 1993 level (3 047 seats and 17 aircraft), with a possible annual increase corresponding to the market growth rate'.

Summary of the applicants' arguments

407 The applicants submit that the limitation on Air Charter's supply was ineffective. Air Charter is not an air carrier but a marketing agency whose activity is to charter aircraft to tour operators. Of the 17 aircraft operated by Air Charter in 1993, only eight belonged to the Air France group and nine were leased. The leases were to terminate during 1995. The supply limitations were offered by the French authorities and accepted by the Commission at a time when Air Charter had already notified the lessors that it would not renew its leases. Air Charter was therefore

allowed to add up to nine replacement aircraft to its fleet and thus potentially to increase its capacity by 20% to 25% on an already highly competitive market. The lessors recovering their nine aircraft would necessarily have competed with Air Charter, which, as a beneficiary of the aid, would have been able to lease its aircraft to tour operators at artificially low prices.

408 The applicants add that the Plan did not contemplate any restructuring measure for Air Charter, which would nevertheless receive part of the aid. The supply limitation was thus an open invitation for a State-aided company, not subject to restructuring measures, to use the aid to double its fleet and, in any event, to increase supply on the French charter market.

409 The United Kingdom takes the view that Air France or Air Charter ought to have made a commitment that Air Charter would buy only the number of aircraft required to replace the capacity lost by non-renewal of those leases.

410 The Commission, the French Republic and Air France contend that those arguments are unfounded.

Findings of the Court

411 Concerning the risk that Air Charter might apply artificially low prices, suffice it to point out that the company, more than 50% owned by Air France, was required to comply with condition of authorisation No 9, which prohibited it from applying tariffs below those of its competitors for an equivalent supply. The Commis-

sion was accordingly entitled to form the view that Air Charter would manage its supply on the basis of market requirements alone, in the same way as any other commercial undertaking.

412 Nor, inasmuch as it prohibited any increase in Air Charter's supply beyond its 1993 level, subject to market growth, did condition No 12 have the effect of authorising a doubling of the company's operating fleet. As the Commission has stressed before the Court, it was in no way obliged to require Air Charter either to renew the leasing contracts which it had just terminated for commercial and financial reasons or to refrain from replacing those aircraft whose leases had expired, which would have penalised Air Charter by reducing its operating fleet by more than 50%.

413 In so far as it has been contended that Air Charter would receive part of the aid even though the Plan did not envisage any restructuring measure for the company, suffice it to state that Air France's restructuring plan did indeed concern the charter sector of the Air France group (p. 22 of the Plan) and that, in any event, condition of authorisation No 6 prohibited any use of the aid for purposes other than restructuring.

414 The arguments directed against condition of authorisation No 12 must accordingly be rejected.

(j) Condition of authorisation No 13

415 The French authorities were required under this condition to 'guarantee that any transfer of goods or services from Air France to Air Charter reflects market prices'.

Summary of the applicants' arguments

416 The applicants consider that this condition was ineffective. It was, they submit, unworkable because the notion of 'market price' is imprecise and required Air France to treat a subsidiary — the chairman of which had been appointed head of Air France's French operations — at arm's length while simultaneously granting it part of the aid. In addition, the commitment did not seek to control the sale of goods and provision of services by Air Charter to Air France, which therefore did not have to reflect market prices.

417 The Commission contends that those arguments are unfounded.

Findings of the Court

418 In so far as the present arguments are limited to questioning whether condition No 13 could be effectively applied, suffice it to recall that they must be excluded from consideration in the present context (see paragraph 292 above).

419 To the extent to which it has been contended that this condition covered neither the sale of goods nor the provision of services by Air Charter to Air France, it must be noted that the Commission has stated before the Court, without being challenged, that Air Charter did not supply significant goods or services to Air France. In addition, the applicants in Case T-371/94 have themselves acknowledged, in connection with condition of authorisation No 12, that Air Charter was not an air carrier, but rather a marketing agency whose activity was to charter aircraft to tour operators and which had approximately 40 employees, but no mechanics or crew personnel (paragraph 234 of the application in Case T-371/94).

In those circumstances, the Commission was justified in discounting the economic impact that such sales or provisions of services might have had.

420 It follows that the arguments directed against condition of authorisation No 13 cannot be upheld.

(k) Conditions of authorisation Nos 15 and 16

421 The French authorities were required by these conditions to:

— '[modify,] with the cooperation of Aéroports de Paris ..., as soon as possible, ... the traffic distribution rules for the Paris airport system in accordance with the Commission decision of 27 April 1994 on the opening of the Orly-London link' and

— 'ensure that the work required to adapt the two terminals at Orly carried out by Aéroports de Paris, and a possible saturation of one or other of those terminals, do not affect competitive conditions to the detriment of the companies operating there'.

Summary of the applicants' arguments

422 The applicants submit that condition No 15 was no more than a shallow pretence, given the French authorities' clear intention not to comply with the decision of 27 April 1994, as evidenced already in May 1994 by the adoption of rules for the allocation of traffic rights within the Paris airport system which were in clear

violation of Community rules. They add that, while the contested decision authorised Air France to receive the first tranche of the aid immediately, condition No 15 required that Air France's competitive advantage resulting from the Paris airport traffic distribution rules be eliminated at some time defined only by the terms 'as soon as possible'.

423 The applicants emphasise the illusory nature of condition No 16, which, they claim, was violated even before it was imposed through the discriminatory conditions, established before the adoption of the decision, for the transfer of all French companies outside the Air France group from Orly West to Orly South and the regrouping of Air France and Air Inter at Orly West. Aéroports de Paris and Air France both come within the supervision of the Minister of Transport. Such organic links, the applicants argue, contravene Article 90 of the Treaty, in conjunction with Article 86, because of the inherent risk of discrimination to which they give rise. The plan to adapt the Orly terminals, they claim, was conceived in a way which made it difficult and costly for Air Inter's competitors to begin new services from Orly South. As a result, only a radical modification of the Plan could have avoided discrimination against Air France's competitors.

424 On a general level, the applicants submit, with regard to these conditions, that a commitment to obey the law cannot be considered as offsetting the aid's effects, since the French authorities must comply with the law in any event.

425 The Commission contends that those arguments are unfounded.

Findings of the Court

426 The arguments directed against conditions Nos 15 and 16 are limited to emphasising that those conditions were both ineffective and lacking in utility. It is thus sufficient to point out, first, that arguments seeking only to question whether a con-

dition governing authorisation of the aid could be effectively applied must be excluded from examination in the present context (see paragraph 292 above) and, second, that, on the assumption that the French authorities were already under a duty, by virtue of other Community law provisions, to comply with the obligations set out in conditions of authorisation Nos 15 and 16, the usefulness of those conditions lies in the fact that they enabled the Commission to refer the matter directly to the Court of Justice without first being obliged to institute administrative proceedings (see paragraph 348 above).

427 The arguments directed against conditions of authorisation Nos 15 and 16 must therefore be rejected.

428 Since none of the arguments directed against the conditions of authorisation has been upheld, the contention that the method chosen by the Commission to examine what impact the aid would have on the common interest was mistaken must be conclusively dismissed (see paragraphs 295 and 296 above).

429 It follows from the foregoing that, subject to paragraphs 238 to 280 above, all of the claims alleging that the Commission committed errors in forming the view that the aid was intended to facilitate the development of economic activity and did not adversely affect trading conditions to an extent contrary to the common interest must be rejected. The applicants and the interveners supporting them have been able to defend their rights and the Court has been able to exercise its power of review. Consequently, and with the exception of the assessment of the effects of the aid on the competitive position of Air France in regard to its network of non-EEA routes and the associated feeder traffic, the contested decision satisfies in that regard the requirements of Article 190 of the Treaty, and the claim that the statement of reasons was inadequate must therefore be rejected.

The contentions alleging that the Commission committed errors in concluding that the restructuring plan was capable of restoring Air France's economic viability

The alleged general inadequacy of the restructuring plan

— Summary of the parties' arguments

430 The applicants and the interveners supporting them make the general criticism that the restructuring plan was inadequate and imprecise. The applicant in Case T-394/94 submits that the Commission failed adequately to demonstrate, in the contested decision, the extent to which the aid was necessary to finance the vague and inadequate proposals disclosed in the Plan, and that it failed to insist on a plan setting out precise details of the steps necessary to restore the viability of Air France. The applicants in both cases claim that the Commission failed to provide adequate reasoning for the contested decision, on the ground that it neglected to consider third-party comments filed during the administrative procedure.

431 The Commission takes the view that the contested decision is adequately reasoned on that point. As regards the substance, it states that it assessed the coherence and effectiveness of the restructuring plan on its merits and did not commit any errors of assessment or of law.

— Findings of the Court

432 It is first necessary to consider whether the contested decision was adequately reasoned in regard to the restructuring plan drawn up and submitted by Air France,

particularly in view of the essential grounds of complaint submitted by the parties concerned during the administrative procedure (see paragraph 96 above).

433 In this connection, it must be noted that the parties concerned stated, during the administrative procedure, that the restructuring plan was inappropriate, inadequate and excessively vague, and thus not capable of restoring Air France's viability. It was, they argued, even less stringent than the preceding plan, PRE 2, which had already been considered to be insufficient in August 1992. It did not constitute what was necessary for Air France, but only what was acceptable to France, since PRE 2, which was more stringent than the Plan here in issue, had been withdrawn because of union protests. Furthermore, the Commission ought to have taken account in this context of all the restructuring plans previously issued by Air France, which had all failed because of the political situation and the power of the unions.

434 The parties concerned emphasised that the restructuring plan would have no prospect of success if it were not possible to dismiss excess staff, cut wages and require staff to improve productivity. The only realistic means whereby to reduce Air France's costs, namely an increase in staff productivity, was envisaged on a voluntary basis. It was thus highly unlikely that the desired 30% increase in productivity would be achieved. The Plan did not recommend any reduction in the benefits enjoyed by Air France staff. It provided only for a reduction of 5 000 jobs over three years, whereas Lufthansa had shed 8 000 jobs over two years and British Airways 4 000 over one year. In addition, the Plan failed to take account of the overcapacity crisis within the Community air transport sector; indeed, it even envisaged an increase in the fleet and in capacity.

435 The parties concerned added that the amount of FF 20 billion provided for in the Plan as State aid was not clear. Referring to a press article, they pointed out that there were indications of a lack of transparency in Air France's accounts. The Commission, they argued, ought to have ensured that Air France's accounts were not hiding anything. Furthermore, the chairman of Air France stated in February

1994, in a press article, that the company had to obtain FF 8 billion by the end of March of that year; in the context of PRE 2, the sum of FF 5 billion was discussed.

436 Finally, the restructuring plan never mentioned the Air France group and did not impose any restriction on the group as a whole. It related only to Air France and did not allude to the group's future intentions regarding Air Inter. However, Air Inter was in equal need of restructuring. Consequently, the Commission ought to have insisted that the Plan also cover the operations of Air Inter and Air Charter.

437 In the light of those observations, the Court points out that, in the contested decision, the Commission traced the history of the various restructuring plans adopted by Air France with a view to resolving its financial problems. In September 1991, Air France adopted a first restructuring plan (CAP '93), which provided *inter alia* for a capital injection of up to FF 5.8 billion. In October 1992, after suffering a further deterioration in its financial situation, the Air France group adopted a second restructuring plan (PRE 1), which, however, proved in early 1993 to be unable to redress the situation of the group and was for that reason abandoned. In September 1993, a third plan (PRE 2) was launched, only to be withdrawn, in the face of union objection, in favour of the Plan (contested decision, OJ, p. 74). So far as the disputed restructuring plan is concerned, the Commission pointed out that it had been drawn up by Air France on the basis of a paper drafted by the consultants Lazard Frères, which also fixed the amount of recapitalisation needed to redress Air France's financial structure and profitability. The Commission stated that the Plan, whose purpose was to be attained between 1 January 1994 and 31 December 1996, provided for a 30% increase in Air France's productivity (contested decision, OJ, p. 75).

438 The Commission then went on to specify the 'particular ... topics' on which the Plan focused, namely, a reduction in costs and financial expenses (through a decrease in investments, a reduction in operating costs and increased productivity coupled with a decrease in financial charges), a different conception of the product and better utilisation of resources (in particular through marketing initiatives, and at fleet and network level), reorganisation of the company and employee participa-

tion. The Commission added that implementation of the Plan was to be financed through the increase in capital and the sale of non-core assets (contested decision, OJ, pp. 75 and 76).

439 With regard to the assessment of the viability of the restructuring plan, the Commission took the view that it set out a number of measures that represented genuine efforts toward the restructuring of the airline. It recognised in particular the great efforts undertaken in the social field (wage freeze, block on promotions, better utilisation of working time, distribution of free shares to employees in compensation for reductions in wages). The staff concerned had approved the programme through a referendum. Following approval by the unions, the Commission stated that it was convinced that the social measures provided for in the Plan could be fully adopted and successfully implemented (contested decision, OJ, p. 82).

440 In addition, the Commission considered that the restructuring of the airline into profit centres designed to rationalise its operation represented one of the strong points of the Plan. It took the view that the improvements in productivity envisaged by the Plan would lead Air France to a 'good average' position compared to other airlines, pointing out that it based its analysis on the ERPK efficiency indicator. After explaining how that unit of measurement functioned, the Commission found that Air France's productivity would improve by 33.3% during the restructuring period. The ratio to be achieved in 1996 was expected to he higher than the estimated average ratio of the seven other largest European airlines (Lufthansa, British Airways, KLM, Alitalia, Iberia, SAS and Swissair). In short, the Commission found that the Plan was capable of restoring the economic and financial viability of Air France, particularly since the French Government had made commitments that Air France would be run in accordance with commercial principles and treated as a normal undertaking (contested decision, OJ, p. 83).

441 That statement of reasons constitutes an adequate response to the observations of the parties concerned and indicates sufficiently the Commission's reasoning with regard to the general aspects of the restructuring plan. It demonstrates that the Commission did not overlook the preceding restructuring plans that had failed to restore Air France's position. In particular, the Commission noted the fact that

PRE 2 had failed because it had not been accepted either by Air France's staff or by the unions, whereas the new plan did meet their approval. It is clear that only an achievable restructuring plan, even if less stringent than a previous unachievable plan, can have any chance of success. The Commission was thus under no obligation to provide more detailed reasoning on that point.

442 As to whether the measures in the restructuring plan were sufficient for attaining the intended objectives of rationalisation and debt repayment, the description of the measures envisaged and the setting up of the arrangements for supervision by the Commission under Articles 1 and 2 of the contested decision constitute a sufficient statement, as regards the reasoning of that decision, that the Commission believed that it was possible for the restructuring plan in question to be achieved and that it had reserved for itself the means of recourse that it thought appropriate, in the event that such achievement were compromised. If the conditions set out in Article 1 were not complied with, the Commission could refer the matter directly to the Court of Justice under the second subparagraph of Article 93(2) of the Treaty (see paragraph 348 above). Furthermore, Article 2 provided that proper implementation of the restructuring plan was a condition governing payment of the second and third tranches of the aid.

443 When the restructuring plan is considered in this light, the Commission was clearly not under an obligation to provide specific explanations comparing Air France's plan and those of other airlines such as Lufthansa and British Airways. Those plans related to other airlines restructured at different times.

444 The ground of complaint alleging lack of clarity in Air France's accounts was unsupported by any factual evidence. It merely referred to a press article and called on the Commission to take care that Air France's accounts were not hiding anything. The Commission was therefore under no obligation to state an express view on this point by indicating, in particular, whether or not it had acceded to that request.

445 In so far as it has been alleged that the restructuring plan in dispute could not be limited to Air France alone but ought to have covered other companies in the group, it is sufficient to point out that the Commission cannot require a Member State to draw up a restructuring plan for a company which, in that State's opinion, is not in need of restructuring. However, the question whether and to what extent the Commission, in examining and authorising a plan which seeks to restructure a company forming part of a group, may be required to take account of other companies in the group is not relevant to the reasoning of the contested decision in regard to the adequacy of the restructuring plan in question, which is confined to Air France. The questions concerning the involvement of the entire group have been addressed above in a separate context (paragraphs 298 to 324). The same applies with regard to the specific question of Air France's capacity, which was itself also the subject of specific examination above (paragraphs 357 to 373).

446 It follows that the reasoning of this part of the contested decision must be considered to comply with the requirements of Article 190 of the Treaty.

447 With regard to the general criticism that the restructuring plan was inadequate and imprecise, suffice it to point out that the Commission enjoys a broad discretion when assessing a plan designed to restructure an undertaking in economic and financial difficulties, and that its assessment also frequently relates to confidential information to which competitors of the undertaking concerned may not have access. Consequently, it is only in cases where the Commission has committed a particularly manifest and serious error when assessing such a plan that the Court may rule against the authorisation of State aid intended to finance such restructuring. In the present instance, no such error has been established. However, the Court points out that it has been unable to examine the productivity targets to be achieved by Air France with specific regard to its non-EEA air routes, since the reasoning on this point in the contested decision is insufficient (see paragraph 280 above).

448 Subject to this last proviso, the arguments directed against the Commission's approval of Air France's restructuring plan must be rejected.

449 The contention of the applicants in Case T-371/94 that this plan in reality sought not to restore Air France's viability but to respond to government objectives therefore has no basis in fact or in law.

The remaining contentions

450 The applicants and the interveners supporting them argue that Air France's restructuring plan wrongly excluded consideration of Air Inter, Air France's sale of a maximum of assets not linked to air transport, and an overall reduction in capacity. In addition, they contend, that plan was based extensively on the ERPK indicator designed to measure Air France's productivity, even though it was an inappropriate unit of measurement for that purpose. Furthermore, the measures envisaged by Air France's restructuring plan were, they claim, much less severe than those adopted by other airline companies.

451 In that regard, it is enough to refer to what has been stated above, in the examination of other contentions, in order to conclude that none of the above arguments directed against Air France's restructuring plan can be upheld.

452 As regards the claim of the applicants and the interveners supporting them that the Commission was wrong to authorise the purchase of 17 new aircraft as a feature of the restructuring plan, the Court points out that, in the absence of clarification as to the financing of that investment and explanation as to its legal nature, it is not in a position to examine this contention.

III — *The plea alleging infringement of Article 155 of the Treaty*

453 In so far as the applicant in Case T-394/94 submits that, in failing to apply Articles 92 and 93 of the Treaty correctly, the Commission also infringed Article 155 of the Treaty, it must be stated that the examination of the substantive pleas raised by the applicants and the interveners supporting them has failed to disclose any error of assessment or of law in the application of Articles 92 and 93. Furthermore, the purpose of Article 155 of the Treaty is to provide a general definition of the Commission's powers. It cannot therefore be argued that each time the Commission infringes a specific Treaty provision such infringement involves an infringement of the general provision of Article 155. It follows that this plea must in any event be dismissed.

IV — *Conclusion*

454 Examination of all of the pleas in law raised in the present litigation has made it clear that the contested decision suffers from insufficient reasoning on two points, concerning, respectively, the purchase of 17 new aircraft for FF 11.5 billion (see paragraphs 84 to 120 above) and the competitive position of Air France on the network of its non-EEA routes with the associated feeder traffic (see paragraphs 238 to 280 above). Those two points are of crucial importance within the general scheme of the contested decision. That decision must consequently be annulled. In those circumstances, it is no longer necessary to rule on the request by the applicant in Case T-394/94 that all relevant files and documents held by the Commission should be produced.

Costs

455 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants and the Maersk interveners have asked for costs to be awarded, the Commission must be ordered to pay the costs.

456 Pursuant to Article 87(4) of the Rules of Procedure, the French Republic, the Kingdom of Denmark, the United Kingdom, the Kingdom of Sweden, the Kingdom of Norway and Air France must bear their own costs.

On those grounds,

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

hereby:

1. Joins Cases T-371/94 and T-394/94 for the purposes of judgment;

2. Annuls Commission Decision 94/653/EC of 27 July 1994 concerning the notified capital increase of Air France;

3. Orders the Commission to pay the costs, including those of the interveners Maersk Air I/S and Maersk Air Ltd;

4. Orders Compagnie Nationale Air France, the French Republic, the Kingdom of Denmark, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Sweden and the Kingdom of Norway to bear their own costs.

Bellamy Lenaerts Briët

Kalogeropoulos Potocki

Delivered in open court in Luxembourg on 25 June 1998.

H. Jung A. Kalogeropoulos

Registrar President

Summary