JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
12 December 1996 *

In Case T-358/94,

Compagnie Nationale Air France, a company incorporated under French law, having its registered office in Paris, represented by Dominique Borde and André Moquet, of the Bars of Paris and Brussels, with an address for service in Luxembourg at the Chambers of Guy Harles, 8-10 Rue Mathias Hardt,

applicant,

v

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

defendant,

APPLICATION for annulment of Commission Decision 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),

* Language of the case: French.

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

composed of: H. Kirschner, President, B. Vesterdorf, C. W. Bellamy, A. Kalogeropoulos and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 26 June 1996,

gives the following

Judgment

Facts

1 The Community's air transport sector has been in an economic crisis since 1990. Compagnie Nationale Air France (hereinafter 'Air France' or 'the applicant'), a limited company in which the French State holds 99.329% of the share capital, has also been affected by serious financial and economic difficulties.

2 In 1991 and 1992 the Commission examined the economic and financial situation of Air France for the first time. In that context, following notifications by the French authorities, the Commission, by decisions of 20 November 1991 and

15 July 1992, authorized injections of capital totalling FF 5.84 billion. It took the view that the long-term prospects for a return on the investment overrode the short-term difficulties arising from the financial structure of the Air France Group. It also took into account the fact that the Air France Group was undergong restructuring under a 'strategic plan' (known as 'CAP'93'), approved on 1 August 1991 by the French authorities, which set several economic objectives to be achieved during the period 1991-1993. In view of those factors, the Commission considered that the financial transactions in question were not State aid within the meaning of Article 92 of the EEC Treaty.

3 In order to cure its financial difficulties, in October 1992 Air France drew up a second restructuring plan called the 'programme de retour à l'équilibre' (known as 'PRE 1'), which aimed principally at reducing operating costs and was intended to lead to a structural improvement of its self-financing capacity from 1994.

4 In November 1992, Air France approached the Caisse des Dépôts et Consignations-Participations (hereinafter 'the CDC-P') in order to obtain its assistance in certain financing transactions. The CDC-P, a French limited company holding 0.538% of Air France's share capital, is a wholly owned subsidiary of the Caisse des Dépôts et Consignations (hereinafter referred to as 'the Caisse'), a special public body established by statute.

5 In mid-December 1992, the CDC-P stated that it was willing to guarantee the proposed transactions. After the details of the transactions had been worked out at the beginning of 1993 by the CDC-P and Air France, Air France's board adopted arrangements at its meeting on 17 February 1993.

6 Consequently, on 24 March 1993, the extraordinary general meeting of the shareholders of Air France passed a resolution approving the issue, for a total amount of FF 1.5 billion, of:

— *obligations remboursables en actions* (ORA) (bonds redeemable into shares), amounting to approximately FF 750 million;

— *titres subordonnés à intérêt progressif assortis de bons de souscription d'actions* (TSIP-BSA) (progressive interest subordinated notes), also for approximately FF 750 million.

7 Almost all those securities issued by Air France in April 1993 were taken up by the CDC-P (99.7% of the ORA and 99.9% of the TSIP-BSA), the French State, the main shareholder in Air France, having decided not to do so. Some private foreign investors were allowed to subscribe in proportion to their holdings in the capital of Air France, which then totalled 0.132%, having a value of approximately FF 2 million.

8 The securities issued are registered and unlisted.

9 They have the following characteristics.

10 Until 1 January 2000 interest is payable on the ORA at a fixed rate (4%) and a variable interest rate linked to the performance of Air France, the global expected actuarial interest being 6.5%. Each ORA will be compulsorily redeemed by conversion into a share by 1 January 2000 at the latest, the holder having the right to require such redemption at any time before that date. The internal rate of return

on the investment, calculated by the CDC-P taking into account interest and the anticipated increase in share value, is 14%.

11 The TSIPs are issued for an unspecified period. Provision is made for their redemption in the event of the liquidation or dissolution of Air France, after payment of debts, whether or not preferential, but before redemption of the ORA. However, Air France is entitled to redeem the TSIP before due date with effect from 1 January 2000. Until that date interest is payable on the TSIP at fixed and progressive rates (from 5.5% to 8.5%), the average actuarial interest being 7%. With effect from that date, interest becomes variable and will be increased by a progressive rate. Air France may suspend payment of interest if the group records consolidated losses above 30% of its own capital. Each TSIP issued carries a *bon de souscription d'actions* (BSA), which is independent of the TSIP and — like the ORA and the TSIP — may be assigned or transferred. The holder may convert the BSA into shares at any time until 1 January 2000. BSA which have not been converted by that date will lapse. The internal rate of return on the investment between 1993 and 1999, calculated by the CDC-P, is 11.5%.

12 Learning, from the press, that the French Government was considering injecting capital into Air France, the Commission sent a letter to the French authorities on 1 March 1993, requesting them to supply information regarding the measures being considered in order to make good the deficit in the Air France Group. In reply, the French Government stated, in a letter of 22 April 1993, that the two abovementioned issues of securities had been guaranteed by the CDC-P. Following a fact-finding meeting, at which Commission officials, representatives of the French Government and representatives of Air France attended in May 1993, the subscription to the securities by the CDC-P was registered on 19 July 1993 as aid not notified to the Commission. By letter of 7 December 1993 the Commission informed the French Government that on 10 November 1993 it had decided to initiate the procedure provided for in Article 93(2).

13 By letter of 7 January 1994 the French authorities submitted as follows:

— the financial intervention in question had not been notified to the Commission because it was not considered to be State aid;

— the Caisse and the CDC-P are institutions independent of the French Government;

— the CDC-P decided to invest in Air France at a time when Air France's situation was comparable to those of its competitors and prospects were generally optimistic; the CDC-P therefore behaved like a prudent investor;

— the attractive nature of the subscription conditions is confirmed by the participation of foreign private investors, it having proved impossible to satisfy all their subscription applications for otherwise there would have been a partial privatization of Air France;

— the sole object of the investment was to contribute to the restructuring of Air France and the investment was linked to the restructuring plan of October 1992 (PRE 1).

14 In the course of 1993 Air France issued three other types of securities, namely a debenture loan of FF 1.5 billion at an interest rate of 8.25% in February, a debenture loan of FF 1.5 billion in June, and a loan of FF 300 million in October, which were all apparently placed in the private sector.

15 As regards the ORA and the TSIP-BSA, on 27 July 1994 the Commission adopted Decision 94/662/EC concerning the subscription by CDC-Participations to bonds issued by Air France (OJ 1994 L 258, p. 26, hereinafter 'the contested decision' or 'the Decision').

16 In the Decision, the Commission found, first of all, that despite the CAP'93 restructuring plan and the injection of approximately FF 6 billion in 1991 and in 1992, Air France's situation had continued to deteriorate, since in 1992 Air France had recorded the third consecutive negative net result, this one being by far the largest (minus FF 3.2 billion), and found itself in a worse position than other major European companies.

17 The Commission then observed that the Caisse is a French public entity (*établissement public*) whose directors are appointed by the French Government. The CDC-P, one of its wholly-owned subsidiaries, is not autonomous from the Caisse, but is itself controlled by the French public authorities. The capital injection was an act imputable to the French State. The investment activity in question of the Caisse and the CDC-P was therefore carried out under State control.

18 The Commission examined in particular whether the financial transaction in question had taken place in circumstances which would have been acceptable to a private investor operating under normal market economy conditions. It considered that this was the case when a significant number of private minority shareholders participate in the transaction proportionately to their shareholdings. However, the private investors' shareholdings must, in the Commission's view, have genuine economic significance. In the present case, the private parties' shareholdings in Air France represented only 0.132% of its capital and their share of the securities to which they had subscribed was negligible. Moreover, the Commission attached no decisive significance to the fact that the applications from foreign private investors had not been met in full. The securities to which those private investors had wished to subscribe represented only a small percentage (3.3%) of the total number.

19 The Commission stated that the date on which the aid was granted was the date on which the securities were subscribed, namely April 1993, on the ground that the CDC-P was not legally obliged to subscribe to the issue before that date. In any event, the date could not have been before 17 February 1993, the date on which Air France's board fixed the final details of the investment and proposed to issue the securities. When the investment decision had been taken (on 17 February 1993 at the earliest), the CDC-P should have been aware of the sharp deterioration in

Air France's financial structure. It would certainly have been informed of the increase in the company's losses for 1992 (FF 3.2 billion in 1992, following losses of FF 685 million in 1991 and of FF 717 million in 1990) and should have been seriously concerned by the critical debt position of the company.

20 In that context the Commission considered the nature of the securities issued, in order to verify their conformity with market conditions. It characterized the ORA as a 'deferred increase in capital', adding that the same considerations were valid for the TSIP-BSA. The Commission stated that the disadvantage of the TSIP-BSA was the poor prospect of repayment in the event of the dissolution of the company, which was the reason why 'such bonds are not very common in the capital markets'. The Commission went on to state that the return on the ORA and the TSIP-BSA were very largely dependent on the performance of Air France. It also pointed out that the calculation by the CDC-P of the internal rates of return on the securities had been too optimistic. If the CDC-P had taken account of the weakness in the company's medium and long-term financial prospects, it would have concluded that the value of the future shares obtained upon conversion would be zero. The Commission concluded that a prudent private investor would not have been willing to subscribe to an important financial arrangement with Air France such as that entered into by CDC-P.

21 The Commission considered that, in the case of loss-making companies such as Air France, a long-term investor would base his decision on a coherent restructuring plan. In the present case, the aid had not been directly linked to the PRE 1. On any view, the PRE 1 had not, even in the long term, been sufficient to redress the financial and economic viability of Air France, since it aimed principally to reduce operating costs and financial charges, but did not sufficiently address the other financial items which were assumed to remain constant and did not provide for any other restructuring measures in the event of a further deterioration of Air France's economic situation. In the Commission's opinion, the CDC-P should have been aware, at the time when it made its investment, of the structural weaknesses of the PRE 1.

22 Taken overall, the abovementioned factors led the Commission to conclude that a rational private investor would not have injected FF 1.5 billion into Air France in view of its recent poor financial and operating performance, its inability to carry out the CAP'93 restructuring programme and the manifest insufficiency of the PRE 1 to redress the situation. Ultimately, therefore, it considered the injection of capital in question to be an operating aid aimed at helping Air France temporarily to overcome its financial crisis.

23 It then found:

— that the aid in question distorted competition and, by its very nature, affected trade between Member States and throughout the Economic European Area (EEA);

— that it was not covered by any of the categories provided for in Article 92(2) of the Treaty or Article 61(2) of the EEA Agreement;

— that it could not be considered to be compatible with the common market by virtue of Article 92(3) of the Treaty and Article 61(3) of the EEA Agreement.

24 Consequently, the Commission:

— decided that the subscription by CDC-P, in the amount of FF 1 497 415 290, to the ORA and TSIP-BSA in April 1993 constituted unlawful State aid and was incompatible with the common market (Article 1 of the Decision);

— required the French Republic to order the reimbursement of the aid of FF 1 497 415 290, after deduction of any interest which Air France had already paid to CDC-P (Article 2).

25 Pursuant to Article 4, the Decision was notified to the French Government on 9 August 1994.

26 On 27 July 1994 the Commission also adopted Decision 94/653/EC concerning the notified capital increase of Air France (OJ 1994 L 254, p. 73), in which it decided that a State aid to be granted to Air France in the form of a FF 20 billion capital increase was compatible with the common market and the EEA Agreement. In that decision it referred to the subscription by CDC-P to the ORA and the TSIP-BSA issued by Air France in April 1993. It considers the ORA to be quasi-equity. As regards the TSIP-BSA, it states that the subscriber is under no obligation to convert those securities and that, if it was necessary to classify that type of financial instrument, it would be more appropriate to classify it as a debt.

27 That decision of 27 July 1994 has been contested by several airline companies (Case T-371/94 *British Airways and Others* v *Commission* and Case T-394/94 *British Midland* v *Commission*).

Procedure

28 By application lodged at the Registry of the Court of First Instance on 26 October 1994, Air France brought the present action. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry. However, it adopted measures of organization of procedure by requesting the parties to lodge certain documents and to answer a number of questions. The parties presented oral argument and their replies to the Court's questions at the hearing on 26 June 1996.

29 The French Republic brought a parallel action before the Court of Justice, contesting the same decision (Case C-282/94). The Court of Justice stayed those proceedings by order of 4 April 1995.

30 The applicant claims that the Court of First Instance should:

— find that in the contested decision the Commission infringed Articles 92 and 190 of the Treaty and therefore annul that decision;

— order the Commission to pay the costs.

The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

31 The Commission does not contest the admissibility of the action. Although the contested decision is addressed solely to the French Republic, it concerns Air France directly and individually, within the meaning of the fourth paragraph of Article 173 of the EC Treaty, in its capacity as recipient of the aid in question (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 13).

32 The Court of Justice has consistently held to be inadmissible (see, for example, Case 108/88 *Jaenicke Cendoya* v *Commission* [1989] ECR 2711, paragraphs 8 and 9) claims for a declaration that submissions put forward in support of an action for annulment are well founded. Consequently, the applicant's claim for a declaration by the Court of First Instance that, in the contested decision, the Commission infringed Articles 92 and 190 of the Treaty must be dismissed.

Substance

33 In support of its application Air France relies on two pleas. The first plea alleges infringement of Article 92 of the Treaty, on the ground that, by characterizing the investment by CDC-P in Air France as State aid, the Commission manifestly failed to apply that provision correctly. The second plea alleges infringement by the Commission of its duty to provide a statement of reasons in accordance with Article 190 of the Treaty.

1. *Infringement of Article 92 of the Treaty*

34 The applicant bases its first plea on several grounds. It claims in effect that the Commission committed manifest errors in the application of Article 92 of the Treaty.

35 In its view, the classification of the aid in question as State aid is based on a defective analysis of:

— the statutes of the Caisse and the CDC-P;

— the date on which CDC-P took its decision to invest;

— the context of the investment decision of the CDC-P;

— the significance of the subscriptions of several private shareholders in Air France and the significance of other private investments in Air France;

— the application of the principle of the prudent private investor in the light of the characteristics of the securities issued.

36 The Court considers that, given the circumstances of this case, it is appropriate to divide this plea into two parts concerning (i) the alleged lack of State involvement in the investment at issue and (ii) the Commission's alleged misapplication of the test based on a prudent private investor's normal conduct in relation to that investment, this part of the plea being itself based on a number of different arguments.

The first part of the first plea

Arguments of the parties

37 The applicant claims that in the contested decision the Commission wrongly stated that the CDC-P is not independent of the Caisse, which is itself controlled by the French public authorities, and that the investment in question was carried out under State control. It claims that both the Caisse and the CDC-P are truly independent of the French Government.

38 In that regard, it refers, first of all, to the special status of the Caisse, which, established by Articles 110 and 115 of the *loi sur les finances* (Finance Law) of 28 April 1816, is classified as a special body (*établissement spécial*) and 'subject to the

supervision and guarantee of the legislature'. Since the legislature is independent of the executive, the Caisse cannot therefore be considered to be a body controlled by the French public authorities. The argument which the Commission uses in order to show that the Caisse is not independent of the French State, based on the way in which the French Government appoints directors of the Caisse, is irrelevant. The irrevocable nature of the appointment of the Director-General of the Caisse — who, pursuant to the Law of 1816, cited above, is under the sole control of an independent supervisory Commission representing 'the legislature', is aimed at ensuring the Director-General's independence from any pressure from the executive.

39 Next, the 'general section' of the Caisse, which performs its competitive activities as a bank and an investor, is outside the ordinary jurisdiction of the French Court of Auditors, which is the institution responsible for financial control of the administration and its branches. By contrast, the accounts of the Caisse are subject to scrutiny by independent auditors who perform their task in accordance with the general law applicable to commercial companies. In the applicant's view, the Commission has failed to take account of the dual nature of the tasks entrusted to the Caisse, which can be seen in the total separation between the activities of the 'general section' and the management of saving funds, the latter being strictly regulated since it is performed on behalf of the State. The funds used by the CDC-P for the subscription at issue were funds of the Caisse, credited to the general section and not subject to any legal or regulatory requirement for prior authorization or consultation, or approval *ex post facto*, by the State authorities.

40 The applicant also observes that the way in which administrative and judicial control is exercised over the Caisse and the nature of its fiscal and accounting system demonstrate that State political bodies have no decisive control over its functions.

41 As regards the CDC-P, the wholly-owned subsidiary of the Caisse, the applicant claims that it also operates independently of the French Government. The

subscription in question to the securities issued by Air France was covered by its statutes. Its business consists in the provision of speculative risk capital, which aims primarily to achieve profitability and cannot be compared to the conduct of an institution performing a function serving the general interest. The applicant adds that, under the statutes of the CDC-P, its directors are appointed by the general meeting of shareholders, which may revoke those appointments in accordance with the general law applicable to commercial companies. On the CDC-P board are well-known figures from the business world who are entirely unconnected with the Caisse group and the State administration.

42 However, the applicant does not dispute the fact that, even if the formal decision to invest in Air France was ultimately taken by the CDC-P, the investment was carried out at the decisive instigation of its majority shareholder, the Caisse, and with the funds which the Caisse placed at its disposal.

43 As a matter of law, it contends that the Commission has given a broad interpretation to the phrase 'by a Member State or through State resources' in Article 92 of the Treaty by taking the view that even mere State influence on an economic actor may lead to a finding of State aid, even if the sums involved in the investment in question do not come from State resources. That interpretation is incompatible with the wording of that article, which must be strictly applied. The requirements of Article 92 of the Treaty are not fulfilled if, as in the present case, the aid in question was not granted by the State or through State resources. The CDC-P subscribed to the issues in question using private funds which the Caisse placed at its disposal.

44 The applicant emphasizes the private origin of the funds managed by the Caisse. Under the applicable national rules, those funds come from voluntary deposits by private individuals or deposits by savings banks. When managing private funds, the Caisse therefore acts, in relation to the funds of the 'general section', which unlike savings funds are freely managed, as an investor responding to developments on the markets. The applicant also claims that private savers can at any time withdraw

deposits managed by the Caisse, which is a significant distinction in comparison with public resources which, since they come from taxes, are at the sole disposition of the public authorities.

45 It concludes that, since the resources managed by the Caisse are private funds, the sums it places at the disposition of the CDC-P cannot be characterized as State resources. The transaction in question in the present case involved neither a direct or indirect transfer of State resources nor a financial burden on the State. In this regard, the applicant refers to the judgments of the Court of Justice in Case 82/77 *Openbaar Ministerie* v *Van Tiggele* [1978] ECR 25, paragraph 25; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887, paragraph 21; and Case C-189/91 *Kirsammer-Hack* v *Nurhan Sidal* [1993] ECR I-6185, paragraphs 17 and 18).

46 Referring to the judgments in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433 and in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219 and to the Opinion of the Advocate General in the latter case (p. 240), the applicant states that in the present case neither the Caisse nor the CDC-P acted upon the order of the State or under its dominant or effective influence. Since the Caisse and the CDC-P are neither State institutions nor private bodies controlled by the State and since their decisions are taken independently of any prior instructions or *ex post facto* approval from the State, the Commission was not entitled to treat the subscription by the CDC-P to the Air France issues in April 1993 as State aid.

47 The Commission first of all draws attention to the case-law of the Court of Justice to the effect that the prohibition in Article 92(1) of the Treaty covers all aid granted by Member States, irrespective of whether the aid is granted directly by the State or is granted by public or private bodies charged by the State with administering the aid (*Van der Kooy and Others* v *Commission*, cited above, paragraph 35). In the present case, the Caisse's task is to administer, in accordance with the applicable national provisions, public and private funds, often deposited pursu-

ant to a legal or statutory obligation. The placement of funds managed by the Caisse, like the withdrawal of deposits, is also governed by statutes and regulations.

48 In that regard, the Commission observes that the judgment of the Court of Justice in Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 16, in which it held that State resources are involved where the funds in question come from contributions made compulsory by State legislation and managed and apportioned in accordance with that legislation, even if they are administered by institutions separate from the State. It considers that the deposits made with the Caisse pursuant to statutory and regulatory obligations must be regarded as compulsory contributions within the meaning of that judgment. In any event, it is not necessary to show that the funds whose use is provided for by statute or regulation specifically and explicitly constitute aid measures (Case C-303/88 *Italy* v *Commission*, cited above, paragraph 14). Consequently, the sums deposited with the Caisse cannot be regarded as private funds.

49 The Commission stresses the fact that the State is involved in the appointment of the directors of the Caisse. Thus, pursuant to the national provisions in force, the Director-General of the Caisse is appointed by the President of the Republic upon a report from the Minister for the Economy and Finance. The fact that at the material time the appointment of the Director-General could be revoked by the President of the Republic only upon a request from the supervisory commission does not diminish the State's role since almost all the members of that commission are from the State apparatus. The appointment of the other managers of the Caisse and the administrative officers takes place within the government and the established members of staff are covered by the general civil service regulations. There can therefore be no doubt as to the crucial role of the public authorities in the functioning of the Caisse.

50 As regards the supervisory commission, the Commission explains that, even if it represents the legislative authority, that fact does not rebut the argument that the Caisse is subject to State control. The State is responsible, in Community law,

whatever organ caused its failure to comply with an obligation. In other areas the Court of Justice has held that, when the State intervenes, the capacity in which it acts is irrelevant (Case 152/84 *Marshall* v *Southampton and Southwest Hampshire Area Health Authority* [1986] ECR 723, paragraph 49, and Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 56). Consequently, it cannot be denied that action by the Caisse must be regarded as action by the State, whatever section of the Caisse provides the funds used in a particular transaction.

51 The Commission concludes that, whatever its special features, the Caisse, a public body, is covered by the provisions of the Treaty on State aid. Even if the Caisse is, in theory, subject to the control of the legislature, its activities cannot escape Community control of State aid. Since it is a public body, it cannot be disputed that its activities are imputable to the State.

52 In its reply, the applicant disputes the relevance of the two *Italy* v *Commission* cases, cited above, upon which the Commission relies in order to show that the funds used by the CDC-P are State resources. Since the funds placed at the disposal of the Caisse are private funds, it is quite impossible for them to be regarded as 'subsidies' granted by the State; secondly, those private funds, representing fixed sums owed to depositors with the Caisse, are in no way 'compulsory contributions' required by State legislation and cannot, therefore, be treated as State resources.

53 The applicant adds that the supervisory commission is a genuine supervisory authority which exercises real influence on the decisions of the Director-General of the Caisse. In any event, the Commission has in no way shown that the Caisse's decision to place part of its own resources at the disposal of the CDC-P for the purposes of the investment in question was not reviewed by the supervisory commission.

54 Moreover, the term 'State apparatus' used by the Commission is based on an improper generalization of the notion of 'State authority' used in Article 92 of the Treaty. The only State authorities which are able to take decisions to grant an economic advantage liable to amount to a State aid are those which have political powers enabling them to adopt measures of general interest, that is to say the government and the central administration of the State, whose task it is to implement the economic policies set by the government.

Findings of the Court

55 The issue to be examined is whether the investment in question by the CDC-P could properly be regarded by the Commission as arising from conduct imputable to the French State (Case C-303/88 *Italy* v *Commission*, cited above, paragraph 11).

56 Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement refer to aid granted by the States or through State resources 'in any form whatsoever'. Consequently, those provisions must be interpreted not on the basis of formal criteria but rather by reference to their purpose, which, according to Article 3(g) of the Treaty, is to ensure that competition is not distorted. It follows that all subsidies from the public sector threatening the play of competition are caught by the abovementioned provisions, it being unnecessary for those subsidies to be granted by the government or by a central administrative authority of a Member State (see, to that effect, Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 13, and *Sloman Neptun*, cited above, paragraph 19).

57 In the present case, the Court may restrict its examination to the statute of the Caisse. Even though the subscription to the securities in question was formally carried out by the CDC-P, a limited company governed by private law, the applicant has expressly accepted (reply, paragraph 12) that this 'investment was carried

out at the decisive instigation of its majority shareholder [the Caisse] and with the funds which the Caisse placed at its disposal'. It follows that, on any view, the subscription in question is imputable to the Caisse. Consequently, the applicant's argument that the CDC-P is independent is irrelevant.

58 The Caisse was established by the Finance Law of 1816 as an '*établissement spécial*' placed 'under the supervision and guarantee of the legislature'. Its tasks — including in particular the administration of public and private funds composed of compulsory deposits — are governed by statutory and regulatory rules and its Director-General is appointed by the President of the Republic, the appointment of its other directors being a matter for the government.

59 Those factors are sufficient for it to be held that the Caisse belongs to the public sector. Although it is subject only to the 'legislature', the legislative power is one of the constitutional powers of a State, and thus conduct of the legislature is necessarily imputable to the State.

60 This reasoning is confirmed by the case-law of the Court of Justice concerning Member States' failure to fulfil their obligations under Article 169 of the Treaty. Under that case-law, a Member State incurs liability whatever the agency of the State whose action or inaction caused the failure to fulfil its obligations, 'even in the case of a constitutionally independent institution' (Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15). That assessment also applies in relation to control of State aid, since the Court of Justice has held that the means of redress provided for by the second subparagraph of Article 93(2) of the Treaty is merely a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the special problems which State aid poses for competition within the common market (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 23).

61 The Commission was accordingly entitled to treat the Caisse as a public-sector body whose conduct is attributable to the French State.

62 That conclusion is not undermined by the arguments to the effect that the Caisse enjoys legal autonomy from the political authorities of the State, that the appointment of its Director-General, who is subject solely to supervision by an independent supervisory commission, is irrevocable, that the Caisse has a special statute in relation to the Cour des Comptes, and that it has a particular accounting and fiscal regime. Those arrangements are part of the internal organization of the public sector, and the existence of rules for ensuring that a public body remains independent of other authorities does not call into question the principle itself of the public nature of that body. Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.

63 In so far as the applicant then contests the characterization of the investment in question as State aid by pointing to the private source of the funds managed by the Caisse and to the fact that the depositors of those funds may require their repayment at any time, the Court of Justice has held (*Van Tiggele*, cited above, paragraph 25, and Joined Cases 213/81, 214/81 and 215/81 *Norddeutsches Vieh-und Fleischkontor* v *BALM* [1982] ECR 3583, paragraph 22) that in order for the investment in question to be regarded as State aid, it must amount to an advantage granted directly or indirectly through State resources, which presupposes that 'the resources from which the aid is granted come from the Member State'.

64 The applicant claims that, because they are reimbursable, the funds deposited with the Caisse are not identical to the 'compulsory contributions' considered in Case 173/73 *Italy* v *Commission*, cited above, because it is only the latter contributions which are permanently at the State's disposal. In that regard, it should be observed that in that judgment (paragraphs 15 and 16) the Court of Justice held that the partial reduction of social charges on undertakings in a particular industrial sector was aid within the meaning of Article 92 of the Treaty, since the loss of revenue

resulting from it was made good by resources accruing from obligations made compulsory by the State's legislation.

65 It is true that the present case differs from Case 173/73 *Italy* v *Commission* in that the sums deposited with the Caisse are not non-repayable but may be withdrawn by depositors. Consequently, unlike revenue from taxation or compulsory contributions, those sums are not permanently at the disposal of the public sector. Nevertheless, it is necessary to consider the extent to which the legal status of the funds managed by the Caisse is reflected by economic reality, having regard in particular to the fact that Community law applies to aid granted through State resources 'in any form whatsoever'.

66 It is to be observed here that deposits with, and withdrawals from, the Caisse produce a constant balance which the Caisse is able to use as if the funds represented by that balance were permanently at its disposal. In that regard, the Caisse may therefore, as the applicant itself observed, 'act as an investor responding to developments on the markets' (application, paragraph 11) by using that available balance, at its own risk.

67 The Court considers that the investment in question, financed by the balance available to the Caisse, is liable to distort competition within the meaning of Article 92(1) of the Treaty in the same way as if that investment had been financed by means of revenue from taxation or compulsory contributions. That provision therefore covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Consequently, it is irrelevant that the funds used by the Caisse were repayable. Moreover, there is nothing in the documents before the Court to suggest that the realization of the investment in question was hampered by the refundability of the funds used.

68 Finally, this conclusion is not undermined by the judgment of the Court of Justice in Case 290/83 *Commission* v *France* [1985] ECR 439, paragraph 15, in which it held that 'Article 92 of the Treaty covers aid which ... was decided and financed by a public body and the implementation of which is subject to the approval of the public authorities ...'. That judgment is not to be interpreted as meaning that a finding of State aid always presupposes the existence of approval of the public authorities, even where the financial transaction in question was decided upon and financed by a body which is itself part of the public sector. The Court was merely listing all the factors actually existing in the case before it and went on to conclude from them that, on any view, those factors, taken together, were caught by Article 92(1) of the Treaty. Consequently, even if the investment made by the Caisse in this case was not the subject of approval by the French Government, the fact that the Caisse, belonging to the public sector, used for that investment funds which were at its disposal is sufficient, as explained above, to characterize the investment as State action which may constitute aid within the meaning of Article 92(1) of the Treaty.

69 It follows that the first part of the first plea cannot be upheld.

The second part of the first plea

70 The applicant, relying on a number of separate arguments, claims that the Commission improperly applied to this case the test based on the conduct of a prudent private investor operating in normal market-economy conditions. The Court observes here, firstly, that this test ensues from the principle that the public and private sectors are to be treated equally, pursuant to which capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions, cannot be regarded as State aid (Case C-303/88 *Italy* v *Commission*, cited above, paragraph 20).

71 Secondly, in Case C-56/93 (*Belgium* v *Commission* [1996] ECR I-723, paragraphs 10 and 11), the Court of Justice, examining pleas of manifest error of assessment of facts and misinterpretation of Article 92(1) of the Treaty, held that the consideration by the Commission of the question whether a particular measure may be regarded as aid within the meaning of Article 92(1) of the Treaty where the State had allegedly not acted 'as an ordinary economic agent' involved a complex economic appraisal. In the present case, the Commission's application of the test of a prudent private investor's normal conduct likewise involved complex economic appraisals.

72 It is settled law that the Commission has a discretion when adopting a measure involving such appraisals. Judicial review must be restricted to determining whether the Commission complied with the rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based are accurate and whether there was any manifest error of assessment or misuse of powers (Case C-56/93 *Belgium* v *Commission*, cited above, paragraph 11).

73 The arguments submitted by the applicant must be examined in the light of all those considerations.

Incorrect finding of the date on which the CDC-P took its investment decision

— Arguments of the parties

74 The applicant claims that, by holding in the contested decision that the actual subscription by CDC-P to the securities issued by Air France took place in April 1993 only, the Commission failed to take account of the time needed for preparing and implementing a transaction as complex as the issue of ORA and TSIP-BSA.

Since the CDC-P had assisted in the preparation of those issues, it had been involved from the very beginning in the process of drawing up the financing package ultimately offered to the public. Thus, the first contacts between Air France and the CDC-P took place in November 1992. In December 1992, after a favourable assessment of the medium-term financial forecasts drawn up by Air France, Air France and the CDC-P agreed to draw up long-term financial projections, which were completed in January 1993. CDC-P's board had been officially informed of the transaction in question in January 1993. That was when the CDC-P informed Air France of its proposal to subscribe in the amount of the planned public offer, which would affectively guarantee for Air France the success of the planned transaction.

75 The applicant states that it was only at the end of the first quarter of 1993 that it became aware of the 'sharp deterioration of Air France's financial structure', to which the Commission refers in order to justify characterizing the investment in question as State aid. However, the profitability studies underlying the investment decision had been carried out on the basis of accounts drawn up as at 30 September 1992 (the only figures available at the end of 1992), the first quarter of 1993 being earmarked solely for the implementation of the planned issues. The subscription in April 1993 was, therefore, merely the formal conclusion of a process following an economic decision made at the very beginning of 1993 when that financial deterioration had not yet occurred.

76 The applicant considers that, by giving greater weight to the formal aspect of the investment, namely the subscription itself in April 1993, than to the reality of the decision-making process, the Commission put the time of the economic appraisal of the transaction some four months after the real date on which the decision was taken. By so doing, the Commission failed to observe its own practice in matters of competition and State aid, which is to take into account the economic nature of the transaction and not its legal form. So, it unjustifiably adopted the approach which best suited its interests, without taking into account the practical realities of mounting a public subscription offer.

77 The Commission observes that the contested decision states that, according to normal business practice, the date of CDC-P's decision to invest must be the date of the actual subscription in April 1993 and that, in any event, that date could not have been a date before 17 February 1993. By taking the view that before that date no legally irrevocable decision could have been taken, it had taken account of the real powers and influences at work and looked beyond purely legal formalities. The letter sent on 7 January 1994 by the French authorities to the Commission clearly states that 'the CDC-P finalized its decision to subscribe [to the issue in question] in February 1993'.

— Findings of the Court

78 In the contested decision (p. 32 of the Official Journal) the Commission found, on the basis of the information supplied by the French authorities, that:

'... Air France's board of directors, following negotiations with CDC-P, fixed the detailed rules concerning the bonds and proposed to the shareholders to approve the issue on 17 February 1993. The shareholders' extraordinary meeting then approved the issue of the bonds on 24 March 1993. According to normal business practice CDC-P's investment decision should be considered to have taken place when the bonds were subscribed (ie. April 1993). The French authorities have not proved that CDC-P were legally obliged to subscribe to the issue before that date. In the absence of a binding legal act, any declaration of CDC-P, before the date of the subscription, should be treated as a mere statement of intention. In any event, even supposing that CDC-P took an irrevocable investment decision before April 1993, the relevant date should, at the earliest, be 17 February 1993 (ie. the date of the proposal from the board of directors to issue the bonds). Before that date the final details of the issues were not fixed and, thus, CDC-P did not have sufficient information available to take a final decision or to give any kind of commitment.'

79 That reasoning of the Commission cannot be regarded as vitiated by a manifest error of appraisal. In normal circumstances, a prudent private investor would not have taken a decision irrevocably obliging him to make an investment of the size in

question or to underwrite it, until the details of that investment had been finally fixed. In the present case, he would not therefore have taken such a decision before 17 February 1993. In a situation such as that at issue in this case — where the subscription in April 1993 to the securities in question had been preceded by several months of negotiations between the issuer and the subscriber — a prudent private investor would also have taken steps during that period of negotiations to monitor closely the economic and financial situation of the undertaking which was the subject-matter of his proposed investment. If a major setback occurred, he would not have hesitated to withdraw from that plan, unless he was legally obliged to carry it out. Consequently, the Commission was entitled to regard the investment decision as having being taken in April 1993, or on 17 February 1993 at the earliest.

80 The question raised by the applicant as to which relevant financial and economic factors a prudent private investor could and should reasonably have taken into account at the material date will be considered in the context of the next argument.

81 Consequently, the argument that the finding as to the date on which the investment decision was taken was wrong must, in any event, be rejected.

Incorrect analysis of the context in which the CDC-P took its investment decision

— Arguments of the parties

82 The applicant contends that in the contested decision the Commission failed to carry out any analysis of the general state of the air transport market at the time of the transactions in question. An analysis of the context immediately surrounding

the decision in question would not have prevented a prudent private investor from taking a similar decision. Even if the information available at the relevant date showed that Air France's situation had deteriorated during the 1992 financial year, the CDC-P was entitled to take into account various factors giving grounds for hope that the situation would rapidly improve. In the applicant's opinion, such factors included the improvement in traffic recorded by Air France during 1992 (up by 11.2% at the end of November 1992).

83 The applicant adds that the decision to subscribe to the securities in question was largely influenced by the implementation in October 1992 of the restructuring plan (PRE 1) drawn up by Air France which was aimed at completion of the CAP'93 plan and had set an objective of a return to financial equilibrium as from 1994. Moreover, the restructuring of Air France had been under way for a number of years. Thus, even if Air France's 1992 results were not as expected, the CDC-P could have hoped for an improvement in its financial situation in subsequent years. In that context, the PRE 1 had expressed the determination of Air France's management to take the measures that had become necessary, the objective having being to increase its self-financing capacity by FF 3 billion per year, to continue to reduce staff in order to improve productivity and to adopt a more aggressive business policy. The CDC-P was therefore justified in taking the view that the huge reduction in jobs (5 000 in two years), the commercial measures implemented in order to remedy the decrease in unit-yields and the cumulative objectives of the CAP'93 and PRE 1 programmes (an improvement of + FF 4.5 billion over the 1994 gross operating profit) would meet Air France's difficulties, even though there had been considerable delays in implementing the measures provided for in those plans.

84 The applicant then observes that the anticipated prospects of a recovery for Air France in view of the measures provided for by the PRE 1 were bolstered by the forecasts for the development of the air transport market for 1993: firstly, at the beginning of 1993 Air France was contemplating an increase in its passenger and freight traffic; secondly, Edmond de Rothschild Banque had stated in a report on an increase in Air France's capital, completed on 13 January 1993, that the air transport market, even though depressed, displayed some signs that were encouraging in the short term for investors.

85 In relying in particular upon the weaknesses in the restructuring plans implemented by Air France, the Commission had based the contested decision on circumstances of which the investors could not have been aware at the moment when they took their decision to subscribe to the securities in question. The failure of the PRE 1 plan had been caused by events occurring during the first half of 1993. Moreover, the CAP'93 restructuring programme was still in force in April 1993 and the Commission was not entitled to assume that, at the time of the subscription in question, the financial objectives of the CAP'93 could not be achieved. Similarly, at the time of the investment in question, the CDC-P could not have been aware of the fall in passenger traffic during the first four months of 1993 or the financial situation of Air France after September 1992.

86 As regards the medium and long term outlook for the investment in question, the applicant states that the prospects both for airline companies in general and Air France in particular gave grounds for considering that participation in the issues in question represented a good financial opportunity. Referring again to the Rothschild report, it observes in particular that that report stated that the 'profitability of companies who improve their productivity is likely to increase greatly as soon as there is an upturn in the economy' which was why 'some analysts recommend the sector generally, in the long term'.

87 In that context, the applicant points to the advantages enjoyed by Air France, namely outstanding access to the Charles-de-Gaulle airport at Roissy-en-France, an exceptional network in France and on a world-wide scale, and a financial structure during 1992 which was comparable to, indeed more satisfactory than, that of its main competitors. The indebtedness of Air France was equal to 33% of its turnover as against 38% for British Airways, 41% for Swiss Air and 67% for Japan Airlines. Similarly, the ratio of net profit to turnover of the Air France Group was, at the end of 1992, wholly comparable to that of its competitors. It was these elements taken as a whole which led Lehman Brothers, a merchant bank, to emphasize Air France's potential when it stated in a report published in September 1993 that: 'there is a great potential for Air France to become one of Europe's most successful airlines ... Air France has the potential to become a profitable, leading European carrier'.

88 Furthermore, the optimistic analysis of long-term developments in the market had been confirmed by the Commission itself which, in its 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), stated that the forecast for the aviation industry was, in the long run, quite positive and that if the general economy managed to recover aviation companies should obtain better results over the next two years (at p. 38). Furthermore, in its Decision 94/653 of 27 July 1994, cited above, adopted on the same day as the contested decision and approving the notified capital increase of Air France, the Commission had stated that, since passenger traffic had increased by 14% and 9% in 1992 and 1993, the prospects for the European aviation industry remained quite positive in the medium term (1994 to 1997), it being likely that the annual increase in traffic would be around 6% (at p. 82).

89 The applicant also states that in the contested decision the Commission adopted a position which conflicted with the position which it had taken in regard to the ORA issue by Air France in July 1992; it had taken the view that the holding, in the year 2000, of Air France shares would be 'a considerable asset', having regard to prospects for development of the Air France Group and an increase in the value of the company. The applicant claims that, although between July 1992 and the beginning of 1993 the situation of Air France did indeed deteriorate, that did not diminish the company's long-term prospects. The temporary difficulties encountered during that period merely increased the risk assumed by investors, which was reflected by an increase in the return on the April 1993 issues in comparison with those of 1992.

90 The applicant concludes from this that the Commission was not entitled to take the view in the contested decision that a normal investor would not have invested in that sector and to claim that, at the beginning of 1993, the CDC-P had anticipated that general trend on the air transport market. Aware of Air France's financial difficulties as reflected in its accounts of 30 September 1992, the CDC-P took the view that those difficulties were merely temporary and had to be set in an overall favourable context which would ultimately lead to Air France's return to profitability. Moreover, that view was shared by the private investors who subscribed to the issues in question.

91 In any event, at the time when the CDC-P took its decision — when only the accounts of Air France as at 30 September 1992 were available, the final accounts for the 1992 financial year not yet having being published — the CDC-P was entitled to take into account the operating profit achieved by the Air France Group in 1991 (FF 213 million) and the positive net results obtained during the financial years 1983 to 1989 (FF 685 million in 1989). In that context, the applicant refers to the judgment of the Court of Justice in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 15, according to which a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which, although experiencing temporary difficulties, is capable of becoming profitable again, possibly after a reorganization.

92 The Commission states, first of all, that it did not claim that a private investor would not have invested in the air transport sector. It had, rather, examined the question whether, having regard to the financial situation of Air France, a private investor would have invested FF 1.5 billion at the time when the CDC-P took its decision. It was, in particular, the absence of a viable restructuring plan which enabled that question to be answered in the negative.

93 It is incorrect to say that the CDC-P's decision to invest was taken with due regard to the CAP'93 restructuring programme. That programme had been replaced in October 1992 by the PRE 1 plan. As is apparent from the letter of the French authorities of 7 January 1994, the CDC-P investment was 'specifically in the context of an important restructuring plan submitted in Autumn 1992 (PRE)'. In that regard, the Commission points out that in the contested decision (at p. 33 and p. 34) it considered the PRE 1 in detail and found that it was insufficient to bring about, even in the long term, the economic viability of Air France. In so doing, it considered the PRE 1 as it had been submitted in October 1992 and did not assess it on the basis of events occurring after the investment decision in question.

94 Furthermore, the applicant is wrong to claim that only Air France's accounts as at 30 September 1992 were available when the CDC-P took its decision to invest.

The extent of Air France's losses in 1992 was foreseeable and partially established in November 1992. Already on 13 October, 7 November and 15 December 1992, press articles had indicated that the President and the Director-General of Air France had announced that the forecast consolidated losses for 1992 were in the order of FF 3 billion. The prospect of losses of FF 3.2 billion had been expressly mentioned in a prospectus issued by Air France concerning a February 1993 loan, which the *Commission des Opérations de Bourse* (hereinafter 'the COB') had certified on 25 January 1993. It is inconceivable that the CDC-P, which had been in negotiations with Air France since November 1992, was unaware of that figure and of the serious deterioration which it represented compared with previous losses.

95 Contrary to the applicant's claims, the immediate context surrounding the investment in question in no way leads to the conclusion that a private investor would have made it. The applicant was aware of the seriousness of Air France's situation. The 11.2% increase in traffic, over the first eleven months of 1992, indicated by Air France, was not a sign of an improvement, because during the same period the unit revenues recorded by Air France decreased by 8.1%. In addition, the performance of Air France in 1992 in comparison with its competitors had been relatively poor: Air France had increased its passenger-kilometres transported by 8.9%, whereas British Airways had increased this figure by 15.4%, Lufthansa by 14% and KLM by 16.1%, the average increase in 1992 in that regard for all companies in the EEA being 13.3%.

96 Nor, in the Commission's opinion, were the medium and long-term prospects of such a nature as to induce a prudent private investor to invest in Air France at the time when the CDC-P took its decision. The Commission considers that the Rothschild report relied on by the applicant analyses neither the consequences of the liberalization of air transport in 1997 nor the financial situation of Air France and does not deal with the problems associated with its productivity. As to the Lehman Brothers report, the Commission states that it dates from September 1993 so that the CDC-P was not aware of its content and conclusions when it took its decision to invest. In any event, in that report it is stated, as regards Air France, that: 'until recently, lack of strategic vision and restrictive work practices have been

at the heart of continual and heavy group losses'. Likewise, the report links Air France's potential to become one of the most profitable European companies with its ability to achieve a considerable reduction in its costs. However, the PRE 1, in force at the material time, made no real provision for a reduction in Air France's costs.

— Findings of the Court

97 The contested decision contains a detailed description of the economic situation of Air France, referring in particular to the sharp deterioration in its financial structure during the three years preceding the investment in question. In it the Commission observes that Air France accumulated successive losses of FF 717 million in 1990, FF 685 million in 1991 and FF 3.2 billion in 1992, the losses thus having increased four-fold in comparison with 1991, despite the adoption in 1991 of the CAP'93 restructuring plan and the injection in 1991 and 1992 of FF 5.84 billion (see paragraph 2 above). Moreover, it takes the view that the new restructuring plan, PRE 1, adopted in October 1992, was clearly incapable of improving the difficult situation of Air France, even in the long term.

98 In that context, when exercising its discretion in the matter, the Commission was not obliged to mitigate the negative conclusion which it had reached, by taking into account the few signs and prospects of an improvement to which the applicant refers, since they could be regarded as insignificant in comparison with the general financial and economic situation of Air France. In that regard, it suffices to refer to the judgment in Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 14, in which the Court did not require the Commission meticulously to weigh up all the negative and positive elements but in the case of the undertaking Aluminia accepted an overall assessment to the effect that the existence of a positive balance sheet, assuming such a result to have been foreseeable, would not have been enough to induce a hypothetical private investor to contribute the capital at issue, since such a result was still insufficient to outweigh the crushing volume of indebtedness and the overwhelming losses.

99 Without disputing the reality of the abovementioned factors which the Commission took into account in the contested decision, the applicant nevertheless makes a number of objections to the assessment made by the Commission.

100 First of all, it claims that, at the date on which the investment in question took place, the final accounts for the 1992 financial year showing the loss of FF 3.2 billion during the course of that year had not yet been published, so that, at that date, the CDC-P could not yet have been aware of the amount of that loss.

101 In that regard, it should be noted that press articles which appeared in October, November and December 1992 in *Le Figaro*, the *Financial Times* and *Le Monde* reported that the Air France Group was expecting a deficit of around FF 3 billion for the 1992 financial year. Moreover, a loan prospectus issued by Air France itself, certified by the COB on 25 January 1993, refers to the following 'future prospects': 'the consolidated net result (share of the group) for the 1992 financial year is now estimated to be a loss of FF 3.2 billion'. The Commission was therefore entitled to take the view that a prudent private investor would have been aware of those figures, especially since that investor, the CDC-P, had been involved in negotiations with Air France since November 1992. The complaint that the Commission was not entitled to take into account the loss of FF 3.2 billion in 1992 must therefore be rejected.

102 Secondly, the applicant complains that the Commission failed to take account of the positive nature of the cumulative aims of the PRE 1 restructuring plan and of the CAP'93 programme — which was still in force in April 1993 — and based the contested decision on circumstances after the date on which the investment decision was taken, since the failure of the PRE 1 plan had in fact been caused by events after that date.

103 In that regard, after describing the measures provided for by the PRE 1, the contested decision concluded that the PRE 1 contained several gaps and deficiencies.

The Commission observes in particular that, apart from the creation of a hub at Charles-de-Gaulle airport at Roissy-en-France, no other measure to increase revenues was provided for; that the plan did not analyse how the market would develop as liberalization progressed; that it did not provide for any adaptation of Air France's commercial policy to take account of the temporary overcapacity affecting the air transport industry, but on the contrary pursued an investment strategy; and that it did not provide for other restructuring measures in the event of further deterioration in the economic situation of the company. In that context, no circumstance subsequent to February 1993 was mentioned or taken into consideration in the contested decision. In response to those findings, the applicant merely claims that the CDC-P's decision to invest was largely influenced by the implementation of the PRE 1, summarizes the aims of that plan and lists the anticipated results. The Court considers that this kind of pleading cannot establish that the Commission committed a manifest error of appraisal in taking the view that the PRE 1 was insufficient to restore, even in the long term, Air France's economic viability and profitability.

104 As to the effect of the CAP'93 programme, it should be observed that, first, during the administrative procedure, the French authorities did not prove that any relationship existed between the investment at issue in this case and that programme. On the contrary, they indicated in their letter of 7 January 1994 that the investment was solely part of the PRE 1. Secondly, the CAP'93, accompanied by an injection of FF 5.84 billion in 1991 and in 1992, was balanced by a four-fold increase in the losses of Air France, which reached FF 3.2 billion in 1992. Consequently, the Commission rightly did not take account of the CAP'93 programme in the contested decision.

105 Finally, the applicant claims that, in taking the view that no prudent private investor would have undertaken the investment in question, the Commission openly contradicted its own optimistic estimation of the Community civil aviation industry in general, and of Air France in particular. It adds that those optimistic assessments were also shared by banking experts.

106 In as much as the applicant thus refers to the decisions which the Commission had adopted on 20 November 1991 and 15 July 1992 (see paragraph 2 above), it is to be observed first of all that the applicant quotes the text of the press release relating to those decisions, which gives a much more optimistic assessment of the Air France Group's prospects than the text of the decisions themselves. Those decisions merely regard the financial transactions in question as compatible with the principle of the prudent private investor, on the ground that the long-term prospects for a return on the investment outweighed 'on the basis of the information available' the short-term difficulties resulting from the 'current financial structure' of the Air France Group. Furthermore, in the decision of 20 November 1991, the Commission stated that it 'expressly reserves its position as regards new increases in the capital of Air France in 1992 and 1993' and that its decision concerning those transactions will depend upon 'an up-to-date assessment of the undertaking's financial and economic situation, of the implementation of the plan', etc.

107 It is therefore apparent that the Commission itself restricted the temporal scope of its evaluation of the prospects of the Air France Group, which of itself precludes any contradiction with the subsequent appraisal in the contested decision. Moreover, although the 1991 and 1992 decisions authorized the injection of FF 5.84 billion, they also took account of the CAP'93 restructuring plan which had just been launched and in respect of which the Commission apparently had no complaints at that time. As stated above, it was only at the beginning of 1993 when a prudent private investor would have realized that, despite the CAP'93 and the injection of FF 5.84 billion, Air France's losses were going to increase fourfold and that the subsequent restructuring (PRE 1) would be insufficient. That being established, the Commission could take the view, in the contested decision, that the medium and long-term prospects for the Air France Group were poor, without thereby contradicting its two previous decisions.

108 As regards Decisions 94/118 of 21 December 1993 (Aer Lingus) and 94/653 of 27 July 1994 (Air France), cited above, the Commission held, as in the contested decision, that the financial and economic situation of the undertakings concerned were such that a prudent private investor would not have performed the financial transactions in question. Those transactions, like those with which the present case is concerned, were therefore characterized as State aid. Only by applying the derogation in Article 92(3)(c) of the Treaty did the Commission accept the

existence of two valid restructuring plans and find that the proposed State aid was justified by the situation of the Community civil aviation industry, whose medium and longer term prospects were reported to be positive. Consequently, there was no inconsistency in the application of the test of the prudent private investor.

109 The positive assessments made by Edmond de Rothschild Banque and the merchant bank Lehman Brothers referred to the aviation industry as such and to the possibilities for development of Air France. However, until Air France had submitted a convincing restructuring plan — which it had not done at the beginning of 1993 (see paragraph 103 above) — the Commission was entitled to take the view that Air France would not benefit from any development potential which it may have or from positive changes in the Community civil aviation industry.

110 The argument alleging an incorrect appraisal of the context of the investment decision must therefore be rejected.

Manifest error in applying the principle of the prudent private investor, having regard to the nature of the securities issued

— Arguments of the parties

111 The applicant considers that the securities in question constitute market transactions carried out in market conditions and claims, first, that in the contested decision the Commission failed to take account of the fact that the investment in question was carried out through a public offer of securities and, far from being for the CDC-P alone, was open to any investor. By virtue of the applicable national regulations, that public offer of securities required a prospectus of the proposed issues to be submitted for prior review by the COB. Since the COB gave

its certificate of approval to the prospectus drawn up for the April 1993 issues, it is clear that the COB believed that the proposal did not involve intolerable risks for investors. The COB had not even issued a warning and required its inclusion in the prospectus, as it is entitled to do under the applicable national provisions.

112 Referring to the COB's functions, the applicant explains that, even though a consideration of the compatibility of risks with investors' interests does not automatically mean that the expediency of the transaction in question is considered, in practice the COB does not hesitate to refuse to give its approval for transactions which present too many risks. If the COB had considered that the issue involved risks incompatible with the interests of savers, it could have refused to approve the issues in question or inserted a warning drawing the attention of investors to the risks involved. Consequently, unless it had challenged the COB's approval, which it did not even mention in the contested decision, the Commission could not have concluded that the prospects for a return on the CDC-P's investment were such that a private investor would not have subscribed to it.

113 Secondly, the applicant contests the Commission's conclusion regarding the unusual nature, on the financial markets, of the securities issued by Air France and to which the CDC-P subscribed. The largest French companies had made similar issues, for example during 1990 and 1991. The ORA and the TSIP-BSA at issue are appropriate in that they, first, guarantee subscribers a certain return in the short and medium term and, secondly, allow significant 'leverage' to be anticipated in the long term, by providing access to the share capital of Air France. In any event, the Commission has not proved that the characteristics of the securities issue are not normal for that type of product. So, unlike the case of a loan granted at a rate lower than the market rate, where the aid element is represented by the difference between the normal rate and the lower rate, the investment transaction in question in this case did not contain any aid element.

114 In its reply (paragraphs 103 to 107), the applicant states, in regard to the appraisal of the TSIP in question, that in February and June 1993 Air France issued two debenture loans, of FF 1.5 billion each, which were managed by Crédit Lyonnais. The return on the TSIP after the year 2000, compared with the interest paid during the same period for the TSIP issued at the same time by Crédit Lyonnais, the CIC and the Banque La Henin, is within normal market rates. Finally, it compares the conditions of issue of the TSIP-BSA in question with those of the OBSA (*obligations assorties de bons de souscription d'actions*) issues (bonds with warrants), which it considers to be a financial product having characteristics very similar to the TSIP-BSA, and comparable, by analogy, to the issues of convertible bonds (*obligations convertibles* or 'OC') since 1990.

115 Furthermore, it observes that the ORA and the TSIP-BSA are designed to make their holders shareholders after a remunerated qualifying period, so that the decision to subscribe to that type of product is explained by the return received during the period of the loan and by the expectation of profit as a result of a significant increase in value of the shares when the bonds are converted into shares. The Commission's analysis, based solely on Air France's financial situation in 1992 and 1993, is not therefore relevant from the financial point of view; any assessment of the profitability of the investment should have involved an appraisal of changes in Air France's financial situation up to the year 2000. The BSA attached to the TSIP entitled their holders to subscribe to new shares in Air France, and to do so at a price of FF 517 per share, whereas at that time the estimated value of a share in the year 2000 was FF 849, according to an Air France document dated 19 February 1993. The assertion in the contested decision that the BSA are without value since the underlying shares would be valueless at the planned date for their subscription is therefore without foundation.

116 As regards more particularly the TSIP, the applicant observes that the terms of issue provide for redemption before due date at the option of Air France at any time from 1 January 2000. The CDC-P was therefore justified in taking the view that the mechanism whereby a progressive rate is added to the variable interest rates with effect from the year 2000 induced Air France to redeem the TSIP, before due date, on 1 January 2000. That mechanism inducing redemption before due date should have led a prudent investor, such as the CDC-P, to regard the TSIP issued

as typical bonds with a maturity date of 1 January 2000, bearing fixed and progressive interest rates varying from 5.5% to 8.5% with an actuarial rate of return of 7%.

117 At the hearing the applicant explained this point in more detail. It stated that the Commission had made two fundamental errors of appraisal. First, after having classified the ORA as equity investment and a deferred increase in capital, it stated that 'similar considerations are valid for the TSIP-BSA' (contested decision, OJ, p. 32). In so doing, the Commission had distorted the clear nature of the TSIP, viewing them as participation stock, even though the TSIP are essentially a form of interest-bearing bond which may give access to the share capital of Air France only if the investor so chooses. Secondly, in claiming (also OJ p. 32) in regard to the same TSIP-BSA that '[t]he owner may decide not to exercise his subscription right and to continue to receive interest after 1 January 2000 until the company resolves to reimburse the shares', the Commission implied that the failure to convert the BSA into shares resulted in the subscriber having a right to continue to receive interest after 1 January 2000. However, these are two completely different questions, since the BSA are independent of the TSIP and assignable as such.

118 Finally, the applicant points to the potential increase in value which could have been expected from a future privatization of Air France. The success of the privatization of British Airways but also the prospect at the end of 1992 of a change of governing party in France in April 1993 might have favoured this potential. The prospect of future privatization was being discussed at the time when the investment at issue was made, as is shown by statements made by representatives of the future governing party. At the end of 1992 and the beginning of 1993 — that is to say, several months before the French Parliamentary Elections, the outcome of which was then in no doubt — the CDC-P could have legitimately expected the future privatization of Air France, the effect of which would be to increase in the future the liquidity of the Air France shares which it would own as a result of taking up the securities in question.

119 The Commission repeats that it carried out a detailed examination of the characteristics of the securities issued by Air France and subscribed by the CDC-P (contested decision, OJ, pp. 28 to 29 and 32).

120 It adds that the exceptional nature of the ORA is confirmed by the fact that, in 1993, Air France was the only company to issue simple ORA and that their issue represents 70% of the total volume of ORA issued in France, of whatever type. The two other issues of ORA in 1993 had been issued with BSA; the issuing companies were quoted on the stock market. The Air France ORA were the only ones to be issued outside the regulated markets; unless quoted on the secondary market, these ORA are not easy to dispose of, particularly since they are registered. Moreover, in the event of liquidation of the company, holders would rank alongside the shareholders for the purposes of reimbursement, after all other creditors.

121 As regards the TSIP-BSA, the Commission states that Air France was the only company to issue this type of security in 1993, their unusual nature being shown by the fact that only one issue of TSIP took place in 1992 and there was no such issue in 1991. It adds that the TSIP-BSA, like the ORA, are difficult to dispose of. Since no issue of TSIP other than that of Air France took place in 1993, the applicant's comparisons with the TSIP issues by other companies are irrelevant. In any event, those other TSIP were very different from those issued by Air France. In its rejoinder, the Commission does not adopt any position concerning the arguments set out in the reply concerning the evaluation of the TSIP-BSA in question and the comparison between them and the TSIP issued by other companies or with other types of issued securities.

122 The Commission considers that the access to the share capital of Air France — on a firm future date for holders of ORA, potentially for holders of TSIP-BSA — was no ground for expecting significant, long term 'leverage' in terms of a potential increase in value. The applicant has itself acknowledged in its application that in March 1993 it was difficult to predict the value of Air France shares in the year 2000 or the extent of any increase in value; however, one month previously, the estimated value of a share at that maturity date had been precisely calculated at FF 849. The Commission observes that in December 1994 the price of an Air

France share was fixed at FF 78 by a decree of the Minister for the Economy and Finances, in conformity with the opinion issued by the privatization commission.

123 In its view, the unusual nature of the subscription in question is confirmed by the fact that, despite the allegedly attractive nature of the issues in question, only the CDC-P showed real interest in them, since it subscribed, solely for itself, 99.9% of the TSIP-BSA and 99.7% of the ORA, whereas it held only 0.53% of the share capital of Air France. The Commission concludes that the financial situation of Air France, in particular the size of the losses recorded and the level of indebtedness, as well as the weaknesses inherent in the PRE 1 and the inadequacy of that plan to redress that situation, made it impossible for Air France to obtain the sums in question on the capital markets and that, consequently, a private investor would not have invested sums of that amount in Air France.

124 The Commission considers that the grant of a COB certificate does not constitute approval in all respects of the issue in question. A COB certificate merely confirms that the information presented to potential investors is adequate to enable them to take their decision with full knowledge of the facts. It does not imply any appraisal of the merits of the proposed transactions or the soundness of the arrangements for giving effect to them; it is granted when the COB approves the formalities of the transaction.

125 In so far as the applicant claims that the Commission distorted the nature of the TSIP-BSA, the Commission stated at the hearing that, in its view, the essential factor was not so much the technical or specific characteristics of the ORA, on the one hand, and of the TSIP-BSA, on the other, but primarily the principle of investing in Air France. Moreover, it had not committed any manifest error of appraisal in identifying the principal characteristic of the TSIP-BSA, namely optional conversion, in comparison with the compulsory conversion of the ORA upon their maturity. Finally, in its prospectus concerning the issues in question, Air France itself indicated that the issue of both the ORA and the TSIP-BSA was intended to strengthen its own capital in the long term.

— Findings of the Court

126 As regards, first, the possible significance of the COB's certification of the prospectus for the issues in question, it is clear from the documents before the Court (reply, paragraph 115) that the applicant has not contended that, in the present case, the COB actually considered the merits for a prudent private investor to enter into the financial transaction in question; on the contrary, the applicant accepted that such systematic review by the COB did not take place.

127 In its form of declaration, the COB merely states that it has affixed 'its Certificate No 93-138 of 25 March 1993 on this prospectus, pursuant to Articles 6 and 7 of Order No 67-833 of 28 September 1967'. So it is clear that it did not give a reasoned opinion containing financial and economic appraisals different from those contained in the contested decision, which the Commission could, and possibly should, have taken into account.

128 As regards, secondly, the objections that the Commission misapprehended the value and characteristics of the securities issued, it must be examined, first of all, whether the Commission was wrong in comparing the TSIP-BSA to the ORA.

129 The relevant passage in the contested decision (OJ, p. 32) states as follows: 'The subscription by CDC-P to the ORA may be compared to an equity investment, which is aimed at strengthening the airline's own capital. The ORA are bonds which are compulsorily redeemed in equity and, from a financial perspective, represent a deferred increase in capital. In the case of the ORA, the return on the

investment depends, as has been described above, on the financial performance of the company and on the value of the shares at the time of the conversion. Similar considerations are valid for the TSIP-BSA. The TSIP-BSA are not obligatorily redeemed in shares ...'.

130 For an objective interpretation of the treatment of those two types of securities as being alike ('similar considerations are valid ...'), that passage must be considered in the light of the general statement of reasons concerning the securities issued. In that regard, the essential characteristics of those securities are correctly described in the contested decision (OJ, pp. 28 and 29) and the applicant has never disputed that description as such. There can therefore be no question of the Commission's having confused the mechanics of the ORA with those of the TSIP-BSA.

131 As regards the economic appraisal of the securities issued, the characterization 'equity investment' and 'deferred increase in capital', which is indisputably correct for the ORA since they are compulsorily redeemed as shares, is also valid for the BSA, subject — as the Commission itself pointed out — to the fact that their convertibility into shares is only optional.

132 As regards the TSIP, although it is correct that they merely bear interest without affording a right of conversion into shares, it is also true that they are in fact redeemable only in the event of the liquidation or dissolution of Air France; at the relevant date, at the beginning of 1993, any redemption before due date by Air France would, because of the losses incurred and absence of a valid restructuring plan, appear to a prudent private investor to be ruled out. Consequently, the Commission was entitled to take the view that the TSIP had an 'indefinite duration' (OJ, p. 28) without thereby committing a manifest error of appraisal.

133 Moreover, in Chapter II, B, 2.1.7, of the Air France prospectus relating to the issues in question (Annex 2 to the application) it is expressly stated that the issue

of the TSIP-BSA is 'aimed at strengthening the company's own capital for the future'. Furthermore, the applicant repeated that view during the written procedure (application, paragraph 24(a)) stating that 'unlike other products such as classical debentures ..., the TSIP-BSA are intended to make their holders shareholders after a qualifying period during which interest is paid'. Consequently, the Commission did not commit a manifest error of appraisal in treating the TSIP-BSA and the ORA as being somewhat alike.

134 On any view it was entitled to consider that, having regard to Air France's economic situation, which continued to deteriorate, and in the absence of a valid restructuring plan, a prudent private investor would not, at the beginning of 1993, have subscribed to almost all of the ORA and the TSIP-BSA issued by Air France as the CDC-P, backed by the Caisse, had done. There was, indeed, hardly any prospect of reimbursement by Air France of the capital invested, whether that be in shares or by reimbursement of the funds introduced. It has therefore not been proved that the Commission committed a manifest error of appraisal in taking the view that the value of the future shares accruing under the ORA and the BSA was negligible and in stating that the TSIP had the additional disadvantages that they were redeemable only after all debts, other than ORA, in the event of the dissolution or liquidation of Air France, and that there was a risk that payment of interest on them would be suspended for the year in which Air France recorded a consolidated loss greater than 30% of its capital. Moreover, it is significant that none of the three private banks which had actually participated in the investment in question had wished to subscribe to the TSIP.

135 Since the Commission, enjoying a discretion in matters of appraisal, was therefore entitled to review the investment in question in its entirety, it was not obliged to isolate the element of aid contained in each ORA or TSIP-BSA with reference to the relevant normal conditions of the market, considering in particular their rates of interest and of internal return. That finding is also true in regard to the comparison of the TSIP-BSA with other allegedly similar securities. Those comparative elements, even though the Commission has not essentially disputed them, are irrelevant, since the applicant has not claimed, and still less proved, that those other securities involved risks comparable to those of the TSIP — in particular as regards the unfavourable conditions for their reimbursement in the event of the

dissolution or liquidation of the issuing company — or that the issuing companies other than Air France were, at the date of the issue, in a financial and economic situation comparable to that of Air France at the beginning of 1993.

136 Nor, having regard to the foregoing, is there any purpose in considering whether or not the Commission failed to see that the BSA are independent of the TSIP in stating that 'the owner may decide not to exercise his subscription right and to continue to receive interest ...'. Both the BSA and the TSIP could be regarded as not representing — either jointly or separately — a real value which, in the eyes of a prudent private investor, would have justified making an investment of the scale of that made by the CDC-P, or, rather, the Caisse.

137 The same holds for the fact that in its Decision 94/653 of 27 July 1994 (cited in paragraph 26 above), the Commission classified the ORA as quasi-equity of Air France and the TSIP-BSA as debt. Having regard to the characteristics of the TSIP and their real value, as discussed above, the question whether the classification made in Decision 94/653 in order to determine the gearing ratio of Air France is in conformity with balance sheet rules may indeed be raised in any dispute concerning that decision, but is not relevant in the present context.

138 Finally, in so far as the applicant refers to the potential increase in value of Air France shares following its expected privatization after the French parliamentary elections, it suffices to find that, in the present case, the possibility of those events taking place is too vague and cannot be regarded as valid reasons which would prompt a prudent private investor to invest sums commensurate with the scale of the investment by the CDC-P, or, rather, the Caisse.

139 Consequently, the argument that, in view of the characteristics of the securities issued, the test of the prudent private investor was misapplied, must also be rejected.

Wrong analysis of the significance of the subscriptions by other private shareholders in Air France and of the significance of other investments in Air France

— Arguments of the parties

140 The applicant complains that in the contested decision the Commission merely stated that the holdings of private shareholders in Air France amounted to only 0.132% of its share capital, that the share of securities to which they subscribed was therefore negligible and that, in order to diversify its portfolio, an investment bank might decide to make some risky investments. According to the applicant, there was no obligation on the private investors — who as shareholders, were aware of the situation of Air France — to subscribe to the issues in question.

141 The applicant adds that, in accordance with the judgment in Case C-305/89 *Italy* v *Commission* (paragraphs 19 and 20), the Commission should have considered the risks assumed by the private investors in relation to their financial strength in order to assess whether they would have been induced, if they had been of the same size as the CDC-P, to invest FF 1.5 billion. The Commission's analysis is restricted to stating the value of the private investments in absolute terms.

142 Moreover, the Commission failed to take into account the fact that the private investors wished to acquire a number of securities proportionately larger than their respective holdings in the share capital of Air France, although their subscription was limited in order to preclude the subscription at issue from being treated under national law as a partial privatization.

143 However, the applicant challenges the Commission's argument that the partial privatization rules were the reason for the low participation by other private Air France shareholders in the issues in question. In reality, applications by those shareholders could not have been satisfied in full because the French State had waived its preferential right to subscribe and the CDC-P had been allocated the largest proportion of the securities still available. The CDC-P had not wished to waive the right to subscribe which it had been granted under the terms of issue.

144 In its reply, the applicant referred, in the passage concerning the appraisal of the TSIP (see paragraph 114 above), to two debentures, each of FF 1.5 billion, issued by Air France in February and June 1993 and managed by Crédit Lyonnais. At the hearing, it explained that reference in more detail, stating that at the material time other private investors thus also displayed their confidence in the financial and economic capabilities of Air France. Thus, in February and June 1993 Air France was able to issue, to a syndicate of five banks, bonds amounting to FF 3 billion and, in October 1993, a debenture of FF 300 million which was subscribed in its entirety by a private American bank (see paragraph 14 above). The five — nationalized and private — banks had passed on those bonds to other private investors, such as pension funds. All those private investors necessarily made the same positive analysis as the CDC-P regarding the financial and economic prospects of Air France. Moreover, the major aircraft manufacturers had also shown their confidence in Air France, since in 1993 they sold eight aeroplanes equivalent to FF 3 billion under financing agreements.

145 The Commission refers to the matters set out in the contested decision (OJ pp. 31 and 32) and points to the negligible amount of securities subscribed by the private shareholders of Air France. Even taking into account the desire of those shareholders to subscribe for a greater amount of the securities in question, the overall amount (approximately FF 26 million) represents only 3.3% of the total issue, that is to say, a negligible investment, without significant risk for the private shareholders. Moreover, only the CDC-P, as a result of its status as a public body, was in a position to subscribe to the ORA in respect of which the French State had waived its rights. If the CDC-P was able to subscribe to 99.7% of the ORA, this was

simply because the private shareholders had a limited entitlement under French legislation governing partial privatizations and because the right which the State failed to exercise could be exercised only by the CDC-P.

146 As to the argument submitted by the applicant at the hearing (see paragraph 144 above), the Commission contended at that hearing that the arguments submitted were new and gave no details of either the banks in question or the characteristics of the securities issued.

147 It also observes that the financial situation of Air France was analogous to that of Boussac Saint Frères, the undertaking concerned in the judgment in *France* v *Commission*, cited above (paragraph 40), in which the Court of Justice held that private investments on a considerably lower scale than public contributions did not prevent the measures in question from being regarded as State aid when the recipient undertaking was not able to acquire the necessary funds on the capital market and when, on account of its financial situation, an acceptable return on the investments within a reasonable period could not be expected.

— Findings of the Court

148 As regards the participation of the three private shareholders in the investment in question, the contested decision explains in detail that certain private shareholders, namely some of Air France's employees, together with the Bank of New York/London, Bankers Trust INT. PLC and Granite Capital LP, subscribed to the ORA and to some TSIP, but no bank subscribed to the TSIP. However, the decision states that the shares held by private shareholders in Air France represents only 0.132% of its capital and that the share of the ORA and TSIP to which they subscribed is negligible (4 516 ORA out of 1 877 526 and 14 TSIP out of 483 456). The participation of the private investors in the subscription to the ORA and the TSIP-BSA could not therefore rule out the possibility of the capital injection being a State aid. Finally, the fact that the three banks requested a subscription to the ORA of FF 25.9 million — namely 9.9 for the Bank of New York/London, 7.9 for

Bankers Trust INT. PLC and 7.9 for Granite Capital LP — was of no decisive importance, since the 65 025 ORA to which the three banks wished to subscribe represented only a tiny percentage (3.3%) of the total number of ORA to which all the investors wished to subscribe (1 942 760).

149 In that regard, in view of the evidence before it and in the exercise of its discretion in the matter, the Commission could reasonably take the view that both the value of the securities to which the private investors actually subscribed and that of the securities to which they wished to subscribe were considerably less than the total value of securities to which the CDC-P, a public sector body, subscribed. It was therefore entitled to conclude, without committing a manifest error of appraisal, that the intentions displayed by the private investors in this case did not show that a prudent private investor of the same size as the CDC-P, that is to say of the same size as the Caisse, would have risked an investment of FF 1.5 billion in Air France.

150 In so far as the applicant refers to the three debentures in February, June and October 1993, the contested decision refers to the first two debentures when stating that at the end of 1992 the balance sheet of the Air France Group showed a temporary imbalance towards short term debts and that 'this situation was corrected through the issue of two long term bonds in March and June 1993, of a total of FF 3 billion' (OJ, p. 30). Furthermore, the Commission referred in its defence (paragraph 100) to the prospectus for the February 1993 bond certified by the COB on 25 January 1993 (three pages of which were attached in Annex 23 to the defence) in order to show that the prospect of a loss of FF 3.2 billion was already known at that time.

151 In that regard, it must be reiterated, first, that the comparison between the securities in question in this case and other types of securities, such as the three debentures referred to by the applicant, is irrelevant in so far as the applicant has not claimed, and still less shown, that those debentures — redeemable after a fixed

period — display characteristics which are similar to the specific risks of the ORA and the TSIP-BSA. The applicant has not provided any details regarding those debentures (total period, rate of interest, redemption, ranking of debts, possible admission to the stock market etc.). Nor has it given any details in respect of the banks which subscribed to those debentures, nor on the private investors to whom the debentures would ultimately have been passed on (size, possible diversification, extent of the risks incurred in subscribing to the debentures). Consequently, the argument based on those debentures does not prove any manifest error of appraisal by the Commission and cannot therefore be upheld.

152 The same applies to the objection based on the sale of aircraft to Air France under financing contracts, since no details concerning those sales — in particular regarding the way in which ownership of the aircraft is to be transferred — have been provided by the applicant.

153 The argument that the significance of the private investments in question were incorrectly analysed must therefore also be rejected.

154 Since none of the arguments submitted in support of the second part of the first plea is well founded, this part cannot be upheld. Consequently, the first plea must be dismissed in its entirety.

2. *Infringement of Article 190 of the Treaty*

Arguments of the parties

155 The applicant considers that the contested decision must be annulled on the ground that it does not contain an adequate statement of reasons. The Commission's power to require Member States to order repayment of illegal State aid

extends only to the actual aid itself, that is to say, in the present case, the difference between the rate of return usually offered on the financial market in products comparable to the securities issued by Air France and the rate of return offered with the issues in question. Consequently, the contested decision in no way shows that the amount ordered to be repaid after deduction of interest corresponds to the aid element. The Commission has therefore failed to fulfil its obligation to state reasons for the decision ordering repayment of the amount of the subscriptions.

156 The applicant complains that the Commission analysed the issues in question as if there had been a mere participation in Air France and that it required the whole amount of the investment by the CDC-P, after deduction of interest, to be recovered. In order to provide a proper statement of reasons for the contested decision, the Commission should have explained — having regard to the specific nature of the securities issued and, in particular, the fact that they provided for payment of interest until at least the year 2000 — why the rate of remuneration offered did not correspond to the risk of the investment. Even if the view were taken that the value of the Air France shares would be zero in the year 2000, an examination of the real economic advantage which Air France had received would have required that a comparison should have been made between the rate of interest provided for by the terms of issue of the ORA and the rates normally offered on the market for long-term loans. Similarly, as regards the TSIP-BSA, the Commission should have examined the conditions of remuneration of the securities issued.

157 By way of example, the applicant refers to Commission Decision 88/454/EEC of 29 March 1988 concerning aid provided by the French Government to the Renault Group, an undertaking which mainly produces motor vehicles (OJ 1988 L 220, p. 30), in which the Commission had quantified the aid element included in the overall sums received by the Renault Group. Observing that the loans had been granted at a rate lower than the market reference rate, the Commission had calculated the difference between those rates in order to identify the amount of the advantage awarded and, thus, the aid granted. However, in the present case, the Commission did not carry out any economic analysis enabling it to determine the real economic advantage offered by Air France through the issues in question.

158 The applicant adds that the Commission failed to set out in the contested decision other evidence, legal, economic and financial, in support of its argument concerning the characterization of the investments in question. It refers to the lack of characterization of the CDC-P as a State body, and to the incorrect analysis of the date upon which the investment decision was taken, as regards application of the test of the prudent private investor and as regards the general context in which the investment decision was taken. It also refers to the absence from the contested decision of even the most elementary evidence of any instructions having been previously given by a State authority, the absence of any analysis of the situation of the financial markets at the material time and the absence of any comparison with financial products displaying characteristics comparable to the ORA and the TSIP-BSA issued by Air France.

159 After referring to its power to require Member States to order aid incompatible with the common market to be repaid, the Commission refers to the case-law of the Court of Justice concerning the purpose and extent of the duty laid down by Article 190 of the Treaty to provide a statement of reasons, both in general and in the specific area of State aid. In the present case, it had informed the French Government, even before the opening of the procedure under Article 93(2), that any recipient of illegal aid could be required to repay that aid. Since the reasons for requiring the whole amount of the aid to be repaid do not have to be dealt with separately but must be seen in the context of the decision itself (see Case C-303/88 *Italy* v *Commission*, cited above, paragraph 54), the Commission considers that the contested decision contains an adequate statement of reasons.

160 Finally, it states that it explained at length in the contested decision that the financial situation of Air France at the time of the subscription in question was catastrophic, to the point where no prudent private investor would have invested in that company. The Commission considers that, in describing that situation and in showing the unusual nature of the securities issued in this case, it complied with the requirements of the case-law concerning the duty to provide a statement of reasons. The reasoning in the contested decision therefore enables the reasons for which repayment of the whole amount of the investment in question was ordered to be understood.

Findings of the Court

161 The Community institutions' obligation under Article 190 of the Treaty to state the reasons on which a decision is based is intended to allow the Community judicature to exercise its power to review the legality of the decision and to allow the person concerned to know the reasons for the measure adopted so that he can defend his rights and ascertain whether or not the decision is well founded (see, for example, the judgment in Joined Cases 43/82 and 63/82 *VBVB* and *VBBB* v *Commission* [1984] ECR 19, paragraph 22).

162 In that regard, the contested decision, taken as a whole, contains a statement of reasons which is adequate to support Article 1 of that decision, according to which the investment in question constitutes an unlawful State aid which is incompatible with the common market. As follows from consideration of the applicant's first plea, the applicant was fully able to defend its rights, just as this Court was able to exercise its power of review.

163 The position is the same in regard to the reasoning of Article 2, which requires the French Republic to order reimbursement of the State aid after deducting the interest already paid. Part X of the contested decision explains that the recovery of the unlawful aid is necessary to restore the *status quo ante* by eliminating all financial advantages from which the recipient of aid illegally granted has unduly benefited since the date of the granting of the aid. Since the Commission objected to the very principle of the investment in question, namely the injection of capital as such, and not to the ways in which returns on that capital was provided, that reasoning must be considered to be adequate.

164 The applicant complains that the Commission failed to adopt the least restrictive measure — requiring the aid in question only to be altered, in accordance with the first subparagraph of Article 93(2) of the Treaty. In so far as the applicant refers, on this point, to Commission Decision 88/454 of 29 March 1988 (Renault), cited

above, it suffices to state that in that decision the Commission did not merely order such alteration; instead, Article 2 of that decision orders the Member State concerned to abolish the aid element contained in the loans in question 'by requesting their reimbursement or by applying a normal market interest rate to them'.

165 In addition, in the present case, the Commission was not obliged to quantify the actual economic advantage which Air France gained in relation to market conditions. Since the calculation of that advantage would have called for particularly complex economic appraisals regarding, in particular, the market for debentures and bonds in France, the Commission was entitled to rely on a general conclusion that, overall, the risks involved were disproportionate to the advantages to be gained. It did not have to elaborate how a different issue of securities would have been acceptable to a prudent private investor.

166 Since the case involved a very complex issue of securities, which had already been subscribed and whose inherent characteristics could not longer be altered as such, the Commission was therefore entitled to order the repayment of the capital injected. It was under no obligation to enter into discussions with the French Republic on other possible ways and arrangements by which Air France could be granted aid.

167 Consequently, the second plea cannot be upheld either.

168 Since none of the pleas submitted by the applicant has been upheld, the application must be dismissed as unfounded.

Costs

169 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 applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Kirschner Vesterdorf Bellamy

Kalogeropoulos Potocki

Delivered in open court in Luxembourg on 12 December 1996.

H. Jung H. Kirschner

Registrar President