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

In Case T-16/96,

Cityflyer Express Ltd, a company incorporated under English law, established at Gatwick Airport (United Kingdom), represented by Charles Price, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14A Rue des Bains,

applicant,

v

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

defendant,

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

* Language of the case: English.

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

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

Registrar: A. Mair, Administrator,

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

gives the following

Judgment

Legal background

1 Article 92(1) of the Treaty establishing the European Community (hereinafter 'the Treaty') provides:

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

2 Article 92(3)(c) of the Treaty allows the Commission, by way of derogation, to declare compatible with the common market:

'(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

3 The Commission laid down rules governing the grant of State aid to undertakings in the aviation sector in Communication 94/C 350/07 entitled 'Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the Aviation Sector' (OJ 1994 C 350, p. 5, hereinafter 'the Guidelines').

4 Section IV of the Guidelines, devoted to the distinction between the State's role as owner of an enterprise and as provider of State aid to that enterprise, states as regards the financing of loans:

'The Commission will apply the market economy investor principle to assess whether the loan is made on normal commercial terms and whether such loans would have been available from a commercial bank. With regard to the terms of such loans, the Commission will take into account in particular both the interest rate charged and the security sought to cover the loan. The Commission will examine whether the security given is sufficient to repay the loan in full in the event of default and the financial position of the company at the time the loan is made.

The aid element will amount to the difference between the rate that the airline would pay under normal market conditions and that actually paid. In the extreme case where an unsecured loan is made to a company which under normal

circumstances would be unable to obtain financing, the loan effectively equates to a grant and the Commission would evaluate it as such' (point 32 of the Guidelines).

Facts

5 Vlaamse Luchttransportmaatschappij NV (hereinafter 'VLM') is a private airline established in Antwerp (Belgium). It was incorporated on 21 February 1992 with initial share capital of BFR 10 million. The share capital was then increased several times and by the end of 1993 stood at BFR 75 million and was increased to BFR 100 million during 1994. Since 1993, it has been operating scheduled flights, in particular between Antwerp and London (London City Airport) and between Rotterdam and London (London City Airport).

6 The Antwerp-London route (to and from Gatwick Airport) is also operated by Cityflyer Express Ltd (hereinafter 'Cityflyer' or 'the applicant') and by Sabena (to and from London Heathrow).

7 At the end of 1993, the total monthly capacity on this route was approximately 22 000 to 24 000 passengers but the total number of passengers actually carried was only between 9 000 and 10 000 per month.

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

9 The contract granting the loan provides:

'*Artikel 1: Voorwerp*

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

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

...

Artikel 3: Voorwaarden

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

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

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

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

...'

('*Article 1: Purpose*

The beneficiary undertakes to continue to develop and operate a number of European air routes.

The Flemish Region hereby grants the beneficiary a loan, repayable without interest, in order to support that activity.

...

Article 3: Conditions

During the term of the contract, the prior consent of the Flemish Region is required for the sale or mortgaging of moveable or immovable property and the business of Vlaamse Luchttransportmaatschappij NV and for the sale of certain of its assets.

Any change in the structure of the company's share ownership shall be subject to the prior consent of the Flemish Region.

During the life of the contract the company's share capital may not be decreased without the prior consent of the Flemish Region.

In the event of breach of those conditions, the contract may be revoked without notice and the loan shall immediately become repayable on demand.

...')

10 Following a complaint from Cityflyer, the Commission on 16 November 1994 initiated the procedure provided for by Article 93(2) of the Treaty (OJ 1994 C 359, p. 2).

11 The applicant and the British airline British Airways made their views known. They asked the Commission to find that the interest-free loan constituted aid incompatible with the common market.

12 On 23 January 1995, the Belgian Government also submitted its observations.

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

14 In the contested decision, the Commission concluded that the loan granted by the Flemish Region to VLM included an unlawful State aid component because it was granted in breach of the requirements of Article 93(3) of the Treaty. It also considered, in Article 1, that the aid component was incompatible with the common market for the purposes of Article 92 of the Treaty and Article 61 of the Agreement on the European Economic Area (hereinafter 'the EEA Agreement'). It accordingly required Belgium to order that interest at the rate of 9.3% be payable on the loan (Article 2) and to order that the aid component, equal to interest charged at that rate, on the loan since the date on which it was granted, be repaid (Article 3). The rate of 9.3% is the result of adding a base rate of 7.3% applicable to Belgian State debt in 1994 and a risk premium of 2% (last paragraph of Chapter V of the contested decision).

15 In the sixth paragraph of Chapter V of the contested decision, the Commission explains that 'there can be no doubt that there is an aid component: no private investor or bank operating under normal market conditions would grant an interest-free loan to a company in which it had no holding and which was in financial difficulties less than two years after its formation. VLM's balance sheets and proft-and-loss accounts show that it made an operating loss of BFR 13 million in 1993, its first full year in operation. Its net losses in that year amounted to BFR 11.52 million, equal to 15% of the equity.'

16 The seventh paragraph of Chapter V of the contested decision reads as follows: 'Turning to the amount of the aid, the Commission, in its communication entitled "Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector", considers that the aid component in such cases amounts to "the difference between the rate that the airline would pay under normal market conditions and that actually paid. In the extreme case where an unsecured loan is made to a company which under normal circumstances would be unable to obtain financing, the loan effectively equates to a grant and the Commission would evaluate it as such." That VLM should have made losses over its first year of operation, which were fairly moderate all things considered, is not unusual in air transport, given the special features of the business. In early 1994,

such losses were not such as to prevent access to the financial market, especially as 1993 had been a particularly difficult year in civil aviation, and prospects for 1994 were brighter. VLM's losses did in fact fall to BFR 8.6 million in 1994, and its activities continued to develop. Furthermore, the lender has in fact a form of guarantee for its claim, because in return for the loan the Flemish Region is allowed to intervene in the running of the company: its consent must be obtained before certain assets can be transferred or mortgaged, and before any reduction in the capital of the company or any change in the structure of the shareholdings. It should be noted that by late 1993 VLM held tangible assets worth BFR 7.3 million and financial resources worth BFR 16 million. Furthermore, in 1994 a further increase of BFR 25 million in the company's equity capital has now brought the total up to BFR 100 million. It is clear from Articles 6 and 7 of the loan contract, first, that the transaction may be rescinded immediately should VLM fail to comply with the terms and conditions agreed in the contract, and secondly, that VLM is subject, for the duration thereof, to inspection by the Inspectorate of the Ministry of Economic Affairs of the Flemish Community and also by the Flemish Committee for the Supervision of Business Management (Vlaamse Commissie voor Preventief Bedrijfsbeleid). The Commission accordingly takes the view that the amount of aid is equal to the interest which VLM would have had to pay in normal market conditions.'

17 In the following paragraph, the Commission concluded that, in view of those contractual terms, VLM could have borrowed, under normal market conditions, the sum made available to it at the rate of 9.3%.

Procedure and forms of order sought

18 The applicant lodged its application at the Registry of the Court of 1 February 1996.

19 On 15 July 1996 VLM lodged an application to intervene, which it withdrew on 29 October 1996.

20 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided to open the oral procedure. The hearing, at which the parties presented oral argument and replied to oral questions from the Court, was held on 25 September 1997.

21 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

22 In its reply and at the hearing, the applicant also asked the Court to order production of certain documents (see below, paragraphs 98 to 100).

23 The defendant, the Commission, contends that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

24 In the rejoinder, the Commission also contends that certain matters put forward by the applicant in the reply are inadmissible (see below, paragraphs 36 to 38).

Admissibility

Admissibility of the action

Arguments of the parties

25 In its defence, the Commission advances a plea of inadmissibility on the grounds that the applicant has no interest in securing the annulment of the contested decision.

26 Annulment of the contested decision is sought in so far as the sum corresponding to the interest which VLM would have paid under normal market conditions is described as aid incompatible with the common market, within the meaning of Article 92(1) of the Treaty, whereas, according to the applicant, it is the amount lent ('the principal sum') which constituted such aid. In the Commission's view, an annulment order to that effect, followed by a new decision requiring VLM to repay the whole of the amount lent would have the effect of improving its financial position. As regards the period prior to notification of the contested decision, VLM would have had to pay the reference rate applicable in Belgium (Communication of the Commission on regional aid systems, OJ 1979 C 31, p. 9, point 14); however, that rate (8.34%) was less than that applied in the decision (9.3%). Furthermore, owing to the fall in interest rates which has occurred in the meantime, VLM could borrow at a rate more favourable than that imposed by the contested decision. The time to be taken into consideration in determining that rate is the date on which the contested decision was taken. If, on the other hand, regard is had to the point at which a new decision is taken by the Commission following an annulment, the applicant's lack of interest is all the more obvious because of the further fall in rates.

27 Where annulment has the effect of improving the position of the recipient of aid, its competitors have no interest in bringing proceedings, even if they are directly and individually concerned, so that the action must be declared inadmissible (Joined Cases 5/62 to 11/62, 13/62, 14/62 and 15/62 *San Michele and Others* v *High Authority* [1962] ECR 449, Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357 and Case 58/75 *Sergy* v *Commission* [1976] ECR 1139, paragraph 5; Case T-58/92 *Moat* v *Commission* [1993] ECR II-1443, paragraph 32).

28 The applicant contends in reply that its interest is established since the decision is of direct and individual concern to it. In the present case, it is in exactly the same position as the applicants in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 25; see also Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraphs 37 and 42).

29 The defendant's argument is based on the supposition that VLM could obtain financing and ignores the applicant's contention that, at the time when the loan in question was granted, VLM would not have been able to obtain such financing on an unsecured basis.

Findings of the Court

30 The admissibility of an action for annulment must be determined with regard to the applicant's interest in bringing proceedings at the time when the application was lodged (see, to this effect, *Forges de Clabecq* v *High Authority*, cited above in paragraph 27, and *Moat* v *Commission*, cited above in paragraph 27, paragraph 32). That interest cannot be assessed on the basis of a future, hypothetical event (see, to this effect, Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389, paragraph 11).

31 The defendant's argument is based on two assumptions: that the contested decision is annulled for the reasons advanced by the applicant and that VLM obtains new financing from a credit institution. In such a situation, the defendant considers that the applicant has no interest in bringing proceedings because VLM's financial situation would be better owing to the fall in interest rates which occurred after the adoption of the contested decision.

32 In the present case, the applicant has a vested, present and legitimate interest in obtaining annulment of the contested decision for the reasons which it has explained. Even if it is supposed that the defendant must adopt a decision of the kind sought by the applicant, the possibility of VLM obtaining financing on better conditions than those imposed in the contested decision is purely speculative and cannot therefore serve as a criterion for determining the admissibility of the application.

33 Moreover, even supposing that VLM could, as the result of a fall in rates, now borrow at a rate less than the rate of 9.3% applied in the contested decision, that possibility exists irrespective of any annulment of that decision. Indeed, it is highly improbable that the Flemish Region might refuse to allow VLM to prepay the loan when this would enable VLM to borrow on better conditions from a credit institution.

34 Since the contested decision is liable to have an adverse affect on the applicant's competitive position, it has a legal interest in bringing proceedings.

35 It follows that the objection of inadmissibility raised against the application must be dismissed.

Admissibility of issues raised at the reply stage

Arguments of the parties

36 The Commission also claims that issues raised by the applicant in the reply are inadmissible. First, they were not raised in the administrative procedure (Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31). Second, they were either raised too late in the proceedings or were extraneous to the question of the legality of the contested decision.

37 The objection of inadmissibility relates to the arguments put forward by the applicant concerning the time taken by the Belgian authorities to produce a copy of the loan contract in question in response to the Commission's request and the Belgian authorities' characterisation of that loan as an investment. The first question is unrelated to the issues raised in these proceedings. The second is not consistent with the Commission's appraisal of the aid element contained in the transaction.

38 The objection of inadmissibility also covers a claim for confirmation that the first instalment of the loan was repaid as scheduled in the contract. That claim raises questions relating to events subsequent to the contested decision and does not concern the assessment of its validity.

Findings of the Court

39 As regards, first of all, the argument that the matters in question are inadmissible on the ground that they were not raised during the administrative procedure, it must be recalled that in the field of State aid no provision makes the right of a

person directly and individually concerned to challenge a measure addressed to a third party conditional upon all the complaints set out in the application having been raised during the administrative procedure. In the absence of such a provision, the right of such a person to bring proceedings cannot be restricted on the basis only of the fact that, although he could, during the administrative procedure, have submitted observations on an assessment disclosed when the Article 93(2) procedure was opened and then repeated in the contested decision, he failed to do so (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 64).

40 The other arguments put forward by the Commission are not pertinent. In order to persuade the Court to examine the case in greater depth, the applicant has raised the matters in question in the context of an account of the factual context of the case without amending the form of order which it seeks or raising any new plea.

41 In those circumstances, the objection of inadmissibility to the matters referred to in paragraphs 37 and 38 above and raised by the applicant in the reply must be dismissed.

Substance

42 The applicant submits three pleas in support of its application:

— incorrect application of Article 92(1) of the Treaty;

— infringement of the obligation to state reasons laid down by Article 190 of the Treaty;

— manifest errors of assessment.

First plea: infringement of Article 92(1) of the Treaty

Arguments of the parties

43 The applicant submits that, in holding that only the amount corresponding to the interest which VLM would have paid under normal market conditions, and not the principal sum lent, amounts to aid incompatible with the common market, the defendant applied Article 92 of the Treaty incorrectly.

44 The Court of Justice has upheld the principle that regard should be had to the normal conduct of a private investor in a like transaction (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14, Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 13, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 26, and Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 8).

45 That principle applies equally to aid in the form of an equity or capital injection and to aid in the form of a loan (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 31, and Case 40/85 *Belgium* v *Commission*, cited in paragraph 44 above). If this were not the case, Member States would be induced to provide unlawful finance for undertakings by means of loans rather than by means of capital injections.

46 When applied to the grant of a loan, this principle invites the question whether a private investor would have granted the loan to the beneficiary on the terms on which it was actually granted. If the answer to that question is in the negative, then the principal sum must be classified as aid.

47 The defendant misapplied the test as to the normal conduct of a private investor in a like transaction in assessing whether the loan in question constituted State aid. Instead of asking the question whether such an investor would have granted the loan on the terms on which it was actually granted, it considered the question whether the investor would have granted it on the basis that it bore interest at 9.3%. Having concluded that an investor would have granted the loan in question at that rate, it wrongly deduced that the aid was confined to unpaid interest.

48 The interpretation adopted by the defendant involves a different application, and therefore an unlawful application, of Article 92(1) of the Treaty according to whether the aid is provided in the form of a loan or in the form of a capital injection (see 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).

49 The defendant contends that the plea should be dismissed. It rejects the test proposed by the applicant since it takes no account of the distorting effects produced by an aid measure.

Findings of the Court

50 The aim of Article 92 of the Treaty is to ensure that competition is not distorted on the internal market (Article 3(g) of the Treaty). The prohibition laid down in Article 92(1) of the Treaty applies to State aid which distorts or threatens to distort competition in so far as it affects trade between Member States.

51 In order to determine whether a State measure constitutes aid distorting or threatening to distort competition and affecting trade between Member States within the

meaning of that provision, the relevant criterion is that stated in the contested decision, namely, whether the undertaking receiving the aid could have obtained the amounts in question on the capital market (Case C-142/87 *Belgium* v *Commission*, cited above at paragraph 44, paragraph 26). In particular, the relevant question is whether a private investor would have entered into the transaction in question on the same terms and, if not, on which conditions he could have entered into the transaction.

52 In the present case, the defendant concluded that VLM could, at the time when the loan in question was granted, have borrowed BFR 20 million on the capital market at the rate of 9.3% (last paragraph of Chapter V of the contested decision). That conclusion assumes that the loan in question ceases to distort or to threaten to distort competition and affect trade between Member States if it bears interest at that rate.

53 If that assessment is correct — a matter which will be examined below in paragraphs 85 and 88 to 91 in relation to the third plea — the loan in question therefore falls outside the scope of application of Article 92(1) of the Treaty if it bears interest at that rate. Consequently, the defendant rightly considered that only the difference between the interest which would have been paid if that rate had been applied and the interest which was actually paid was to be treated as aid for the purposes of that provision.

54 Application of the private investor test, as defined above, also enables the Commission to determine the measures to be taken under Article 93(2) of the Treaty in order to remove any distortions of competition which are found and to restore the situation prevailing prior to payment of the unlawful aid (see, to this effect, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 96 to 102), having due regard to the principle of proportionality. If a fundamental distinction cannot be established depending on whether aid is granted in the form of a loan or

in the form of a capital injection (Case 323/82 *Intermills* v *Commission*, cited in paragraph 45 above, paragraph 31), the uniform application of the private investor test in both cases may nevertheless, having due regard to the principle of proportionality, require different measures to be adopted in order to eliminate distortions of competition found and to restore the situation prevailing prior to the payment of the unlawful aid.

55 The principle of proportionality requires the adoption of the measures necessary to ensure healthy competition on the internal market which least harms the promotion of a harmonious and balanced development of economic activities throughout the Community (Article 2 of the Treaty). The applicant's argument would run counter to that principle.

56 Since a sum provided in the form of a contribution to share capital is transferred on a permanent basis whereas a sum provided by way of loan, being repayable, is made available only temporarily, the rule of proportionality requires, as a matter of principle, the adoption of different measures in the two cases. Where an equity injection is involved, the Commission can take the view that abolition of the advantage granted must require the repayment of the capital contributed. As regards a loan, on the other hand, if the competitive advantage resides in the grant of a preferential interest rate and not in the actual value of the funds made available, the Commission, instead of requiring the principal sum simply to be repaid, is justified in requiring the interest rate which would have been charged under normal market conditions to be applied and the difference between the interest which would have been paid under those conditions and the interest which was actually paid on the basis of the preferential rate to be paid.

57 Furthermore, the applicant's analysis would completely undermine the purpose of the distinction made in the Guidelines between normal cases in which aid is to be regarded as corresponding to that difference in interest rates and exceptional cases in which aid is treated as corresponding to the principal sum. It follows that this analysis in effect challenges the lawfulness of the Guidelines. In this regard, it must be remembered that the Commission may lay down guidelines for the exercise of its powers of assessment in documents such as the Guidelines in question, in so far

as they contain rules indicating the line to be followed by that institution and do not depart from the rules of the Treaty (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 34 and 36; Case T-380/94 *AIUFFASS and AKT* v *Commission*, cited above in paragraph 39, paragraph 57; see also Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 61). The applicant has not demonstrated however, that the Guidelines departed from the Treaty.

58 It follows that this plea must be dismissed.

The second plea: breach of the obligation to provide reasons laid down by Article 190 of the Treaty

Arguments of the parties

59 According to the applicant, the reasoning set out in the contested decision is confused, unclear and equivocal; it is based on errors and does not sufficiently answer the arguments which it put forward during the administrative procedure.

60 It also contends that the defendant wrongly failed to give it the opportunity of putting its point of view on the explanations provided by the Belgian authorities, in order to refute its arguments. The defendant infringed its obligation to exchange argument with the complainant, so that the reasoning does not satisfy the criteria laid down by the Court of First Instance in its judgment in Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651.

61 The requirements concerning the statement of reasons are even more stringent where, as in the present case, the complainant is not the addressee of decisions taken in procedures concerning State aid.

62 Finally, the applicant submits that the Community judicature is free to exercise its power of review not only in the interests of the applicant but also in the interests of the Community. It is in the interest of the Community that the Commission does not base its decisions concerning State aid on incorrect data and that it does not commit errors of assessment. The obligation to consult with the complainant in certain circumstances is designed precisely to reduce the risk of this happening.

63 The defendant contends that this plea should be dismissed. It considers that the contested decision satisfies the requirements of Article 190 of the Treaty and points out that the Article 93(2) procedure does not in any way require the Commission to engage in dialogue with interested third parties on information provided by national authorities or to provide them with copies of documents obtained during the investigation.

Findings of the Court

64 According to settled case-law, the statement of reasons required by Article 190 of the Treaty must explain clearly and unambiguously the reasoning of the Community authority which drew up the contested decision so as to enable the persons concerned to ascertain the matters justifying the measure adopted so that they can defend their rights and the Community judicature can carry out its review (Case T-471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II-2537, paragraph 29 and case-law cited there, and Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 140 and the case-law cited there).

65 However, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17;

Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230). In stating the reasons for the decisions which it has to take in order to ensure that the rules of competition are applied, the Commission is not obliged to take a position on all the arguments relied on by the parties concerned. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 41 and case-law cited there, and Case T-459/93 *Siemens* v *Commission*, cited above in paragraph 54, paragraph 31).

66 When applied to decisions finding that measures constitute State aid, this principle requires that the reasons for which the Commission considers that the aid measure in question falls within the scope of Article 92(1) of the Treaty should be indicated.

67 In the present case, it is necessary to determine whether the reasons stated in the contested decision explain sufficiently clearly the defendant's reasoning that only the difference between the interest that VLM would have paid under normal market conditions and the interest which it actually paid constitutes State aid within the meaning of Article 92(1) of the Treaty.

68 In this regard, the reasons stated in the sixth, seventh and eighth paragraphs of Chapter V of the contested decision (see paragraphs 15, 16 and 17 above) satisfy the requirements of Article 190 of the Treaty in that they enable the applicant to understand the defendant's reasoning and the Community judicature to carry out its review. In particular, the contested decision clearly states the reasons for which the defendant considered that VLM's financial situation and the contractual terms conferring certain rights on the Flemish Region over VLM's assets enabled it to obtain, under normal market conditions, a loan of BFR 20 million at the market rate (which was 9.3%). The link between that finding and the conclusion that only the unpaid interest must be classified as aid for the purposes of Article 92(1) of the Treaty also clearly emerges.

69 Finally, the applicant's claim that the defendant infringed its obligation in certain circumstances to exchange argument with the complainant, as it alleges by referring to the judgment in *Sytraval and Brink's France* v *Commission* (cited above in paragraph 60, paragraph 78), must be rejected. In the present case, the defendant was able, after obtaining the observations of the interested parties, including those of the applicant, to justify to the requisite legal standard its assessment of the nature of the measure alleged by the complainant to constitute State aid.

70 The opinions of the applicant and the Belgian State differ on the application of the market economy investor test and on the assessment of the conduct of such an investor in relation to the transaction in question, but not on matters of fact (see Chapters II and III of the contested decision). Consequently, on the assumption that the obligation to exchange argument with the complainant entails, in certain circumstances, an obligation to inform it of the observations of the Member State to which the decision is addressed — a point on which it is not necessary to rule — the defendant could explain its reasons for its classification of the measure with reference to Article 92(1) of the Treaty without forwarding that information.

71 It follows from the foregoing that the second plea must be dismissed.

The third plea: manifest errors of assessment

72 The applicant claims that the defendant committed manifest errors of assessment in not classifying the principal sum as aid within the meaning of Article 92(1) of the Treaty. According to the applicant, these errors relate to four matters: VLM's financial situation, the assessment of guarantees or collateral, the fact that the loan was interest-free and the unusual nature of the loan. Given the existence of a serious risk of failure to repay the loan, the lack of security and the loan's unusual, interest-free nature, the loan ought to have been classified as a straightforward subsidy.

VLM'S financial situation

— Arguments of the parties

73 The applicant considers that the defendant has not substantiated its assertion that VLM's losses were fairly moderate and not such as to prevent access to the financial markets. When adopting the contested decision, the defendant could have ascertained that VLM's losses had not fallen to BFR 8.6 million in 1994 (seventh paragraph of Chapter V of the contested decision) but were nearly three times higher. It was apparent from VLM's annual accounts that VLM had made a small profit of BFR 340 541 in 1992, its first year of operation, followed by a loss of BFR 11 523 927 in 1993 and a further loss of BFR 27 538 000 in 1994, bringing the total losses to BFR 39 021 000, or approximately 40% of capital. At the end of 1993, the losses were BFR 11 483 000, representing approximately 15% of capital. At the end of 1994, VLM's ratio of total debt to capital stood at some 144%. Finally, the fact that VLM had no long-term indebtedness showed that it was impossible for it to obtain private sector financing.

74 The applicant also asserts that the defendant took no account of VLM's trading position as it stood at the time when it took the contested decision. That position deteriorated, the total losses being on 31 December 1995 BFR 86 192 000, or 57% of capital, and turnover had fallen.

75 The defendant submits that this assertion should be rejected because VLM's losses and the general prospects for the sector for 1994 were such that VLM could, at the time when the loan in question was granted, obtain a comparable loan on the financial markets.

— Findings of the Court

76 In so far as the applicant maintains that VLM's losses were three times higher than BFR 8.6 million in 1994, the figure mentioned in the seventh paragraph of Chapter V of the contested decision, it must be emphasised that the legality of the contested decision must be assessed in relation to the attitude which a private investor would have had under normal market conditions at the time of the grant of the loan in question, having regard to the information available and developments foreseeable at that time. Consequently, the fact that the losses suffered by VLM in 1994 were nearly three times higher than the estimate contained in the contested decision would be liable to affect its legality only if it were clear that a private investor would have foreseen that VLM's losses were going to be higher than that estimate.

77 It is apparent from the contested decision (end of the fourth sentence of the seventh paragraph of Chapter V of the contested decision) that the defendant viewed the matter from the perspective of a private investor who, at the time of the grant of the loan, would have assessed probable developments in 1994 (see paragraph 16 above).

78 The applicant has not proved that the defendant committed a manifest error in arriving at this assessment.

79 Nor has the applicant shown that the fact that VLM's losses at the end of 1993 amounted to approximately 15% of its capital would have prevented it from obtaining the loan in question at the rate of 9.3% under normal market conditions.

80 Finally, the applicant has not established that VLM's lack of long-term indebtedness was the result of its inability to obtain financing on the market.

Lack of security or collateral

— Arguments of the parties

81 According to the applicant, the defendant committed a manifest error of assessment in describing as security the right of the Flemish Region to refuse to allow VLM to modify the structure of its share ownership or to transfer or mortgage certain moveable or immoveable property, its business or assets (second paragraph of Chapter IV of the contested decision). That right did not give the Flemish Region the possibility of realising VLM's assets in the event of its insolvency or liquidation; furthermore, it was not enforceable against other creditors. As such, it is in no way equivalent to a mortgage or a floating charge which any bank or other lending institution would require in the absence of any sufficient personal guarantee. In fact, that right derived from Belgian legislation irrespective of the terms of the loan in question. Finally, the view that it allows the Flemish Region to intervene in the running of VLM is factually incorrect.

82 The defendant points out that it concluded that the lender had in fact 'a form of guarantee for its claim' (seventh paragraph of Chapter V of the contested decision) owing to the negative covenants imposed on the borrower.

— Findings of the Court

83 Even assuming that, as the applicant maintains, the defendant was wrong in considering that the Flemish Region had 'a form of guarantee for its claim', that fact would not vitiate the decision.

84 Since the defendant considered that, in view of the terms of the contract in question giving the Flemish Region the right to refuse to allow VLM to transfer or encumber its assets, VLM could, under normal conditions, have been able to obtain a loan at the market rate (which was 9.3%), the Guidelines (point 32) did not require the principal sum of the loan to be treated as a subsidy.

85 The points made by the applicant against the defendant's assessment do not cast doubt on the possibility of VLM borrowing BFR 20 million at the rate of 9.3% at the time when the loan in question was granted. It is plausible that VLM could have obtained such a loan, despite the lack of any security entitling the lender to realise VLM assets and despite its losses amounting to approximately 15% of its capital, given that, in particular, it is usual for an airline company to make losses in the first years of operation and given the prospect of improving business in the sector at that time.

Interest-free element

— Arguments of the parties

86 According to the applicant, the loan constituted a subsidy because it was free of interest. The contested decision stands in contrast with Commission Decision 94/662 of 27 July 1994, cited in paragraph 48 above, in which the Commission had decided that certain subordinated notes constituted an equity investment and required the reimbursement of the full capital amount.

87 The defendant rejects that argument.

— Findings of the Court

88 Pursuant to the Guidelines, only if VLM could not have obtained financing on the private market, whatever the rate, would the principal sum have to be classified as State aid within the meaning of Article 92(1) of the Treaty (see paragraph 4 above).

89 Since the contract in question provides for the principal sum to be repaid and since the defendant had concluded that VLM could, under normal market conditions, obtain the loan in question at the market rate (which was 9.3%), the loan cannot be regarded as a subsidy unless it is established that the last conclusion was wrong.

90 As it is, the matters put forward by the applicant are not such as to render implausible the defendant's conclusion that, in the circumstances of the case, VLM could have obtained a loan of BFR 20 million at the rate of 9.3% (see paragraph 85 above).

91 The reference to Decision 94/662, cited above in paragraph 48, is in fact misplaced. That case did not concern a loan but the subscription by a State enterprise (CDC-Participations) to bonds issued by another State enterprise (Air France). The bonds in question were bonds redeemable in shares and, financially, the transaction was therefore to be considered as a deferred capital injection. In the present case, however, the sum made available was never intended to form a permanent part of the recipient undertaking's share capital.

Unusual nature of the loan

— Arguments of the parties

92 According to the applicant, the fact that the loan was granted on an *ad hoc* basis and not under an approved aid scheme shows that the loan in question was exceptional. It complains that the defendant took no account of this and did not seek to ascertain the domestic legal basis on which the decision to grant the loan had been taken. Indeed, the question arises as to whether the legislation on aid in the Flemish Region was respected.

93 The defendant rebuts that argument. First, while the *ad hoc* grant of a loan is evidence of the existence of aid, it still has no bearing on determining the amount involved. Second, the provision of national law on the basis of which the aid in question was granted is not a matter of interest to the Commission when exercising the powers which the Treaty confers upon it in the matter of State aid.

— Findings of the Court

94 The applicant's argument to the effect that the defendant took no account of the fact that the aid was not part of an approved aid scheme must be rejected. In Chapter VI of the contested decision, the defendant took this circumstance into consideration in its assessment in these terms: 'The aid was not granted under any approved scheme of assistance, and ought to have been notified to the Commission in accordance with Article 93(3) of the Treaty'. Consequently, this submission has no foundation. In any event, this point is of no relevance for the purposes of determining how the State measure in question is to be treated under Article 92(1) of the Treaty.

95 The charge that the defendant has not identified the provision of national law under which the aid was granted nor examined the legality of the aid in question with reference to that law must also be rejected. It is not for the Commission to determine the legality of aid in relation to national law; it determines its legality with reference to Community law alone.

96 It follows that this plea must be rejected.

97 It follows from the foregoing that the application must be dismissed in its entirety.

Request for documents

Arguments of the parties

98 In the reply, the applicant asked the defendant to produce a number of documents referred to in the defence but not produced in these proceedings. It asks the Court to request the defendant, under Articles 64 and 65 of the Rules of Procedure, to produce those documents should the defendant refuse to disclose them voluntarily.

99 The documents in question, a large number of which are also mentioned in the contested decision, are letters of the Commission to the Belgian authorities dated 25 May, 14 July, 15 November, 6 December 1994, 1 February, 2 May and 13 June 1995, letters of the Belgian authorities to the Commission dated 3 August 1994, 23 January, 15 June, 14 July and 24 July 1995, as well as the 'requested material' accompanying those last three letters, the contract concluded on 17 December 1993 between the Flemish Region and VLM and the application lodged by VLM with the Court on 27 November 1995.

100 The applicant claims that production of those documents is necessary in order to guarantee the fairness of the procedure.

101 The defendant objects that an interested third party's request for disclosure should be granted only where disclosure is essential for the purposes of reviewing the legality of the contested decision (*Skibsværftsforeningen and Others* v *Commission*, cited above in paragraph 65, paragraph 199). This is not the case here because the parties are not in dispute over the facts but over the legal assessment of them.

Findings of the Court

102 The question to be determined by the Court concerns the classification of the State measure in question under Article 92(1) of the Treaty.

103 The applicant has provided no evidence to show that the documents of which it requests disclosure could be useful in determining that question.

104 Furthermore, the factual circumstances to be taken into consideration for the purposes of making that classification are not in dispute.

105 Finally, both during the administrative procedure and during these proceedings, the applicant has explained in detail its view that the principal sum, and not the interest, ought to have been classified as aid within the meaning of Article 92(1) of the Treaty. It has not indicated in what way disclosure of the documents sought would enable it to present a more convincing argument in support of its point of view.

106 Since it considers that the evidence available on the file provides it with sufficient information and that production of the documents mentioned in paragraph 99 above would not serve the applicant's rights of defence, the Court finds that there are no grounds for ordering the measure of organisation of procedure proposed by the applicant.

Costs

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

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

García-Valdecasas Tiili Azizi

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 30 April 1998.

H. Jung J. Azizi

Registrar President

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