JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 September 2010 *

In Joined Cases T-415/05, T-416/05 and T-423/05,

Hellenic Republic, represented by A. Samoni-Rantou and P. Mylonopoulos, acting as Agents,

applicant in Case T-415/05,

Olympiakes Aerogrammes AE, established in Kallithéa (Greece), represented by V. Christianos, lawyer,

applicant in Case T-416/05,

Olympiaki Aeroporia Ypiresies AE, established in Athens (Greece), represented by P. Anestis, S. Mavroghenis, lawyers, S. Jordan and T. Soames, Solicitors, and D. Geradin, lawyer,

applicant in Case T-423/05,

* Language of the case: Greek.

European Commission, represented by D. Triantafyllou and T. Scharf, acting as Agents,

defendant,

supported by

Aeroporia Aigaiou Aeroporiki AE, established in Athens, represented by N. Keramidas and, in Case T-416/05, also by N. Korogiannakis, I. Dryllerakis and E. Dryllerakis, lawyers,

intervener in Cases T-416/05 and T-423/05,

APPLICATIONS for annulment of Commission Decision C(2005) 2706 final of 14 September 2005 on State aid for Olympiaki Aeroporia Ypiresies AE (C 11/2004 (ex NN 4/2003) — Olympic Airways — Restructuring and privatisation),

THE GENERAL COURT (Sixth Chamber),

composed of M. Jaeger, President, A.W.H. Meij (Rapporteur) and L. Truchot, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2010,

gives the following

Judgment

Facts

1 On 14 September 2005, the Commission adopted Decision C(2005) 2706 final on State aid for Olympiaki Aeroporia Ypiresies AE (C 11/2004 (ex NN 4/2003) — Olympic Airways — Restructuring and privatisation) ('the contested decision').

2 In order to facilitate the privatisation of the airline Olympiaki Aeroporia AE (Olympic Airways), which was wholly owned by the State and became, in December 2003, Olympiaki Aeroporia Ypiresies (Olympic Airways Services; 'OA'), Article 27 of Greek Law No 3185/2003 of 9 September 2003 amending Law No 2668/1998, harmonisation

with Directive 2002/39/EC, resolving questions relating to the Greek Post Office and other matters (FEK A'229/26.9.2003;Law No 3185/2003'), entitled'Conversion of the Olympic Airways Group', had, in particular, provided that'the companies in the Olympic Airways Group [shall be] converted by the hiving-off of their branches, divisions and services relating to their air transport activities and by merger with an existing company in the Group or by absorption by one of those companies'.

3 Under Article 27 of Law No 3185/2003, the flight operations of OA and its subsidiary Olympiaki Aeroploïa AE (Olympic Aviation) were hived off and regrouped 'by merger' within another of OA's subsidiaries, Makedonikes Aerogrammes AE (Macedonian Airways), which received the name Olympiakes Aerogrammes AE (Olympic Airlines; 'NOA'). It is apparent from the documents in the case-file and was confirmed by the parties, at the hearing, that the new airline, NOA, was formed on 11 December 2003 and commenced its operations on 12 December 2003. On that date, OA ceased all flight operations but retained its ground-handling, maintenance and training services. The entire capital of the new airline, NOA, was vested directly in the Hellenic Republic.

4 OA's financial situation and the public financial support to it and NOA have been the subject of several Commission decisions.

Decision 2003/372/EC

5 On 11 December 2002, the Commission adopted Decision 2003/372/EC on aid granted by Greece to Olympic Airways (OJ 2003 L 132, p. 1; 'the Decision of 11 December 2002'), in which it declared incompatible with the common market the restructuring

aid to OA which had been approved during 1994, 1998 and 2000 and certain new unlawful aid. As regards the restructuring aid, that decision was based, in particular, on the finding that most of the objectives of the 1998 plan for restructuring OA to restore its viability in the medium and long terms had not been achieved and the conditions accompanying the decisions of approval had not been fully complied with. Under Article 3 of the Decision of 11 December 2002, the Hellenic Republic was required to recover part of the restructuring aid paid, in a sum of EUR 41 million, as well as the new unlawful aid declared incompatible with the common market.

6 Subparagraph (b) of the first paragraph of Article 1 of the Decision of 11 December 2002 stated that the restructuring aid granted by the Hellenic Republic to OA in the form of new loan guarantees totalling USD 378 million for loans for the purchase of new aircraft and for investment necessary for its relocation to the new airport in Spata (Greece) was considered to be incompatible with the common market.

7 By its judgment in Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875 ('the judgment of 12 May 2005'), the Court of Justice declared that, by failing to take within the prescribed period all the measures necessary for repayment, in accordance with Article 3 of the Decision of 11 December 2002, of the aid found to be incompatible, except that relating to the contributions to the national social security institution ('the IKA'), the Hellenic Republic had failed to fulfil its obligations under that article.

8 In that judgment (paragraphs 32 to 34), the Court particularly took into consideration the fact that, as was clear from the information given by the Commission which was not disputed by the Greek authorities, the Hellenic Republic had transferred OA's

most profitable assets, free of all debts, to NOA, which also belonged to that Member State and was entitled to special protection from its creditors, in derogation from the provisions of the general law and commercial law obligations. The Court particularly held that that legal structure made it impossible, under national law, to recover the aid granted and was an obstacle to the effective implementation of the Decision of 11 December 2002 and to the recovery of the aid.

9 Following an action brought by OA for annulment of the Decision of 11 December 2002, the Court of First Instance (now 'the General Court'), by its judgment in Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* [2007] ECR II-2911, annulled that decision in part, in so far as it concerned tolerance of persistent non-payment of airport charges owed by OA to Athens International Airport ('AIA') and of value added tax owed by OA on fuel and spare parts. The action was dismissed as regards the other new unlawful aid and the restructuring aid.

10 Since it considered that the Hellenic Republic had not adopted measures to comply with the judgment of 12 May 2005, the Commission brought an action under Article 228 EC for failure to fulfil obligations. By its judgment in Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, paragraphs 68, 72, 109, 143 and 145, the Court of Justice accepted that, in principle, so long as it is provided for under the national legal system as a mechanism for extinguishing debts, a set-off operation could constitute an appropriate means by which State aid might be recovered. Furthermore, it ruled that, without prejudice to the application of the Community rules on State aid, it must be held that, for the purposes of those proceedings, the Hellenic Republic had demonstrated that there was a debt payable to OA of EUR 601 289 003, under an arbitration award of 6 December 2006 by which the Hellenic Republic had been ordered to pay certain amounts of damages to OA. Whilst it pointed out that that sum was

considerably greater than the total amount of aid to be recovered under the Decision of 11 December 2002, the Court decided that the Hellenic Republic had failed to demonstrate to the requisite legal standard, as regards part of the new unlawful aid referred to in that decision, that such aid had been repaid. Consequently, the Court ordered, in that regard, the payment of a daily penalty and a lump sum.

The contested decision

11 By letter of 3 March 2003, the Greek authorities informed the Commission of the state of affairs in the privatisation of OA. During 2003, exchanges of correspondence took place between them concerning the restructuring of the airline OA with a view to its privatisation.

12 In the absence of formal notification of possible State aid, the Commission adopted, on 8 September 2003, a decision requiring the Hellenic Republic to provide it with all the information necessary for the purposes of its examination, in the light of Article 87 EC, of the measures connected with the restructuring and privatisation of the airline OA, which might include elements of State aid.

13 On 25 September 2003, a competing airline, Aeroporia Aigaiou Aeroporiki AE (Aegean Airlines; 'Aegean Airlines' or 'the intervener'), lodged a complaint with the Commission concerning OA's privatisation.

14 By letter of 29 September 2003, the Greek authorities sent the Commission Law No 3185/2003 as well as the reply to the order to provide information. By letter of 31 October 2003, the Commission informed the Greek authorities that certain data was still lacking.

15 By letter of 15 December 2003, the Commission repeated its demand for information. The Hellenic Republic provided that information by letters dated 18 and 19 December 2003. By letter of 15 January 2004, the Commission requested some additional information from the Greek authorities, which replied by two letters dated 15 and 16 January 2004.

16 By decision of 16 March 2004, the Commission initiated the formal investigation procedure under Article 88(2) EC concerning measures connected with the restructuring and privatisation of the Olympic Airways Group adopted as regards OA and NOA by the Hellenic Republic after the adoption of the Decision of 11 December 2002 (OJ 2004 C 192, p. 2).

17 In that decision, the Commission noted, among other things, that OA had, following the hiving-off of its flight operations and their regrouping in the new company, NOA, ceased aviation activities, but continued to supply ground-handling, maintenance and training services. The Commission stated that the Greek authorities did not envisage, at that stage, putting OA into liquidation, despite a negative level of its own funds for the second consecutive year. Indeed, according to the Greek authorities, the process of restructuring started in December 2003 was to last for four to five years

and enable a significant part of OA's debts to be absorbed, and OA would be put into liquidation when all its divisions, and its other assets such as buildings, machinery, aircraft no longer flying and all other equipment had been sold.

18 The Commission considered, in the decision of 16 March 2004, that certain advantages for the benefit of OA seemed to constitute State aid incompatible with the common market. It also pointed out that the new airline, NOA, had benefited from the transfer of assets from the flight operations sector of the Olympic Airways Group, leaving OA with its significant liabilities and that none of OA's creditors could have recourse to NOA. Finally, the Commission stated that, in the context of the investigation procedure thus initiated, it started 'from the principle that all the companies which belonged to the [G]roup — including [NOA] — [were] only a single undertaking'.

19 By letter of 11 June 2004, the Hellenic Republic sent the Commission its comments relating to the decision of 16 March 2004.

20 Following the publication of the abovementioned decision in the *Official Journal of the European Union*, Aegean Airways submitted its comments within the period laid down for that purpose for interested third parties.

21 By letter of 11 October 2004, the Commission notified the Hellenic Republic, in accordance with Article 11(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), of its intention to adopt a decision requiring that Member State to suspend any aid until a decision could be taken on its compatibility with the Treaty. The Hellenic Republic replied by letter dated 26 October 2004.

22 Following that reply, the Greek authorities regularly informed the Commission, by letters or at meetings, of the evolution of the privatisation of NOA and OA.

23 From 9 to 26 May 2005, the consultancy firm, Moore Stephens, carried out, at the Commission's request, an investigation at OA's and NOA's premises. Its report, dated 19 July 2005, is entitled 'Investigation into the restructuring and privatisation of Olympic Airways Group/Olympic Airlines'. It is apparent from that report that the investigation was intended to answer, in particular, the questions whether the restructuring of the Olympic Airways Group and the creation of NOA were merely a legal arrangement to transfer the assets and operations to a new legal entity but to maintain the debts in the old legal entity, and whether OA or NOA had received direct or indirect State aid since that restructuring.

24 On 14 September 2005, the Commission adopted the contested decision, finding that State aid had been granted to NOA, in the form of rentals for the sub-leasing of aircraft by that company from OA or the Hellenic Republic lower than those paid by them under the head-leases (Article 1(1) of the contested decision). In addition, the Commission found, in that decision, that three categories of State aid had been granted to OA. The first related to the early payment to OA of an alleged overvaluation of its assets, relating to the flight operations sector, transferred to NOA at the time of the hiving-off (Article 1(2) of the contested decision). The second category of aid consisted in the payment to OA of a sum of EUR 8.2 million and the payment of certain State guarantees referred to in the Decision of 11 December 2002 which were varied (Article 1(3) of the contested decision). Lastly, the third category concerned the Greek authorities' forbearance with regard to OA's non-payment of tax debts and social security contributions (Article 1(4) of the contested decision).

25 The contested decision's enacting terms are worded as follows:

'*Article 1*

1. The acceptance by [OA] and by [the Hellenic Republic] of aircraft sub-lease payments from [NOA] which are lower than the amounts paid by way of head-leases, with the resulting losses borne by [OA] in the order of EUR 37 million in 2004 and by the State up to May 2005 in the order of EUR 2.75 million constitutes illegal State aid to [NOA] which is incompatible with the Treaty.

2. [The Hellenic Republic] has granted illegal and incompatible State aid to [OA] in the amount by which it overvalued the assets of [NOA] at the time when [NOA] was created; this amount is provisionally estimated by the Commission to be approximately EUR 91.5 million.

3. The grant by the [Hellenic Republic] to [OA] of sums totalling approximately EUR 8 million, and the additional payment by the [Hellenic Republic] of certain bank loan and finance lease instalments in place of [OA], to the extent that the latter do not constitute the mere execution of the guarantees referred to in [subparagraph (b) of the first paragraph of] Article 1 of [the Decision of 11 December 2002], and of the related conditions, between May 2004 and March 2005 constitutes illegal State aid to [OA] which is incompatible with the Treaty.

4. The continued forbearance of the [Hellenic Republic] towards [OA] in relation to its tax and social security debts to the State of some EUR 354 million between December 2002 and December 2004 constitutes illegal State aid to [OA] which is incompatible with the Treaty.

Article 2

1. [The Hellenic Republic] shall recover from the beneficiaries thereof the aid referred to in Article 1.

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

Article 3

[The Hellenic Republic] shall immediately suspend all further payments of aid to [OA] and [NOA].

Article 4

[The Hellenic Republic] shall inform the Commission within a period of two months from the date of notification of the present Decision of the measures to be taken to comply with Articles 2 and 3.'

26 The contested decision was notified to the Hellenic Republic on 15 September 2005.

27 In its judgment of 14 February 2008 in Case C-419/06 *Commission* v *Greece*, not published in the ECR, the Court of Justice, in proceedings brought by the Commission under Article 88(2) EC declared that, by not taking, within the prescribed period, all measures necessary to put an end to aid declared unlawful and incompatible with the common market by the contested decision and to recover that aid from the recipients, the Hellenic Republic had failed to fulfil its obligations under Articles 2 to 4 of that decision.

Procedure and forms of order sought by the parties

28 The applicants, the Hellenic Republic, NOA and OA, brought the present actions by applications lodged at the Registry of the General Court on 25 November 2005.

29 In Case T-416/05, by separate document lodged at the Court Registry on 4 February 2006, the applicant submitted an application for suspension of the operation of Article 2 of the contested decision, as regards the aid referred to in Article 1(1) of that decision. By order of 26 June 2006 in Case T-416/05 R *Olympiakes Aerogrammes* v *Commission*, not published in the ECR, the President of the General Court dismissed the application.

30 In Case T-423/05, by separate document lodged at the Court Registry on 19 June 2006, the applicant submitted an application for suspension of the operation of Article 2 of the contested decision, as regards the aid referred to in Article 1(2) to (4) of that decision. By order of 29 January 2007 in Case T-423/05 R *Olympiaki Aeroporia*

Ypiresies v *Commission*, not published in the ECR, the President of the General Court dismissed the application.

31 As the composition of the Court's Chambers had been altered, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present cases were therefore assigned.

32 In Case T-416/05, by application lodged at the Court Registry on 16 August 2006, the applicant, in reliance on the first and second subparagraphs of Article 48(2) of the General Court's Rules of Procedure, pleaded the inadmissibility of alleged new pleas in law raised by the Commission in the rejoinder. The applicant claimed that the Court should declare those pleas in law inadmissible or, in the alternative, should allow the applicant additional time to reply to them. The Commission submitted its written observations on that application.

33 In Case T-416/05, by document lodged at the Court Registry on 2 May 2006, Aegean Airways applied for leave to intervene in support of the form of order sought by the Commission.

34 By document of 14 July 2006, NOA contended that the Court should dismiss that application for leave to intervene. By separate document lodged the same day, it applied for confidential treatment with regard to Aegean Airways as regards the entirety of the contested decision, for as long as a non-confidential version of that decision was not published in the *Official Journal of the European Union*, and as regards certain data contained in the application and the reply and the annexes thereto.

35 By order of 6 June 2008, the President of the Sixth Chamber granted Aegean Airways leave to intervene in support of the form of order sought by the Commission. That order provided for the communication to the intervener, pursuant to the provisions of Article 116(2) of the Rules of Procedure, of the non-confidential versions of the procedural documents, and prescribed a period for the submission of a statement in intervention, without prejudice to the right to supplement it later if need be, following a decision on the validity of the application for confidential treatment.

36 By document lodged at the Court Registry on 25 June 2008, the intervener opposed NOA's application for confidential treatment. Whilst contending that all the procedural documents should be fully disclosed to it, the intervener stated its intention to submit a statement in intervention on the basis of the non-confidential versions of the documents which had been sent to it. The statement in intervention was lodged on 22 July 2008.

37 In Case T-416/05, by letter lodged at the Court Registry on 8 March 2010, in reply to certain questions raised by the Court in relation to its application for confidential treatment, the applicant withdrew it, after being placed in a scheme of special liquidation and the cessation of all commercial activity, at the conclusion of the privatisation procedure. The intervener was invited to submit its additional observations.

38 In Case T-423/05, by document lodged at the Court Registry on 17 May 2006, Aegean Airways applied for leave to intervene in support of the form of order sought by the Commission. By document of 28 July 2006, the applicant contended that the application for leave to intervene should be dismissed. By separate document lodged the same day, it lodged an application for confidential treatment with regard to Aegean Airways.

39 By order of 6 June 2008, the President of the Sixth Chamber granted Aegean Airways leave to intervene in support of the form of order sought by the Commission in Case T-423/05. That order provided for the communication in due course to the intervener, pursuant to Article 116(6) of the Rules of Procedure, of the Report for the Hearing, for the purposes of the submission of any observations it might wish to make at the hearing.

40 In Case T-423/05, by letter lodged at the Court Registry on 10 May 2010, in reply to questions raised by the Court relating, in particular, to its application for confidential treatment, the applicant withdrew that application, after being placed in a scheme of special liquidation, at the conclusion of the privatisation procedure.

41 By order of 18 May 2010, the President of the Sixth Chamber, having heard all the parties, ordered that Cases T-415/05, T-416/05 and T-423/05 be joined for the purposes of the oral procedure and judgment.

42 Since Judge Tchipev was prevented from attending, the President of the General Court decided, pursuant to Article 32(3) of the Rules of Procedure, to sit in the present cases to complete the Chamber.

43 In Case T-415/05, the applicant claims that the General Court should:

— annul the contested decision in whole or in part;

— order the Commission to pay the costs.

44 In Case T-416/05, the applicant claims that the General Court should:

— annul Article 1(1) and (4) and Article 2 of the contested decision, in so far as it concerns the applicant;

— order the Commission to pay the costs.

45 In Case T-423/05, the applicant claims that the General Court should:

— annul all or part of the contested decision, in so far as it covers aid granted to it;

— order the Commission to pay the costs.

46 The Commission, supported by Aegean Airways in Cases T-416/05 and T-423/05, contends that the General Court should:

— dismiss the actions;

— order the applicants to pay the costs.

47 Upon hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure without any prior measures of inquiry. As part of the measures of organisation of the procedure, the parties were requested to reply to written questions by the Court and to produce certain documents. They complied with those requests.

48 The parties presented oral argument and answered the questions put by the Court at the hearing on 14 June 2010.

49 In Case T-415/05, the Hellenic Republic, which had applied for the case to be referred to the Grand Chamber, confirmed, at the hearing, the withdrawal of that application.

Law

A — *No longer any legal interest of the applicants in bringing proceedings*

1. *Arguments of the parties*

50 In its written observations in reply to a request from the Court, the Commission contended that the applicants in Cases T-416/05 and T-423/05, NOA and OA, after being put into liquidation at the conclusion of the privatisation, had no legal interest in bringing the proceedings.

51 The Commission also contended that, in Case T-415/05, following repayment of the aid referred to in the contested decision, the Hellenic Republic no longer had a legal interest in bringing the proceedings.

52 In that regard, the Commission argues that the interests of the Hellenic Republic, which is the sole shareholder in, and, if not the only, by far the principal creditor of NOA and OA, had been fully satisfied by the recovery of the aid at issue. The annulment of the contested decision would not therefore achieve anything more. In particular, there is no evidence that, after payment by those companies of the Hellenic Republic's preferred debts, any debts of other creditors could still be paid.

53 The Hellenic Republic, at the hearing, as well as NOA and OA, both in their written replies to questions put by the Court and at the hearing, disputed that argument of the Commission. They particularly emphasised, at the hearing, that the debts owed to the staff and secured debts ranked prior to those of the State.

54 Finally, in Cases T-416/05 and T-423/05, the intervener maintained, in its reply to a written question put by the Court in Case T-416/05, and at the hearing in the two abovementioned cases, that, following the applicant companies being put into liquidation, it still had a legal interest in intervening in support of the form of order sought by the Commission.

55 NOA, in its reply to a written question put by the Court and at the hearing, and OA, at the hearing, denied that Aegean Airways had such an interest in pursuing its intervention.

2. *Findings of the Court*

56 The conditions of admissibility concern an absolute bar to proceedings, which the Courts of the European Union may at any time of their own motion consider (see order in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission* [2005] ECR II-787, paragraph 22 and the case-law cited). In this case, having regard to the parties' arguments, it must be established whether the applicants can pursue their actions, following NOA and OA being placed in liquidation and the repayment relied upon of the aid at issue.

57 First, as regards the alleged inadmissibility of the Hellenic Republic's action (Case T-415/05), according to settled case-law, Article 230 EC does draw a clear distinction between the right of Community institutions and Member States to bring an action for annulment and that of legal persons and individuals, in that the second paragraph of Article 230 EC gives all Member States the right to contest the legality of decisions of the Commission by means of an action for annulment without having to establish any legal interest in bringing proceedings. A Member State need not therefore prove that an act of the Commission which it is contesting produces legal effects with regard to that Member State in order for its action to be admissible. However, in order for an act of the Commission to be the subject of an action for annulment, it must be intended to have legal effects (order in Case C-208/99 *Portugal* v *Commission* [2001] ECR I-9183, paragraphs 22 to 24; see also, to that effect, Joined Cases

T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission* [2010] ECR II-2099, paragraphs 118 to 120).

58 In this case, in the contested decision, the Commission characterises the measures in question in favour of NOA and OA as State aid and declares them incompatible with the common market.

59 It follows that the contested decision has binding legal effects and therefore constitutes a challengeable act.

60 Consequently, the Hellenic Republic, which challenges, in particular, the characterisation of the measures in question as State aid is, solely by virtue of its status as a Member State, entitled to bring an action for annulment of the contested decision and may, therefore, by virtue of that status alone, pursue that action.

61 Second, as regards NOA's alleged lack of any legal interest in bringing proceedings (Case T-416/05) and OA's (Case T-423/05), it is appropriate to recall that, according to the case-law, the applicant's interest in bringing proceedings must continue until the final decision. Indeed, there is no longer any need to adjudicate on the action if the applicant has lost all personal interest in having the contested act annulled on account of an event occurring in the course of the proceedings, the effect of which is that the annulment of that act is no longer capable, by itself, of having legal consequences to the advantage of the applicant (Case T-301/01 *Alitalia* v *Commission*

[2008] ECR II-1753, paragraph 37, and Case T-42/06 *Gollnisch* v *Parliament* [2010] ECR II-1135, paragraph 61).

62 Here, it is sufficient to state that the applicant companies, which have made clear, in their replies to the written questions put by the Court, that they had completely repaid the alleged aid, in compliance with the contested decision, maintain, correctly, that they retain a current personal interest in pursuing their actions, since, if the contested decision is annulled, the Hellenic Republic will be liable to repay them the sums they repaid, which will be entered as assets in their respective liquidation balance sheets.

63 It follows that the present actions are admissible.

64 Moreover, in Cases T-416/05 and T-423/05, as regards the question whether Aegean Airways still has a direct and present interest in the results of the cases, for the purposes of the second paragraph of Article 40 of the Statute of the Court of Justice, it is sufficient to note that, in the order in *Olympiakes Aerogrammes* v *Commission*, paragraph 28, and in the order in *Olympiaki Aeroporia Ypiresies* v *Commission*, paragraph 23, granting Aegean Airways leave to intervene in support of the forms of order sought by the Commission, such a direct and present interest was recognised on the ground that the intervener, first, was in competition with OA and NOA, the recipients of the aid covered by the contested decision, and, second, had actively participated in the formal investigation procedure which led to the adoption of the contested decision, which is favourable to it. However, as long as NOA and OA are recognised as having, even after being placed in liquidation, a legal interest in seeking the annulment of the contested decision, Aegean Airways retains a corresponding interest in intervening in support of the Commission to argue for the legality of that decision, be it only for the purposes of making claims for compensation, followed by possible

actions, based on the unlawful grant, during the abovementioned period of competition, of aid which caused it injury.

65 It must therefore be accepted that Aegean Airways, as an intervener, still has a legal interest in the results of the present cases.

B — *Substance*

66 The applicants challenge the Commission's findings relating, first, to the existence of financial continuity between OA and NOA for the purposes of recovery of the aid (Cases T-415/05 and T-416/05), second, to the grant of State aid to NOA (Cases T-415/05 and T-416/05) and, third, to the grant of State aid to OA (Cases T-415/05, T-416/05 and T-423/05). In addition, they plead, fourth, breach of the right of the Member State concerned to be heard (Cases T-415/05 and T-423/05), fifth, breach of the principle of proportionality (Cases T-415/05 and T-416/05) and, sixth, breach of the principle of no double jeopardy (Cases T-415/05 and T-423/05).

67 Prior to addressing those various complaints in turn, it is appropriate to point out, at the outset, that, in Case T-416/05, the applicant, NOA, submits that the Commission's alleged new pleas in law are inadmissible (see paragraph 32 above). The admissibility of those pleas will be determined in the examination of the pleas in law to which they relate (see paragraphs 116, 117, 129 to 131, 208 and 409 below).

1. *The financial continuity between OA and NOA being taken into account for the purposes of recovery of the aid (Cases T-415/05 and T-416/05)*

(a) Arguments of the parties

68 As regards the identification of the recipients of the aid at issue for the purposes of its recovery, the Hellenic Republic and NOA challenge the Commission's finding that there was financial continuity between OA and NOA, since that finding could be interpreted, in relation to Article 1(4), read with Article 2 of the contested decision, as requiring recovery from NOA of aid granted to OA after the adoption of the Decision of 11 December 2002 and before the hiving-off.

69 First, the applicants submit that, in the absence of a clear and precise order for recovery to that effect, in the contested decision's enacting terms, in accordance with Article 88 EC and Article 14 of Regulation No 659/1999, no obligation to recover such aid from NOA arose from that decision.

70 The Hellenic Republic submits that the Commission's lack of precision, both in the contested decision and in its pleadings, which reinforce certain contradictions, leads it to question the reasons for and effect of the inclusion, in the contested decision (points 178 to 183), of the abovementioned finding relating to NOA's succession to OA for the purposes of recovery of the aid, whereas the Commission admits, in its defence, that that finding concerns the Decision of 11 December 2002 exclusively

and has no legal effect as regards the contested decision and that it is relying on the Hellenic Republic's lack of a legal interest in bringing the proceedings on that point.

71 It is therefore necessary to clarify, in accordance with the principle of legal certainty, whether the contested decision provides that NOA can be held liable to repay, particularly, the aid referred to in Article 1(4) of the contested decision, so that the question of NOA's succession to OA for the purposes of recovery of the aid might be subject in due course to review by the General Court as part of the present action.

72 Second, the Hellenic Republic and NOA maintain that the Commission's statement, in the contested decision (point 183), that NOA must be regarded, at least for the purposes of recovery of the aid prior to the hiving-off of the flight operations sector, as OA's successor, is vitiated by manifest error of assessment and lack of a proper statement of reasons.

73 The applicants accept that, according to settled case-law, the Commission may be obliged to require that the recovery is not restricted to the initial recipient of the aid but is extended to the undertaking which continues the activity of the original undertaking, using the transferred means of production, in cases where economic continuity exists between the two undertakings (Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 78). However, it follows from that case-law that, first, recovery of the aid from a third party is merely a possibility and second, there must be an element of economic continuity.

74 In particular, the possibility of a company in economic difficulties taking measures to rehabilitate the business cannot be ruled out a priori because of requirements relating to recovery of the aid which is incompatible with the common market (*Italy and SIM 2 Multimedia* v *Commission*, paragraph 76). Contrary to the Commission's allegations, intention to evade the repayment obligation is taken into account in the examination of the economic logic of the transaction of transfer and conversion (*Italy and SIM 2 Multimedia* v *Commission*, paragraph 78, and Case T-324/00 *CDA Datenträger Albrechts* v *Commission* [2005] ECR II-4309, paragraphs 102 to 104).

75 In that regard, the applicants note that the transfer, by the company which received the aid, of part of its assets to a third legal person, in order to afford it an opportunity to develop free from the legal and economic uncertainties which threaten the continued exploitation of that part of its activity, does not demonstrate, as such, the existence of an intention to evade the effects of the recovery (*CDA Datenträger Albrechts* v *Commission*, paragraph 98).

76 In this case, according to the abovementioned case-law, the decisive test is therefore, in the applicants' submission, whether the conversion was required by the economic logic of a more effective recovery or was intended to evade the effects of the recovery order.

77 The hiving-off of the flight operations, as part of the wider programme of restructuring and privatisation of the Olympic Airways Group was intended to sell that sector at the greatest possible profit. In particular, the value of the new airline, NOA, far exceeded the simple sum of the assets transferred. It was increased by the fact that there were, among other things, a fleet of reliable and flexible aircraft, very well trained

staff, knowledge and experience of the national market, commercial reputation and reliability, a network of cooperators, contracts of cooperation and the availability of take-off and landing slots.

78 The applicants submit therefore that, applying the private investor test, the conversion provided for by Law No 3185/2003 was required by the economic logic of the privatisation of the Olympic Airways Group, with a view to the more effective recovery of the aid, and was not carried out with the aim of evading the effects of the recovery order. Indeed, after some fruitless attempts at privatising OA, the Hellenic Republic chose to hive-off the various activities of the Group in order to privatise them separately with the maximum profit. In that regard, NOA challenges, in particular, the Commission's statement, in the contested decision (point 178), that the Hellenic Republic's intention, in the conversion of that group, was to enable its flight operations to be continued.

79 The Hellenic Republic and NOA allege that, in this case, as in the case which gave rise to the judgment in *CDA Datenträger Albrechts* v *Commission*, the value of the company which has been deprived of part of its assets, in this case OA, has not been diminished, because an equivalent part of its liabilities has been transferred. The Commission has, moreover, accepted that liabilities amounting to EUR 145 million were transferred to NOA (point 117 of the contested decision).

80 In addition, contrary to the Commission's allegations in the contested decision (point 179), the transfer of some of OA's assets to NOA has not deprived OA of their revenue. Indeed, OA continues to operate in the sectors of ground-handling, maintenance and repairs, catering, data processing and fuel supply. OA receives very significant revenue from NOA on the basis of commercial contractual terms.

81 In those circumstances, the Commission's assertion, that the creation of NOA constituted an artificial reorganisation within the same group, is erroneous. Under Law No 3185/2003, the Hellenic Republic holds NOA's shares solely for the purposes of its privatisation. In addition, since NOA received no advantage as the company which acquired some of OA's assets and OA continued to operate, there was no economic continuity between the two companies justifying recovery from NOA of the aid of which OA was the recipient (Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 81).

82 Contrary to the Commission's allegations, the Hellenic Republic did not accept, in its letter of 2 June 2005, that NOA had succeeded OA. It only admitted that, if complete recovery could not be obtained from OA after the surplus of its liquidation was exhausted, the recovery obligation could be executed on companies which succeeded OA, if the conditions set forth in the Community case-law concerning succession to the obligation to recover State aid were satisfied. However, such is not the case. As the conclusion of the privatisation of NOA was imminent, the Greek authorities referred expressly, in that letter, to the condition relating to sale at a reasonable market price.

83 By contending, in the defence (paragraph 76), that the conversion in itself was not the subject of the contested decision and did not necessitate therefore any detailed analysis for the purposes of deciding whether NOA had succeeded OA, the Commission admitted that it had not taken into consideration the fundamental criterion relating to the economic logic of that conversion.

84 Consequently, the reasoning on which the finding is based, in the contested decision, that NOA succeeded OA for the purposes of recovery of the aid, is insufficient, since

the Commission failed to examine the economic logic of the process of establishing NOA as part of the restructuring and privatisation of OA, with the aim of enabling the recovery of the highest possible amount of the unlawfully paid aid.

85 Finally, the Hellenic Republic and NOA dispute the Commission's interpretation of the judgment of 12 May 2005. They point out that the Court of Justice ruled only on the legal and financial consequences of Law No 3185/2003 on the execution of the Decision of 11 December 2002. The Court did not adjudicate either on the intentions which had dictated the choice of hiving-off the flight operations sector or on the compatibility of that restructuring with the provisions of Article 87 EC, or on the question of whether NOA could be regarded as OA's successor for the purposes of recovery of the aid covered by the Decision of 11 December 2002. The Court of Justice could not have examined, as part of that action for failure to fulfil obligations, whether NOA had succeeded OA, for the purposes of recovery of the aid, because, at the time that action was brought, on 2 October 2003, NOA had not yet been formed.

86 In the judgment of 12 May 2005, the Court of Justice held only that the transfer of some of OA's assets to NOA rendered it impossible, under national law, to recover the aid granted to OA. However, it came to that conclusion by deciding that 'all the assets' of OA had been transferred 'free of all debts' (paragraph 33 of the judgment). However, that is not the case, the Commission having since admitted that OA had retained significant parts of its assets and transferred a significant part of its liabilities to NOA. The Commission thus distorted the reasoning of the Court of Justice in the judgment of 12 May 2005 and fundamentally misread it, in maintaining that the Court had held that the most profitable assets were transferred to NOA.

87 For all those reasons, the Commission's conclusions relating to the finding of the alleged financial continuity between OA and NOA are, in the submission of the Hellenic Republic and NOA, erroneous and unsubstantiated by reasoning.

88 The Commission sets outs, in the first place, its interpretation of the contested decision. In the defences in Cases T-415/05 and T-416/05, it suggests first of all that, in contrast to the judgment of 12 May 2005, the contested decision does not address the question relating to the recovery, from NOA, of aid granted to OA. The Commission concludes therefrom that the Hellenic Republic and NOA have no current legal interest in bringing the proceedings against the grounds of that decision relating to the treatment of NOA as OA's successor.

89 However, in the rejoinders, the Commission advocates the position that it is clear from Article 2 of the contested decision, interpreted by reference to the grounds of that decision, that the aid at issue granted to OA at least prior to the hiving-off had to be recovered not only from that company but also from NOA. It therefore admits the Hellenic Republic's and NOA's legal interest in challenging the obligation to recover, from NOA, aid granted to OA.

90 The Commission explains that change of position by the fact that it was informed of the precise date of NOA's formation only by the reference, in the reply in Case T-416/05, to 13 December 2003 as the date of that company's formation and commencement of activity.

91 The proof of that precise date 'activates the reservation' stated on several occasions by the Commission as regards the identification of the effective recipient of the aid prior to the hiving-off.

92 As regards the aid at issue paid to OA after the hiving-off, it could and should be recovered also from NOA, were it to be established, in the execution of the contested decision, that the benefit from it had been transferred to NOA. The Commission contends, in that regard, that OA transferred to NOA the benefit arising from the aid which the Hellenic Republic granted it, by sub-leasing aircraft to NOA for rentals lower than those it itself paid to the head-lessors.

93 The Commission states that the apportionment of the repayment obligation between OA and NOA will have to be determined in the execution of the contested decision.

94 In the second place, in Cases T-415/05 and T-416/05, the Commission disputes the applicants' argument intended to demonstrate that NOA did not succeed OA for the purposes of recovery of the aid at issue. It alleges that the recovery of the aid from the entity carrying on the economic activity which benefited from it is intended to restore the conditions of fair competition.

95 Aegean Airways, intervening in support of the form of order sought by the Commission in Case T-416/05, observes that the issue relating to the existence of financial continuity between OA and NOA was decided by the judgment of 12 May 2005.

(b) Findings of the Court

96 At the outset, it is appropriate to point out that, in reply to a question put by the Court at the hearing, the Commission did not confirm OA's statement, in its reply to a written question from the Court and again at the hearing, that it had fully repaid, in compliance with Article 2 of the contested decision, the amount, including interest, of the aid at issue which had been paid to it. In fact, the Commission expressed certain reservations as regards the full repayment of that aid, whilst indicating that, having regard to the putting into liquidation of OA and NOA, it would not require the Hellenic Republic to recover from NOA the aid at issue granted to OA.

97 The Hellenic Republic and NOA, for their parts, stated at the hearing that they maintained their complaints against the characterisation of NOA as OA's successor for the purposes of recovery of the aid paid to OA.

98 In that context, after determining, first, the measures in favour of OA which may be made the proper subject of an obligation to recover them from NOA, it will be necessary, second, to define the legal effect of the contested decision as regards the finding relating to NOA's succession to OA for the purposes of recovery of the aid, before deciding, third, on the validity of the extension of the recovery obligation to NOA.

The determination of the measures in favour of OA which may be made the proper subject of an obligation to recover them from NOA

99 At the outset, as the Court of Justice pointed out in paragraph 32 of the judgment of 12 May 2005, a distinction has to be drawn between the examination of the restructuring measures themselves, in the light of the conditions for applying Article 87 EC, from the question, which is entirely independent, of whether NOA could be regarded as OA's successor, as regards flight operations, for the purposes of recovery of the aid granted to OA before the hiving-off. The only issue, in the context of the action for failure to fulfil obligations which gave rise to that judgment, was the determination of the legal and financial consequences of those restructuring measures on the implementation of the Decision of 11 December 2002.

100 It is clear from the order to provide information and from the decision of 16 March 2004 to initiate the procedure under Article 88(2) EC that the Commission's investigations concerned, in this case, all the measures connected with the restructuring and privatisation of the Olympic Airways Group which might include elements of State aid (see paragraphs 12 and 16 to 18 above).

101 However, in the contested decision, the restructuring measures were not examined as such, from the point of view of their treatment in the light of the conditions for applying Article 87(1) EC. Their nature, and particularly the connection between OA and NOA, was only assessed by the Commission in order, first, to show that there was financial continuity between OA and NOA for the purposes of recovery of the aid at issue and, second, to treat the measures examined in their context (see, in particular, paragraphs 164 to 178 below).

102 As regards, more particularly, recovery of the aid, it was for the Commission alone to examine, in the contested decision, the issue of NOA's succession to OA for the purposes of recovery of the new aid to OA referred to in that decision. Indeed, the determination as to the effective recipients of the aid referred to in the Decision of 11 December 2002, for the purposes of the implementation of the order for recovery contained in that decision, was governed by the judgment of 12 May 2005 (see paragraphs 7, 8 and 99 above).

103 Furthermore, the issue of NOA's succession to OA for the purposes of recovery of the aid may, in these proceedings, be raised only as regards the aid granted to OA before the hiving-off of the flight operations and NOA's formation.

104 In fact, if there was financial continuity between those two companies, NOA could be regarded as the effective recipient of the aid benefiting the flight operations sector which had been granted to the former airline OA before those operations were taken over by NOA.

105 By contrast, contrary to the Commission's allegations in the rejoinders (see paragraph 92 above), the aid at issue granted to OA after the hiving-off cannot be recovered from NOA on the sole ground that it obtained an indirect benefit from it. Even on the assumption that, as the Commission submits, the State aid granted to OA after the hiving-off had put that company in a position to confer, in its turn, on the new company NOA certain benefits which it would not have obtained under normal market conditions, which has not been established, that fact cannot by itself lead to the conclusion that NOA was the effective recipient of the aid granted to OA.

106 In the absence, after the hiving-off, of economic unity between the two companies, OA and NOA, and as the Commission does not dispute, in the contested decision, they were legally and financially independent, it was, in any event, for the Commission to identify clearly the benefit allegedly conferred on NOA by OA and to determine it separately in the light of the conditions for applying Article 87(1) EC (see, to that effect, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 112 to 114, and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 313 and 314). That was also the approach followed by the Commission in the contested decision, as regards the aid granted to NOA in the form of low rentals for the sub-leasing of aircraft (see paragraphs 154 to 253 below).

107 It follows that, in this case, as the applicants suggest, the issue of NOA's succession to OA for the purposes of recovery of the aid at issue only arises as regards the aid allegedly conferred on OA in the form of forbearance in relation to its non-payment of taxes and social security contributions, referred to in Article 1(4) of the contested decision, to the extent that the aid preceded the hiving-off. In fact, the other aid to OA, referred to in Article 1(2) and (3) of that decision, was all granted after the hiving-off.

108 In that regard, it must be noted even at this stage that the pleas in law relied upon by the applicants, in Cases T-415/05 and T-423/05, to obtain the annulment of Article 1(4) of the contested decision, must be rejected as the Court will establish (see paragraphs 378 to 393 below).

109 In those circumstances, the Court must determine the legal effect of the contested decision as regards the finding that there was financial continuity between OA and NOA for the purposes of recovery of the aid referred to in Article 1(4) of that decision to the extent that it was granted prior to 11 December 2003.

The contested decision's legal effect as regards the finding that NOA succeeded OA for the purposes of recovery of the aid at issue

110 It is appropriate to note at the outset that, since the contested decision was adopted on 14 September 2005, the Commission was in possession, at the time of its adoption, of all the information necessary for the purposes of identifying, in the decision itself, the recipients from which the aid concerned should be recovered. In that respect, the circumstances material to this case differ from those examined by the Commission in the Decision of 11 December 2002, prior to the restructuring of the Olympic Airways Group and the formation of NOA in December 2003.

111 However, in the contested decision's enacting terms, the Commission does not expressly identify NOA as the effective recipient of part of the aid granted to OA and referred to in Article 1(4) of that decision.

112 The Commission confines itself, in fact, to requiring, in Article 2 of the contested decision, the Hellenic Republic to recover the aid referred to in Article 1 of the decision from the 'beneficiaries' of that aid. As regards Article 1(4) of the contested decision, it refers expressly to the illegal aid granted to OA in the form of the Hellenic Republic's forbearance in relation to OA's tax and social security debts to the State but does not refer to NOA as an effective recipient of part of that aid.

113 In Case C-419/06 *Commission* v *Greece* declaring that the Hellenic Republic had failed to fulfil its obligations under the contested decision, the Court of Justice did not consider it necessary to examine, among other things, whether, in that decision, NOA was designated as OA's successor for the purposes of recovery of the aid at issue referred to in Article 1(4). In fact, as regards that aid, the Court merely reviewed

whether the contested decision contained information enabling the national authorities concerned to determine themselves, without excessive difficulty, the amounts to be recovered (paragraphs 42 to 44 of the judgment).

114 In that context, it is for the General Court, as the applicants submit, to interpret the contested decision's content as regards any obligation to recover from NOA the aid referred to in Article 1(4) of the contested decision.

115 At the outset, it is appropriate to point out that the Commission, in the rejoinders in Cases T-415/05 and T-416/05, justified its adoption of contradictory positions as regards the contested decision's interpretation by its uncertainty as to the precise date of NOA's formation (see paragraph 90 above).

116 In Case T-416/05, NOA pleaded the novelty and therefore inadmissibility of that argument relating to the Commission's alleged uncertainty as to the precise date of NOA's formation (see paragraph 32 above).

117 In that regard, it is sufficient to note that the Commission's argument is, in any event, irrelevant. Whatever the successive interpretations put forward in this case by the defendant institution might be, it is for the General Court to give the contested decision its definitive interpretation. Consequently, the Commission's adoption of contradictory positions relating to the contested decision's interpretation and its reliance on uncertainty relating to the precise date of NOA's formation, in order to explain the changes in its position, are irrelevant and cannot adversely affect the applicants' rights of defence (Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969,

paragraph 30). Moreover, the decision of 16 March 2004 to initiate the formal investigation procedure (in point 110) and the contested decision (in point 6) expressly state that NOA was formed on 12 December 2003. The applicants confirmed, at the hearing, that NOA commenced its activities on that date. In that context, even if the Commission was not informed in the course of the administrative procedure of the precise date of NOA's formation, 11 December 2003, that fact could not have affected the content of the contested decision — or, therefore, its interpretation — as regards the possible designation of NOA as OA's successor for the purposes of recovery of the aid at issue.

118 For the purposes of interpreting Article 2 of the contested decision, it should be recalled that, according to the case-law, the operative part of a decision on State aid is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (see Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21, and the judgment of 12 May 2005, paragraph 41 and the case-law cited).

119 In this case, the Court must therefore determine whether Article 2 of the contested decision can be interpreted, in the light of the reasons for that decision, as referring, among 'the beneficiaries [of] the aid referred to in Article 1', to NOA as an effective recipient of the aid at issue granted to OA and referred to in Article 1(4) of that decision.

120 In its examination of the nature of the restructuring of the Olympic Airways Group (points 178 to 183 of the contested decision), in the context of its 'appraisal of aid' (Section 6 in the preamble to the contested decision), the Commission analysed more

minutely the detailed rules of the restructuring, already taken into account by the Court of Justice in the judgment of 12 May 2005. The Commission relied on that judgment, to formulate the following conclusion, in point 183 of the contested decision:

'It is therefore obvious that the restructuring of OA in 2003 whereby NOA was created, while it led to the creation of a separate legal entity, was done so as to avoid recovery [of aid] following the [Decision of 11 December 2002] and that NOA is a successor company to OA at least for the purposes of recovery of State aid arising prior to the [splitting].'

121 In order to show, for the purposes of recovery of the aid at issue granted to OA, that NOA succeeded to OA, the Commission thus confined itself to expounding the matters on which, in the judgment of 12 May 2005, the Court of Justice had based its conclusion that there was financial continuity between OA and NOA for the purposes of recovery of the aid covered by the Decision of 11 December 2002. On the basis of those matters, the Commission expressly concluded, in point 183 of the contested decision, that the recovery obligation extended to NOA as regards, in particular, the aid at issue to OA prior to the splitting.

122 In addition, in its consideration of the compatibility of the aid granted to NOA, the Commission noted, in the contested decision (points 216 and 217), that, since NOA was OA's successor for the purposes of recovery of the aid, the new aid granted to NOA could not be declared compatible with the common market, as long as the aid prior to the hiving-off had not been recovered.

123 It is clear from that examination of the contested decision that — although it is regrettable that the Commission did not name, in the enacting terms of that decision, the recipients from which the aid referred to in Article 1(4) and granted prior to the hiving-off had to be recovered — the grounds for that decision render NOA readily identifiable as OA's successor for the purposes of recovery of that aid.

124 In that context, it follows clearly from Article 2 of the contested decision, in conjunction with the abovementioned grounds for that decision, and particularly in the light of the judgment of 12 May 2005, that the Commission required the Hellenic Republic to recover the aid granted to OA, before the hiving-off, not only from that company, but also, if need be, from NOA.

125 Article 2 of the contested decision, requiring the recovery of the aid referred to in Article 1 of that decision, must therefore be interpreted as meaning that it contains an order for recovery of the aid granted prior to the hiving-off, from OA or from NOA, with the apportionment of that recovery obligation between those two companies having to be determined in the implementation of that decision.

126 Indeed, as regards apportionment of the recovery obligation between recipients of aid, it is appropriate to note that, in a decision finding that aid was incompatible and requiring its recovery, the Commission is not required to state to what extent each recipient undertaking has benefited from the amount of the aid in question. It is for the Member State concerned to determine the amount which must be repaid by each of those undertakings in its recovery of the aid. If it encounters unforeseen difficulties, it may submit its problems for consideration by the Commission, and the Commission and State must work together in good faith, in accordance with the duty of genuine cooperation enshrined particularly in Article 10 EC, with a view to overcoming those

difficulties (see, to that effect, Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and ZEMAG* v *Commission* [2005] ECR II-1579, paragraph 124).

127 That solution was confirmed by the judgment of 12 May 2005, in which the Court of Justice, whilst emphasising the purely economic test of restoring undistorted competition in the sector concerned, impliedly accepted the possibility of a merely ancillary recovery obligation in respect of NOA. Indeed, in that judgment, the Court confined itself to declaring the failure to fulfil obligations, leaving it to the competent national authorities and the Commission to determine, within the framework of their reciprocal duty of cooperation in good faith, the apportionment of the recovery obligation between OA and NOA, as regards the aid covered by the Decision of 11 December 2002.

128 In this case, having regard to the interpretation of the contested decision extracted in paragraphs 123 to 125 above, it is appropriate to examine the reasoning for, and validity of, the finding that there was financial continuity between OA and NOA for the purposes of recovery of the aid referred to in Article 1(4) of the contested decision and granted prior to the hiving-off.

Appraisal of the reasoning for, and validity of, the finding, in the contested decision, that NOA succeeded OA for the purposes of recovery of the aid at issue

129 Before examining the merits of the pleas in law alleging the insufficiency of the reasoning and manifest error of assessment put forward by the applicants in Cases

T-415/05 and T-416/05, NOA's assessment of the inadmissibility of the Commission's alleged new pleas in law relating, first, to the Hellenic Republic's alleged intention to evade the recovery obligation and, second, the alleged illegality of NOA's existence (see paragraph 32 above) must be rejected.

130 In fact, it is clear from the rejoinder that the Commission is not invoking any new plea in law relating to the Hellenic Republic's alleged intention to evade the recovery obligation through the restructuring of the Olympic Airways Group and the creation of NOA. It sets out, on the contrary, the argument, already invoked in the contested decision and the defence, that the lack of any intention on the part of the Hellenic Republic to evade that obligation, as alleged by the applicant, is irrelevant since the abovementioned restructuring is an obstacle to the recovery of the aid.

131 As regards the Commission's argument that the judgment of 12 May 2005 concerns the very existence of NOA, by declaring it illegal, it forms part of the argument between the parties on the legal effect of that judgment as regards the identification of the effective recipient of the aid at issue.

132 On the substance, and at the outset, since, as part of its examination of the connection between OA and NOA, the Commission relied particularly on the matters taken into account by the Court of Justice in the judgment of 12 May 2005 to find that 'NOA is a successor company to OA at least for the purposes of recovery of State aid arising prior to the [splitting]' (point 183 of the contested decision), it is appropriate to make clear the legal effect of that judgment in this case.

133 Contrary to the Commission's allegations before the General Court, that judgment can only be accepted as having the force of *res judicata* as regards recovery of the aid covered by the Decision of 11 December 2002, since the established failure to fulfil obligations related precisely to the failure to implement that decision.

134 In particular, as regards the finding that there was financial continuity between OA and NOA for the purposes of recovery of the aid at issue prior to the splitting, even if the relevant facts which could be taken into consideration are essentially the same, whether for the recovery of the aid required by the Decision of 11 December 2002 or for the recovery of the aid granted to OA prior to the splitting, as required by the contested decision, all the elements are not, however, strictly identical. The difference rests in the fact that the transfer of assets from OA to NOA, in the flight operations sector, by detailed arrangements which made recovery of the aid granted to OA impossible from NOA, took place after the adoption of the Decision of 11 December 2002, but prior to the initiation of the formal investigation procedure which led to the adoption, on 14 September 2005, of the contested decision.

135 However, the time of the transfer of the assets to the new company is among the criteria which may, to varying degrees according to the case, be taken into account. Indeed, it is clear from the case-law that, in order to determine whether the obligation to recover aid paid to a company in difficulty can be extended to a new company to which the former company has transferred certain assets, where that transfer gives rise to the conclusion that there was financial continuity between the two companies, the following elements may be taken into consideration: the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and, lastly, the economic logic of the transaction (*Italy and SIM 2 Multimedia* v *Commission*, paragraphs 78, 80 and 85).

136 In this case, it is therefore necessary to determine whether, taking account of the factual context specific to the present proceedings, the Commission could, without exceeding the limits of its discretion, transpose, in the contested decision, the reasoning followed by the Court of Justice in the judgment of 12 May 2005 to conclude that there was financial continuity between OA and NOA for the purposes of recovery of the aid at issue.

137 As regards, in particular, the criterion, the content and scope of which will be made clear later (see paragraph 146 below), relating to the time of the transfer of the assets, it is sufficient at this stage to recall that, in the case that gave rise to the judgment of 12 May 2005, the transfer of assets of the company OA, which was in difficulties, to the new company NOA, in such a way as to make recovery of the aid covered by the Decision of 11 December 2002 impossible from the former company, had taken place after the adoption of that decision (see paragraph 134 above). In *Italy and SIM 2 Multimedia* v *Commission*, paragraph 77, and Case C-277/00 *Germany* v *Commission*, paragraph 71, on which the analysis expounded in the judgment of 12 May 2005 is impliedly based (see paragraphs 143 and 144 below), the transactions of 'evasion' alleged by the Commission had been carried out either during the formal investigation, or at a time when the competent national authorities were aware of the Commission's intention to initiate an investigation.

138 In this case, it is appropriate to observe that the order to provide information, as regards all the measures connected with OA's restructuring and privatisation, capable of involving evidence of aid, had been addressed to the Hellenic Republic on 8 September 2003. The Hellenic Republic and OA could therefore hardly be unaware, at the time of NOA's formation, that the measures in favour of OA prior to the splitting could be the subject of a Commission investigation and that they were a continuation of certain earlier aid, referred to in the Decision of 11 December 2002, accorded to OA in the form of the Hellenic Republic's forbearance in respect of the non-payment of tax and social security contributions.

139 In those circumstances, in view of the similarity of the factual context, the analysis accepted by the Court of Justice in the judgment of 12 May 2005 according to which, in order to restore a situation of undistorted competition in the economic sector concerned, the obligation to recover the aid paid to OA could be extended to NOA, to which OA's most profitable activities had been transferred, applies also, for the same reasons, as regards the aid prior to the splitting at issue in this case.

140 In that regard, this Court cannot accept the interpretation of the judgment of 12 May 2005 advocated by the applicants, which submit that the Court of Justice did not find that NOA was OA's successor for the purposes of recovery of the aid.

141 In fact, in the judgment of 12 May 2005, paragraphs 33 and 34, the Court of Justice accepted the Commission's argument that the operation which consisted of the transfer to NOA of the assets of OA's flight operations sector, free of all debts, by structuring that operation in such a way as to make it impossible, under national law, to recover debts of the former company OA from the new company NOA, had 'created an obstacle to the effective implementation of [the] Decision [of 11 December 2002] and to the recovery of the aid by means of which the [Hellenic Republic] had supported the commercial activities of that company' and '[t]he purpose of that decision, which aim[ed] to restore undistorted competition in the civil aviation sector, [had] thus [been] seriously compromised'.

142 By drawing attention to the necessity to restore the competitive situation in the civil aviation sector, the Court thus designated NOA, implicitly, as the effective recipient of the aid granted to OA and covered by the Decision of 11 December 2002, since that aid to the former airline OA had benefited the flight operations sector transferred to NOA.

143 Indeed, in the light of the Opinion of Advocate General Geelhoed ([2005] ECR I-3878, points 28 to 36), the judgment of 12 May 2005 must be understood as finding that there was, for the purposes of recovery of the aid required by the Decision of 11 December 2002, financial continuity between OA and NOA as regards the flight operations sector. Consequently, the new airline NOA could, in principle, in its capacity as the undertaking enjoying the effective benefit of that aid, be the subject of a national procedure to recover the aid referred to in the abovementioned decision, in order to restore undistorted competition in the economic sector concerned.

144 In support of his analysis, Advocate General Geelhoed relied, in particular, on the judgment in *Italy and SIM 2 Multimedia* v *Commission*, in which the Court of Justice held that the fact of permitting an undertaking in difficulty to create, during the formal inquiry into the aid which it received, a subsidiary to which it then transferred its most profitable business activities would amount to accepting that any company may remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of the aid of its effect in whole or in part. To prevent the effectiveness of the decision from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms (point 33 of the Opinion).

145 In this case, the Hellenic Republic's and NOA's argument seeking, in essence, to challenge the fact that OA's main assets — which related to the flight operations sector — were transferred to NOA, free of most of the liabilities, and by arrangements which made recovery of the aid from that company impossible, tend, in fact, to put in issue the analysis on which the Court of Justice relied in its judgment of 12 May 2005. Indeed, contrary to the applicants' allegations, the principal relevant elements of fact and law already taken into consideration in that judgment have not changed in this case. In particular, whilst it is correct that, in that judgment, the Court noted that the assets of the flight operations sector had been transferred to NOA 'free of all debts',

that finding — based on the information which had been provided to it by the parties — is explained by the fact that the Court was not called upon, as part of the action before it for failure to fulfil obligations, to examine in detail all the arrangements in the restructuring of the Olympic Airways Group, particularly as regards the transfer of a very small part of the liabilities to NOA, since all the long-term debts and 90% of the short-term debts remained with OA. In that context, the fact, relied upon in this case by the applicants, that OA retained the ground-handling, maintenance and training operations but 10% of its short-term debts, that is to say, debts payable in less than one month, were transferred to NOA, as stated in the Moore Stephens report, cannot change the analysis arising from the judgment of 12 May 2005.

146 Moreover, it is appropriate to point out that, contrary to the applicants' allegations, the criteria laid down in the case-law for identifying the effective recipient of aid are objective. Indeed, it follows from the case-law that financial continuity can be established, for the purposes of the recovery of aid, on the basis of various objective elements such as the absence of any payment in consideration for the transferred assets, or of a price consistent with market conditions, or the objective fact that the effect of the transfer is to evade the obligation to repay the aid at issue (see, to that effect, Case C-277/00 *Germany* v *Commission*, paragraph 86; the judgment of 12 May 2005, paragraphs 32 to 34; and *Italy and SIM 2 Multimedia* v *Commission*, paragraph 78). In that regard, contrary to the applicants' allegations, it does not follow from the judgment in *CDA Datenträger Albrechts* v *Commission* that the presence of an intentional element is necessary to find that the obligation to repay aid has been evaded by the transfer of assets. Likewise, it is appropriate to observe that the criterion relating to the time of the transfer of the assets (see paragraphs 135 to 138 above) is also objective and does not imply the existence of an intention to evade. It must be understood as meaning that the time of the transfer is capable of constituting, according to the circumstances of the case, evidence of evasion.

147 In that context, the Court cannot accept the applicants' argument that the restructuring of the Olympic Airways Group and the transfer of the flight operations to NOA were required by the economic logic of a more effective recovery of the aid granted to OA through the privatisation of NOA.

148 In that regard, the purpose of the obligation to recover aid is to restore the competitive situation in the economic sector concerned, and not to enable the public administration to recover its debts (see, to that effect, Case C-277/00 *Germany* v *Commission*, paragraph 76). The economic logic of the asset transfer transaction must therefore be examined from the point of view of restoring the competitive situation in the sector concerned.

149 It follows therefrom that the subjective element relied upon by the applicants, consisting in the fact that the restructuring of the Olympic Airways Group and the formation of NOA, with a view to enabling the privatisation of NOA, among others, in the most favourable circumstances and with maximum profit, with the aim of ensuring the recovery of the aid through, in particular, the proceeds of the privatisation, is in any event irrelevant.

150 Finally, the present proceedings occur in particular circumstances, characterised by the fact that the restructuring of OA and the formation of NOA were not short-term transactions, intended to facilitate the privatisation. The transfer to NOA of the flight operations sector of the Olympic Airways Group was effected by legislation, derogating from the general law, and the entire capital of that new company was immediately vested in the Hellenic Republic. In those circumstances, in the absence of payment of any consideration, by a new acquirer, as long as the privatisation of the airline had not been concluded, there was no need to determine whether the amount of the aid

granted to OA prior to the hiving-off could be regarded as included in a purchase price consistent with market conditions (see, to that effect, Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 77, and Case C-214/07 *Commission* v *France* [2008] ECR I-8357, paragraphs 57 and 58).

151 For all those reasons, the Commission's finding that there was financial continuity between OA and NOA for the purposes of recovery of the aid at issue granted to OA before the hiving-off cannot be held to be vitiated by manifest error of assessment.

152 Moreover, the contested decision contains a sufficient statement of reasons. The Commission clearly set out, in its examination of the connection between OA and NOA, in points 178 to 183 of that decision, the reasons for which it considered that there was, particularly in the light of the judgment of 12 May 2005, financial continuity between OA and NOA for the purposes of recovery of the aid at issue granted prior to the hiving-off. In that regard, it is appropriate to observe that, contrary to the applicants' allegations, the appraisal of the economic logic of NOA's formation, carried out in this case by the Commission in order to determine the effective recipients of the aid granted prior to the hiving-off, must be distinguished from the examination of the compatibility with the common market of the restructuring itself (see paragraph 99 above). The lack of such an examination by the Commission does not reveal therefore any insufficiency in the statement of reasons for the contested decision.

153 It follows therefore that the pleas in law alleging manifest error of assessment and breach of the duty to state reasons for the decision must be rejected as unfounded.

2. *The aid granted to NOA (Article 1(1) of the contested decision) (Cases T-415/05 and T-416/05)*

154 The Hellenic Republic and NOA seek the annulment of the contested decision on the ground that the Commission found, in its Article 1(1), that unlawful aid was granted to NOA in the form of rentals, for the sub-leasing of aircraft, which were lower than those paid by OA and the Hellenic Republic under the head-leases. The applicants rely in that regard on two pleas in law alleging, respectively, breach of Article 87(1) EC and the insufficiency of, or defects in, the statement of reasons for the decision, as regards the examination of the conditions for applying Article 87(1) EC relating, first, to the conferment of an advantage in the light of the private investor test and, second, to the liability of the Hellenic Republic for the conduct in question of OA.

155 At the outset, the applicants challenge the taking into consideration, by the Commission, of the alleged financial continuity between OA and NOA for the purposes of the characterisation of the contested measures.

(a) The taking into consideration of the financial continuity between OA and NOA for the purposes of the characterisation of the contested measures

Arguments of the parties

156 The Hellenic Republic and NOA submit, as a preliminary point, that, in the contested decision, the Commission examined the measures in favour of OA and NOA

separately. In relying, in its defences, on the alleged financial continuity between OA and NOA — which implies, according to the Commission, that the measures adopted as regards NOA could not be assessed independently for the purposes of their classification as State aid — the Commission, in their submission, is attempting to substitute a new statement of reasons for the insufficient and erroneous statement of reasons for the contested decision. That new statement of reasons is therefore inadmissible.

157 Furthermore, the contradictions between the contested decision and the Commission's arguments before the General Court do not enable the statement of reasons for that decision to be understood. They thus adversely affect the rights of defence of the applicants which are forced to refute ambiguous and contradictory statements.

158 In any event, the Commission's new argument is not, they submit, supported by any evidence which could lead to the conclusion that there was financial continuity between OA and NOA.

159 In that context, the Hellenic Republic and NOA submit that the contested measures must be examined separately by reference to their respective addressees, and not on the basis of any alleged financial continuity between OA and NOA.

160 The Commission, supported in Case T-416/05 by Aegean Airways which adopts the Commission's arguments, makes clear that, in the contested decision, it examined the measures in question individually, whilst putting them in the general context of OA's restructuring of which they form part.

161 The Commission contends that the financial continuity between OA and NOA was established by the Court of Justice in the judgment of 12 May 2005. The splitting of the flight operations sector freed that sector of the high rents which burdened it. NOA's flight operations, were, according to the Commission, thus subsidised by OA, whose losses were definitively borne by the Hellenic Republic, through its forbearance as regards OA's debts to the State and the crediting of the special account. The measures in question should therefore be assessed in that economic context.

162 In particular, the persistent financial difficulties of both OA and NOA, in spite of the formal conversion of the Group, and the chronological proximity of the Decision of 11 December 2002 lead, in the Commission's submission, to the conclusion that the contested measures ensure the continuance in activity of their recipients and pursue the same aim as the earlier aid.

163 The intervener points out that the contested measures' compliance with the private investor test must be assessed taking into account the lead time for a return on the investment. It is therefore, in its submission, necessary to take into consideration the complete history of the grant of State aid to the Olympic Airways Group.

Findings of the Court

164 It is appropriate to note, at the outset, that, in the contested decision, the Commission, first, finds that there is, for the purposes of recovery of the aid prior to the splitting, financial continuity between OA and NOA (see paragraphs 68 to 153 above) and, second, characterises as State aid certain measures in favour of NOA or OA

accompanying the process of conversion of the Olympic Airways Group by Law No 3185/2003 with a view to its privatisation.

165 Those two questions are entirely distinct, as is clear from the above explanations (see, in particular, paragraphs 99 to 101 above). The conclusions relating to the question of whether, because of the financial continuity between OA and NOA, NOA also received the aid paid to OA before the splitting and can, as a result, be required to repay it are therefore irrelevant as regards the characterisation, in the light of Article 87(1) EC, of the aid granted directly to NOA after its formation.

166 The question of the characterisation of the new measures in favour of NOA must therefore be distinguished from the question, relating to recovery of aid, examined, for example, in paragraphs 71, 87 and 88 of the judgment in Case C-277/00 *Germany* v *Commission*, in which the Court of Justice held that the mere fact that a newly formed subsidiary had, through leasing the latter's premises, carried on the activities of its parent which had been placed in insolvent liquidation, and, although the Commission maintained that it had not obtained information enabling it to assess whether the rents were consistent with market conditions, cannot lead to the conclusion that the lessee enjoyed the competitive advantage linked to the aid granted to the lessor before the lessee's formation.

167 In this case, the contested measures in favour of NOA consist in the low level of rentals paid by it to OA and the Hellenic Republic for the sub-leasing of aircraft. The Commission maintains, in essence, that the context of those measures, characterised by the financial continuity between OA and NOA and by the Hellenic Republic's financial support to OA in order to ensure the continuation of the flight operations, can be taken into consideration to presume that those new measures in favour of NOA also constitute State aid.

168 In that regard, examination of the contested decision shows that the Commission undertook an individual examination, in the light of the conditions for applying Article 87 EC, of certain specific measures in favour of OA or NOA, including the level of rentals paid by NOA for the sub-leasing of aircraft (points 56, 57, 155 to 161, 186, 188, 191 and 193 of the contested decision). However, it is apparent from that decision that that separate examination of each of the measures in question, for the purposes of their characterisation, necessarily forms part of the general context of the conversion of the Olympic Airways Group consisting in the hiving-off of its flight operations and their being taken over by the new company, NOA, in accordance with the detailed arrangements laid down, particularly, by Law No 3185/2003. Indeed, in view, particularly, of the conclusions of the Commission's experts concerning the restructuring of the Olympic Airways Group in December 2003 (points 110 to 126 of the contested decision), the Commission analysed the nature of that restructuring, without however itself characterising it as State aid (points 178 to 183 of the contested decision) as has already been noted (see paragraph 101 above).

169 The Commission therefore maintains, correctly, that it is apparent from the contested decision that it examined the measures at issue in favour of NOA individually (see, in particular, points 186 and 188), whilst placing them in the general context of the Olympic Airways Group's restructuring of which they formed a part.

170 In those circumstances, contrary to the applicants' allegations, the Commission's argument that the fact that there was financial continuity between OA and NOA must be taken into consideration for the purposes of characterising the measures at issue in the light of Article 87(1) EC does not constitute a new statement of reasons intended to be substituted for the statement of reasons for the contested decision. That argument cannot therefore be declared inadmissible.

171 In addition, it is appropriate to note that, contrary to the applicants' allegations, the taking into consideration by the Commission of the financial continuity between OA and NOA is not in itself inconsistent with the individual examination of the measures at issue and does not render the statement of reasons for the contested decision incomprehensible.

172 Moreover, as regards the taking into consideration of the financial continuity between OA and NOA for the purposes of characterising the measures at issue in the light of the provisions of Article 87 EC, it is appropriate to point out at the outset that, according to settled case-law, the Commission must always examine all the relevant features of the transaction at issue and its context, particularly in applying the private investor test (Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 270; see, also, Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraph 59).

173 In this case, the result is that the taking into consideration of the fact that there was financial continuity between OA and NOA does not relieve the Commission of its duty to ascertain, in the light of all the relevant features, whether the conditions for applying Article 87(1) EC were met.

174 In this case, the Commission was entitled to take account of the context of the measures at issue, characterised, first, by the grant to the former airline OA of restructuring aid and of unlawful aid intended to enable it to continue its flight operations and, second, by the restructuring of the Olympic Airways Group in 2003 with a view to its privatisation and by the nature of the link between OA and NOA. However, the Commission was none the less required to examine whether, in the light of the private

investor test, the measures at issue corresponded to normal commercial transactions in a market economy and were thus distinguishable from the abovementioned unlawful aid (see, to that effect, Case T-98/00 *Linde* v *Commission* [2002] ECR II-3961, paragraphs 43 to 54).

175 In those circumstances, the finding that there was financial continuity between OA and NOA cannot lead to the presumption that, having regard to the persistence of the financial difficulties of those two companies after the splitting, the new measures in favour of NOA, examined in the contested decision, constitute the logical continuation of the earlier abovementioned aid and, therefore, also come within the category of State aid.

176 In that regard, the Court cannot accept the Commission's argument based on the judgment in Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 171 and 176. Indeed, contrary to the circumstances that gave rise to that judgment, in which the measures in question consisted of a series of successive capital injections by a public undertaking in its subsidiary, it is appropriate to note that, in this case, the aid allegedly granted by OA and the Hellenic Republic to NOA, in the form of rentals for the sub-leasing of aircraft much lower than those paid by OA and the Hellenic Republic under the head-leases, is by its very purpose and nature entirely different from the State aid to OA in question in the Decision of 11 December 2002 and has no connection with the latter aid.

177 Moreover, it is important to point out that, according to paragraph 170 of the judgment in *BP Chemicals* v *Commission*, even where the measure in question follows

measures of the same nature classed as State aid, that fact does not rule out, a priori, that the said measure satisfies the market economy private investor test. It is in any case for the Courts of the European Union to ascertain whether, having regard to the relevant features, that measure can reasonably be severed from the earlier aid measures and be regarded, for the purposes of applying the private investor test, as an independent measure.

178 In this case, it was therefore for the Commission to examine whether the alleged aid to NOA fulfilled the conditions for applying Article 87(1) EC, by relying not only on their context, and particularly the chronological succession of those measures by reference to the earlier aid granted to OA and the continuing financial difficulties of the undertakings concerned, but on all the relevant elements of fact and law.

(b) The private investor test

— Arguments of the parties

179 The Hellenic Republic and NOA rely, first, on manifest error of assessment as regards the application of the private investor test and, second, on a defective statement of reasons for the contested decision on that point.

180 As regards manifest error of assessment, the Hellenic Republic and NOA claim that the sub-leasing of aircraft, for rentals lower than those paid under the head-leases, did not confer on NOA any advantage which it would not have obtained under normal market conditions.

181 In this case, they submit that OA's conduct was consistent with that of a private investor who — confronted by the rapid fall in rents following the crisis on the international air transport market following the events of 11 September 2001, and bound by the obligation to pay the rents stipulated in head-leases even if it resiled unilaterally from those contracts — would have reduced the losses suffered by about 50 % by agreeing to sub-lease its aircraft for rentals lower than those which it was paying under the head-leases concluded before that crisis in a different economic environment.

182 Moreover, to determine whether the sub-leases conferred an advantage on NOA, the Commission should have taken account of all the transactions concluded between OA and NOA, which it failed to do in the contested decision. However, through the sub-leases in question, OA was freed from the costs relating to the protection, maintenance and repair of the aircraft. In addition, it provided aircraft maintenance and repair services to NOA at market prices (see points 163 and 164 of the contested decision). Of the total amount of EUR 99 million paid by NOA to OA in 2004 for maintenance services, EUR 44 441 850 relates to the 18 aircraft sub-leased by OA to NOA.

183 Furthermore, the applicants complain that the Commission failed to compare the rentals paid by NOA with market rents. In addition, they challenge the Commission's statement that NOA would not in all probability have found lessors in market conditions. That statement is not supported by any evidence and is belied by the facts. In

particular, following the events of 11 September 2001, the supply of aircraft greatly exceeded demand and rents were exceptionally advantageous. At the end of 2003, there was no demand. From the middle of 2004, it began to grow, which entailed an increase in rents of up to 30 % at the end of 2004 without their attaining the price levels of September 2001. In this case, in June 2004, NOA however concluded a lease of a B 737-300 aircraft for a rent of USD 130 000 for three years, which corresponded to market price.

184 As regards the leasing contracts of four Airbus A 340-300 aircraft, the Hellenic Republic and NOA point out the distinction between, on the one hand, the sub-leases of those aircraft to NOA and, on the other, the Hellenic Republic's decision to exercise its right to substitute itself for OA in those contracts, because the lessors threatened to require the immediate satisfaction of all the guarantees accorded by the State, in the sum of EUR 200 million, and there was a risk of the aircraft being repossessed from OA by the lessors. NOA received no benefit from that substitution of the Hellenic Republic for OA in the leasing contracts.

185 The Commission, supported in Case T-416/05 by Aegean Airways, submits that, following the creation of NOA out of OA, the sub-leasing of aircraft to NOA by OA, for rentals substantially lower than those paid under the head-leases, freed NOA of part of its operating costs, which were thus financed by OA and, ultimately, because of the latter's losses, by the Hellenic Republic. The contested decision refers to the losses thus suffered directly by OA and the Hellenic Republic (point 186) and indirectly by the Hellenic Republic (points 189 and 191). In those circumstances, the measure at issue does not, in the Commission's submission, pass the private investor test.

186 First, it submits that the private investor test takes account of the effect of the measures in question on the recipient, by requiring it to be ascertained whether they confer a benefit on the recipient which it would not have obtained under normal market conditions.

187 However, in this case, the Greek authorities did not send the Commission the necessary evidence in the course of the formal investigation procedure, in spite of the Commission's order to provide all information material to the examination of the conversion of the Olympic Airways Group. Under Article 13(1) of Regulation No 659/1999, the service of that order on the Greek authorities transferred the burden of proof to them. Since the information provided by the Greek authorities was very deficient, the Commission instructed experts to carry out inspections on site. In those circumstances, the Commission alleges that the contested decision's legality can only be determined on the basis of the evidence available to it at the time of the decision's adoption.

188 Second, the Commission submits that, in any event, even if the information relating to market rents had been transmitted to it in time, the comparison of the amounts of the rentals paid by NOA with market rents was immaterial. Indeed, it was not realistic to make such a comparison since NOA would not, in all probability, have found other lessors willing to lease aircraft to it without the Hellenic Republic being involved.

189 That analysis is supported by the fact that the head-lessors, concerned by the fate of their debts from OA, threatened to resile from contracts concluded with that company, to sell the aircraft and to call for the immediate satisfaction of the guarantees which they had required and which imposed more onerous conditions in that regard. Nor is that analysis undermined by the fact that NOA succeeded in concluding an

operating lease in June 2004, since that company remained, according to the Commission, under the Hellenic Republic's 'protection'.

190 By its subrogation to OA in the four leasing contracts and the agreed lowering of the leasing costs, the Hellenic Republic thus enabled the continuation of the leases and, therefore, the continuation of the flight operations. It is not therefore necessary to calculate the difference between hypothetical rents and the rents paid by NOA to OA and the Hellenic Republic.

191 Moreover, the Commission points out that, in the contested decision, it confined itself to classifying as aid granted to NOA the agreed lowering of the costs of leasing aircraft by OA and the Hellenic Republic, without expressly quantifying that aid.

192 In those circumstances, as regards, in particular, the four aircraft sub-leased to NOA by the Hellenic Republic, the Commission, contrary to the applicants' allegations, did not ignore, in the contested decision, the difference between the consideration provided for in the leasing and sub-leasing contracts respectively. However, that distinction is relevant only to calculate the amount of the aid and it was not necessary to refer to it to establish that a part of the rents was borne by the State.

193 The Commission makes clear that the sums of EUR 37 million and EUR 2.75 million referred to in Article 1(1) of the contested decision do not necessarily correspond to the aid, but indicate the amount of the losses suffered by OA and the Hellenic Republic respectively. The amount of the aid will have to be defined, according to the

Commission, in discussions between it and the Greek authorities, in compliance with the principle of genuine cooperation enshrined in Article 10 EC. It cannot be ruled out that that amount will be greater than that of the abovementioned losses.

194 Having regard to all those matters, the contested decision, in the Commission's submission, is sufficiently reasoned as regards the grant to NOA of a benefit resulting from the level of rentals (points 186 and 188). It was not therefore necessary to quantify the aid when comparing the rentals paid by NOA to market prices. In any event, the Greek authorities did not provide the Commission with the information necessary for that purpose.

195 In Case T-416/05, Aegean Airways, intervening in support of the Commission, denies that OA's and the Hellenic Republic's conduct complied with the private investor test on two grounds. First, it contends that a private investor would have preferred to sub-lease the aircraft in question to a sound airline, imposing on it the conditions in force on the market in order to ensure the prompt payment of rents, rather than to NOA, in respect of which there was no possibility of enforcing execution. Finally, no private investor would agree to separate itself from its sole potentially profitable sector of activity.

196 Second, the intervener maintains that the consequences of continuing an aircraft lease, concluded at a high price and for a long term when the environment is favourable, is a usual commercial risk which airlines assume. Consequently, since, according to the intervener, NOA succeeded to OA and belongs to the same group, the mere fact that it did not have to pay high rents constitutes State aid equal to the difference

between the rents paid under the head-leases and those paid under the sub-leases, without the need to compare the rentals paid by NOA to market prices.

197 In addition, Aegean Airways expresses doubts as regards the conformity of the rentals paid by NOA with market prices. It states that, under a contract dated 14 December 2006, it is paying a rent of EUR 700 000 to an aircraft leasing company, for the lease of an aircraft, the market value of which is about 50 % less than that of an aircraft of the type of those which NOA rented.

Findings of the Court

198 After determining the aid at issue as well as the questions raised by the parties' arguments, it will be appropriate to examine the relevant features of the case for the purposes of applying the private investor test before addressing the question of the allocation of the burden of proof in relation to the parties' compliance with their procedural obligations in the administration procedure.

— Determination of the aid at issue

199 It is expressly stated in Article 1(1) and in the grounds of the contested decision that the Commission concluded only that the following constituted State aid, first, the acceptance by OA, during 2004, of rents for the sub-leasing of aircraft to NOA lower than those paid by OA under the operational head-leases (see, in particular, points 158

and 186) and, second, the acceptance by the Hellenic Republic of rents lower than those which it paid under leasing contracts, from the date of its subrogation to OA in those contracts until May 2005, the date of the inspection on site carried out by the Commission's experts (see, in particular, points 160 and 186). The contested decision does not refer expressly to the losses borne by OA under the leasing contracts prior to the subrogation of the Hellenic Republic and under the operational head-leases from 12 to 31 December 2003 and from 1 January to 14 September 2005, the date of the contested decision's adoption. Nor does it refer expressly to the losses suffered by the Hellenic Republic from May to 14 September 2005. That reading of the contested decision is confirmed by Case C-419/06 *Commission* v *Greece*, paragraph 42, in which the Court of Justice stated that the amounts 'of the payments in respect of the sub-leasing of aircraft … were set' in Article 1(1) of the contested decision, which refers specifically to the losses borne by OA in 2004 and by the Hellenic Republic up to the month of May 2005.

200 In the contested decision (see, in particular, points 186 and 188 and Article 1(1) of its enacting terms), the Commission, in reliance on the Moore Stephens report, based the decision solely on the finding of the losses borne by OA and the Hellenic Republic by sub-leasing aircraft to NOA for rents considerably lower than those paid under the head-leases. In that regard, the applicants do not dispute that those losses arising from the differences between the head-rents and the rents paid by NOA reached, as regards OA for the sub-leasing of aircraft to NOA in 2004, a total sum of EUR 37.6 million, that is 55 % of the amounts of the rents paid under the head-leases. As regards the losses borne by the Hellenic Republic, they reached, according to the findings of the Commission's experts, a total amount of between EUR 250 000 and EUR 350 000 per month for each of the four aircraft which it sub-leased to NOA, after substituting itself for OA in the leasing contracts. The difference between the rents paid by NOA for those four aircraft and those paid by the Hellenic Republic under the

leasing contracts thus reached, according to the Commission, up to May 2005, a total sum of EUR 2.75 million, which is not denied by the applicants.

201 As regards the sub-leasing of aircraft by OA to NOA, it is apparent from the Moore Stephens report and from the contested decision (see, in particular, point 155), and it was confirmed by NOA at the hearing that it sub-leased at the outset, on its formation, 23 aircraft from OA. That number then fell to 22 following the non-renewal of an operational lease between OA and the head-lessor on its expiry in March 2005.

202 For those 22 aircraft, sub-leased by OA to NOA, it is apparent from the contested decision and from the Moore Stephens report, and it is common ground that 18 of those aircraft were held by OA under an operating lease, and 4 under leasing contracts. It is apparent from the abovementioned report, and was confirmed by the parties at the hearing, that the Hellenic Republic substituted itself for OA on 17 December 2004 as regards 2 of those leasing contracts and in April 2005 as regards the 2 others.

— Determination of the questions at issue in the light of the contested decision's content and the parties' arguments

203 In that factual context, the Commission confined itself to comparing, in the contested decision, the rents paid by NOA for the sub-leasing of aircraft to those paid under the head-leases. The lack of any comparison between the rents at issue paid by NOA and rents paid on the market is confirmed by the Moore Stephens report. Indeed, in that report, on which the Commission relied in the contested decision, the experts state that, in the time available to them to carry out their work, they were not in a position

to undertake an independent assessment of the level of rents on the aircraft leasing market.

204 Before this Court, the Commission admits however that the amounts of the aid do not correspond to the amounts of the losses borne by OA and the Hellenic Republic referred to in Article 1(1) of the contested decision, but to the difference between the rents paid by NOA and market prices.

205 The applicants complain that the Commission made a manifest error of assessment and infringed the obligation to state the reasons for its decision by refraining, in particular, from comparing the rents paid by NOA to market prices, for the purposes of applying the private investor test.

206 The Commission does not deny that conditions on the aircraft leasing market changed considerably between the date when the head-leases were concluded, prior to the events of 11 September 2001, and the relevant period in this case. In that regard, it takes no position on the report entitled 'Study of the level of market rents in relation to NOA', dated 15 November 2005, by the consultancy 'Aviation Economics' at NOA's request. Nor does it cast any doubt on the applicants' allegations that OA was bound, under the head-leases, by the obligation to pay the amount of the rents stipulated, by way of compensation, if it unilaterally resiled from those contracts.

207 However, the Commission suggests that, in this case, the differences established in the contested decision between the rents paid under the head-leases and those paid

by NOA show a reduction of the costs of leasing aircraft accorded by OA and the Hellenic Republic in favour of NOA. The decisive factor is 'the absorption of those differences in rents by a company in difficulty bound to repay aid'.

208 In that regard, contrary to the applicant's allegations (see paragraph 32 above), the Commission's argument that NOA's flight operations were subsidised by OA whose losses were in the end made good by the Hellenic Republic, which thus suffered indirect loss, is limited to expounding the argument advanced in the defence and cannot be regarded as a new plea in law.

209 Moreover, the Commission confines itself to contending, in essence, that it was not its duty to carry out a comparison between the rents at issue paid by NOA and market prices, in the absence of communication of the necessary evidence by the Greek authorities, in spite of its orders to provide information. In addition, and in any event, that comparison would be immaterial, according to the Commission, because NOA would not, in all probability, have found other lessors without the Hellenic Republic's involvement.

210 Having regard to those arguments of the parties, it is appropriate to determine the relevant features for the purposes of applying the private investor test as regards the measures at issue, before examining the parties' respective procedural obligations during the administrative procedure and the allocation of the burden of proof in this case.

— The relevant features of this case for the purposes of applying the private investor test

211 It follows from Article 87(1) EC that the concept of aid is objective, the test being whether a State measure confers an advantage on one or more particular undertakings (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52).

212 In particular, in order to determine whether the measures in question can constitute State aid, regard must primarily be had to the effects of the aid on the undertakings favoured and not the status of the public or private institutions which grant it (Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 21).

213 It is necessary, therefore, to determine whether the measures in question confer on the recipient undertaking an economic advantage which it would not have obtained under normal market conditions (see *Linde* v *Commission*, paragraph 39, and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 207 and the case-law cited). The fact that the transaction is reasonable for the public authorities or public undertaking granting the aid does not dispense with the need for carrying out that review (see, to that effect, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 315; see also, to that effect, *Linde* v *Commission*, paragraphs 48 to 54).

214 It follows therefrom, as the Commission contends, that, even if it is accepted that 'absorbing the differences in rents' was more reasonable than resiling from the head-leases, the reasonable financial management of the aircraft by OA and the Hellenic Republic reducing losses through the sub-leasing of those aircraft to NOA and the consecutive supply of services to that company under market conditions would not

be sufficient to render that conduct compliant with the private investor test. It follows that, in the context of the present proceedings, contrary to the applicants' allegations, the mere fact that the Commission failed to examine, in the contested decision, all the alleged advantages accruing to OA from the sub-leasing of its aircraft to NOA cannot lead to the conclusion that the Commission misapplied the private investor test.

215 By contrast, the Hellenic Republic and NOA point out, correctly, the need to compare the rents at issue paid by NOA to OA and the Hellenic Republic with those of the market, for the purposes of applying the private investor test in accordance with the abovementioned case-law.

216 In that regard, the Court must reject the arguments of the Commission and Aegean Airways that such a comparison is immaterial. Indeed, first, it is clearly apparent both from the grounds and from Article 1(1) of the contested decision that the aid referred to in that decision does not consist in the sub-leasing, in itself, of aircraft to NOA by OA and the Hellenic Republic, but in the payment by NOA of rents lower than those paid by those sub-lessors under the head-leases or leasing contracts. The Commission's allegations that NOA was not in a position to rent aircraft on the market, without the Hellenic Republic's support, are therefore irrelevant in this case.

217 In that respect, the present proceedings raise questions different from those examined, for example, in Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraphs 30 to 32 and 41, in which the Court of Justice accepted the criterion based on the possibilities, for the beneficiary of a State guarantee, to obtain the loan on the capital markets without that guarantee. Indeed, in the case which gave rise to that judgment, it was the grant of the guarantee which was in question, whereas, in the

contested decision, the measures classified as aid concerned exclusively the level of the rents charged to NOA.

218 In this case, for the purposes of the determination of the measures at issue (points 186 and 188 of the contested decision), the Commission does not put in issue any lack of requirement by OA and the Hellenic Republic of sufficient payment guarantees on the part of NOA, in order to allow it to sub-lease aircraft. Nor does it complain that OA did not resile from the head-leases rather than sub-lease the aircraft to NOA.

219 Second, the Commission, which did not examine the restructuring of the Olympic Airways Group as such (see paragraph 101 above), does not accuse the Hellenic Republic of not having provided, on the formation of NOA, for the transfer of the head-leases and leasing contracts to that company. Consequently, Aegean Airways' argument that the fact that there was State aid to NOA arose purely from the fact that it avoided the usual commercial risk connected to the continuance of the head-leases is irrelevant.

220 Finally, in its determination of the measures at issue, the Commission does not put in issue, in the light of the private investor test, the decision to subrogate the Hellenic Republic to OA in the four leasing contracts. The Commission states that it is apparent from the Moore Stephens report that that decision had been adopted by the Hellenic Republic in order to avoid, both for OA and for itself as guarantor, the more onerous conditions that had been imposed by the financial institutions concerned (head-lessors) at the time of the splitting, because of the uncertainty as regards OA's and NOA's future. The Commission notes only that decision's character as being a derogation, in observing that, according to the experts, the adoption of

new legislation had been necessary to permit that transaction (see point 159 of the contested decision).

221 It follows from all those considerations that, even if the Commission's allegations — that, in essence, the sub-leasing of aircraft to NOA for rents lower than those paid under the head-leases was only made possible through the support of the Hellenic Republic — were well founded, it would not have relieved the Commission of the obligation to ascertain, in accordance with the private operator test, whether the rents paid by NOA were in fact lower than those which it would have paid under normal market conditions during the relevant period.

222 In fact, the detailed terms of the restructuring and the various support measures alleged by the Commission, which were not as such classified as State aid in the contested decision (see paragraph 101 above), represent only the context in which the alleged aid occurred, granted in the form of rents for the sub-leasing of aircraft lower than the rentals paid under the head-leases. That context cannot by itself give rise to a presumption, in the absence of any other credible evidence, that the rents paid by NOA for the sub-leasing of aircraft were lower than those on the market.

223 It follows that, in this case, contrary to the Commission's assertions, the private investor test required it to be ascertained whether the rents at issue paid by NOA corresponded to rents paid under normal market conditions during the relevant period.

— The allocation of the burden of proof and the respective procedural obligations of the Commission and Member State concerned

224 According to the case-law, it was for the Commission, in the contested decision, to put forward the evidence relating to the grant of new aid by comparing, in the circumstances of this case, the rents at issue paid by NOA to those of the market. In fact, it follows from the provisions of Article 88(2) and (3) EC that, in the absence of such a demonstration, the new measures in question cannot be regarded as State aid for the purposes of Article 87(1) EC (Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 23).

225 However, the application of that rule on the burden of proof is subject to compliance by the Commission and the Member State concerned with their respective procedural obligations in the course of the exercise by that institution of its powers to cause the Member State to provide it with all the necessary information (*Olympiaki Aeroporia Ypiresies* v *Commission*, paragraph 35).

226 In particular, it follows from the case-law that the Commission is empowered to adopt a decision on the basis of the information available when it is faced with a Member State which fails to comply with its obligation of cooperation towards that institution under Article 10 EC to provide information requested from it either for the purpose of assessing the compatibility of new or modified aid with the common market or of verifying whether aid previously approved has been properly applied. Before taking such a decision, however, the Commission must order the Member State to provide it, within the time-limit it lays down, with all the documentation, information and data necessary to carry out its review. It is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested that the Commission is empowered to terminate the procedure and make a decision, on the basis of the information available to it, on the questions whether or not aid has been granted and, if it has, whether or not that aid is compatible with the common market or a

decision that aid previously approved had been properly applied (see *Olympiaki Aeroporia Ypiresies* v *Commission*, paragraph 36 and the case-law cited).

227 The abovementioned procedural obligations are referred to and given specific definition in Articles 2(2), 5(1) and (2), 10 and 13(1) of Regulation No 659/1999.

228 It is also appropriate to point out that, under Article 6(1) of Regulation No 659/1999, '[t]he decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'.

229 Those procedural obligations are binding both on the Member State concerned and on the Commission in order to permit the latter to carry out its review on the basis of sufficiently clear and precise information while ensuring respect for the right of the Member State concerned to be heard. It should be pointed out that, according to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of European Union law which must be guaranteed even in the absence of any specific rules (see *Olympiaki Aeroporia Ypiresies* v *Commission*, paragraph 37 and the case-law cited).

230 It is in the light of those procedural principles that it is necessary to examine whether, in this case, the Commission was entitled, as it in essence contends, to presume that there was State aid on the basis only of information available to it or whether the application of the private investor test required it to pursue its investigations in order to be able to compare the rents at issue paid by NOA with those it would have paid under normal market conditions.

231 To that end, it is appropriate to examine the content of the order to provide information and of the decision to initiate the formal investigation procedure as well as the Hellenic Republic's observations produced before the Court.

232 In the first place, in the order to provide information, dated 8 September 2003, the Commission requested, under Articles 5 and 10 of Regulation No 659/1999, that it be sent all the information necessary to examine the measures connected to the restructuring and privatisation of the airline OA. It noted in that regard that, when it examines the compatibility of State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already examined in a prior decision.

233 It is thus apparent from that decision that the order covered, in the absence of notification of the privatisation procedure and of the new measures of restructuring OA intended to facilitate its privatisation, all the evidence linked to that restructuring and privatisation capable of including elements of State aid. The Commission demanded, in particular, to be sent NOA's business plan, its shareholding structure, details of its assets and financing, including liabilities, its legal and fiscal status, as well as detailed information relating to the possible liquidation of OA and its subsidiaries.

234 In the second place, in its decision to initiate the formal investigation procedure, dated 16 March 2004, the Commission examined, first of all, OA's financial situation in 2001 and in 2002, in the light of the audited accounts for those two accounting periods which it had obtained only in September and December 2003. The size of the losses suffered by OA confirmed the Commission's assessment, in the Decision of 11 December 2002, that the Hellenic Republic had become, in effect, the primary source of financing for that company and that without its support the airline would, in all probability, have had to cease its activities (points 17, 26 and 29).

235 As regards any new aid after the Decision of 11 December 2002, which alone is at issue in this case, the Commission found, in the decision of 16 March 2004, that OA and NOA were 'the same undertaking from the point of view of the Community rules [in respect] of State aid' (points 106 and 108).

236 As regards more particularly aircraft operated by NOA, the Commission confined itself to noting, in its detailed description of the situation, that NOA's conversion balance sheet, established in accordance with Law No 3185/2003 at the request of the Greek authorities by the consultancy Deloitte & Touche, showed that the ownership of 18 aircraft that belonged to OA or to Olympic Aviation had been transferred to NOA. In addition, as regards the sub-leasing of aircraft by OA to NOA, the Commission stated that Deloitte & Touche had explained that such sub-leasing meant that OA remained solely liable as regards the charterer and enabled NOA to receive, as was pointed out by the Greek authorities themselves, guarantees furnished by the State for the leasing of aircraft and other contractual obligations, particularly loan guarantees for the purchase of new aircraft and the relocation to the new airport at Spata, approved by the Commission in 1998 and 2000 as aid for the restructuring but declared incompatible with the common market by the Decision of 11 December 2002 (point 54 of the decision of 16 March 2004; see also paragraph 6 above). The Commission pointed out that, according to the government's advisers, the firm Kantor, it was significant that NOA commenced its activities from the end of 2003,

particularly 'in order to benefit from low rates for the purchase and chartering of aircraft, thus enabling it to improve and renew its fleet', and because OA 'had to confront significant difficulties to survive the winter season 2003/2004' (point 57).

237 Moreover, the Commission mentioned, in that decision of 16 March 2004, that, in its complaint, Aegean Airways had claimed that the transfer of assets from OA to NOA, leaving all liabilities with OA, constituted State aid. The Commission also stated that, according to the complainant company, while the charterers and financial bodies accepted the transfer of aircraft from OA to NOA, they would only do so, in all probability, against a guarantee from the State, which constitutes State aid (point 76).

238 The examination of the order to provide information and the decision of 16 March 2004 thus shows that the Commission did not at any time refer, even only impliedly, in those decisions, to the level of rents paid by NOA to OA for the sub-leasing of aircraft. Indeed, the order to provide information covers only, and very generally, the measures connected to the restructuring and privatisation of OA which were capable of constituting State aid. As regards the decision to initiate the formal investigation procedure, it covers exclusively, in the part dealing with the assessment of the measures at issue, the measures in favour of OA as well as the privatisation procedure, which was not examined in the contested decision, but was the subject of a different procedure which led to a Commission decision of 17 September 2008 approving the privatisation plan.

239 In particular, the sub-leases of aircraft by OA to NOA are mentioned only in the descriptive part of the decision of 16 March 2004, from the point of view, it is true, of the advantage resulting for NOA from guarantees furnished by the State to OA on the leasing of aircraft, declared incompatible by the Decision of 11 December 2002.

However, it is appropriate to point out that the sub-leasing itself of aircraft to NOA, in that context, is not classified as State aid in the contested decision which refers only to the level of the rents.

240 In those circumstances, it must be held that the decision to initiate the formal investigation procedure contains no preliminary assessment of the rents paid by NOA, with a view to determining whether they contained any element of aid, as required by Article 6(1) of Regulation No 659/1999.

241 However, in its comments of 11 June 2004 on that decision to initiate the formal investigation procedure, the Hellenic Republic particularly stated that the aircraft leased by OA were sub-leased to NOA at market price because of the damages which OA would have had to pay to the lessors if it resiled from the head-leases before they expired. Those sub-leases were only a short-term solution, since all the head-leases (except a small number of them about to expire) would have to be taken over by NOA in the future. On the other hand, the four aircraft under leasing agreements would continue to be sub-leased to NOA at market price.

242 In addition, it is apparent from the Moore Stephens report that, at the time of the investigations on site, NOA's management justified, to the Commission's experts, the differences between, on the one hand, the rents paid by NOA for the sub-leasing of aircraft and, on the other, the rents paid by OA under the head-leases and by the Hellenic Republic under the leasing contracts, claiming that the rents for sub-leasing corresponded to market prices and that NOA could have leased aircraft from other lessors if those sub-leases had not been offered to it at market price.

243 Moreover, it is accepted that the Hellenic Republic transferred all the necessary information on the head-leases and sub-leases in question, particularly the rents stipulated. It only declined to provide any evidence relating to the level of rents in normal market conditions during the relevant period.

244 However, it is not apparent either from the order to provide information or from the decision of 16 March 2004 or from other material in the Court file, and the Commission does not anyway maintain that it put in issue, in any way whatsoever, during the administrative procedure, the level of rents paid by NOA, in the light of market conditions, or requested the Hellenic Republic to provide additional information in that regard.

245 It is however noteworthy that, in its comments of 26 October 2004 on the order to suspend all aid measures, the Hellenic Republic pointed out that, since its comments of 11 June 2004, it had not been informed of any new investigation on the part of the Commission and had received no request for additional information concerning those comments.

246 In those circumstances, in default, in the administrative procedure, of, first, any express putting in issue of the level of rents paid by NOA and, second, any request for information relating to the compliance of those rents with market prices, the Hellenic Republic cannot be accused of not having provided sufficient information to the Commission to enable it to assess the measures at issue with knowledge of the facts.

247 Moreover, and in any event, it is appropriate to point out that the Commission does not maintain, before the Court, that the missing information was mainly held by the Hellenic Republic. It refers only to the information relating to market prices, which it could without difficulty obtain by undertaking a simple market study during the relevant period.

248 In that context, the Commission could not exempt itself from its obligation to prove that the rents at issue, paid by NOA for the sub-leasing of aircraft, did not correspond to market prices. It was for the Commission at the very least to provide some proof based on factual evidence of such a kind as to require the Hellenic Republic to provide additional explanations (see, by analogy, as regards proof of an undertaking's participation in a cartel, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 78 and 79).

249 Consequently, it was for the Commission, in accordance with its duty of careful impartial examination in the interest of sound administration of the fundamental rules of the Treaty on State aid, to pursue its investigations and to deepen its inquiry, following the Moore Stephens report, in order to establish whether the rents paid by NOA were consistent with the private operator test. To that end, it was for the Commission to serve on the Hellenic Republic an order to provide additional information on the level of the rents paid by NOA, stating, in accordance with Article 10(3) of Regulation No 659/1999, the nature of the information required, be it to commission an additional expert report to enable it to compare the levels of rents at issue with market prices.

250 In that regard, it is appropriate to point out that, by virtue of the requirements connected with respect for the rights of the defence, since the evidence was not forthcoming from the Greek authorities but collected by the Commission from third parties,

it could have been accepted by that institution in support of the finding that there was State aid only after it had put those authorities in a position of duly submitting their comments on that evidence (see, to that effect, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraphs 27 to 29, and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 29 and 30).

251 In this case, in the light of all the foregoing considerations, it is sufficient therefore to hold that the Commission failed, in the contested decision, to verify, as it was required to do by the private investor test, whether the rents at issue were lower than market prices. Indeed, the contested decision contains no finding to undermine the position advocated on that point by the applicant during the administrative procedure (see paragraph 241 above). Moreover, the detailed business plan of the experts, set out in the Moore Stephens report on which the contested decision is based, states that the investigations only covered the risk of sub-leasing aircraft to NOA 'for artificially low rents, even if those rents could have been equivalent to market prices'. However, it is important to note in that regard that, although the Commission may commission outside consultants, without albeit being bound to do so, it is not thereby exempted from assessing their work (Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 72).

252 It follows therefrom that, by relying only on the differences between, on the one hand, the rents paid by OA and the Hellenic Republic for leasing aircraft and, on the other, the rents paid by NOA for sub-leasing those aircraft, to find that there was the grant to that company of an advantage which it would not have obtained under normal market conditions, the Commission made a manifest error of assessment in applying the private investor test.

253 It follows that the plea in law alleging breach of Article 87(1) EC is well founded. Article 1(1) of the contested decision must therefore be annulled, without it being necessary to examine the pleas in law alleging default in the duty to state the reasons for the decision and that the State was liable for the measures at issue. Consequently, Article 2 of the contested decision must also be annulled, in so far as it requires recovery of the aid referred to in Article 1(1).

3. *The aid granted to OA*

(a) The early payment of the amount of the overvaluation of OA's assets transferred to NOA (Article 1(2) of the contested decision) (Cases T-415/05 and T-423/05)

254 The Hellenic Republic and OA challenge the contested decision in so far as the Commission found, in its Article 1(2), that illegal aid incompatible with the common market was granted to that company, the amount of which corresponded to the overvaluation of OA's assets transferred to NOA when that new airline was created.

255 The applicants plead breach of Article 87(1) EC and of the duty to state the reasons for the decision. In the alternative, the Hellenic Republic submits that, even if the measure at issue could be classified as State aid for the purposes of Article 87(1) EC, which it denies, that measure should have been declared compatible with the common market under Article 87(3)(c) EC. It submits that the contested decision is also vitiated by a breach of the duty to state reasons on that point.

Breach of Article 87(1) EC and breach of the duty to state the reasons for the decision (Cases T-415/05 and T-423/05)

— Arguments of the parties

256 The Hellenic Republic and OA submit that the Commission and its experts ignored the economic logic underlying the Olympic Airways Group's conversion, which they treated as a simple internal restructuring. They explained that the privatisation for which the Hellenic Republic opted from 2003 was based on separating the flight operations of the Olympic Airways Group and the formation of a new independent company, NOA, outside the Olympic Airways Group, with the aim of maximising its value and selling it immediately. That conversion was intended to enable the Hellenic Republic to recover as much as possible of its investment in OA in the form of aid for the restructuring paid over the course of the last 10 years.

257 In that context, the Commission confused the private investor test with that of the private creditor. Indeed, a private investor would evaluate the undertaking's chances of recovery and would not require the undertaking to be put into liquidation on the first default, without taking any account of its longer-term potential.

258 On the basis of the conversion balance sheets, NOA's share capital was fixed at about EUR 130 million. The Hellenic Republic therefore made payments in favour of OA of a total amount equivalent to that sum, more than half of which was used by OA for the payment of guarantees and covering other expenses linked to the redundancy of employees following the conversion.

259 Contrary to the Commission's allegations, that early payment conferred no advantage on OA, since its amount did not exceed the value of the assets of which that company was deprived. In addition, it was provisional, pending receipt of the proceeds from the sale of NOA and of the other companies leaving the Olympic Airways Group.

260 In those circumstances, the contested decision is vitiated by manifest error of assessment and breach of the duty to state the reasons for the decision as regards the grant of an advantage to OA and the application of the private investor test.

261 The applicants claim that, in the context of the conversion of the Olympic Airways Group, the assets transferred to NOA had to be valued at their market value. They observe in that regard that, whereas the assets transferred to NOA were valued by the Commission's experts at EUR 38.5 million, the value of the aircraft alone of which OA was deprived was put at more than EUR 120 million on the basis of a report by Airclaims.

262 In addition, the applicants challenge the absence of any right to compensation for OA for all its rights to slots in various airports, in particular at Heathrow (London, United Kingdom), where sales of rights by airlines had brought them around EUR 7 or 8 million per slot, for the bilateral contracts which it had concluded, as well as for its commercial brand and logo, which were universally well known.

263 In that regard, OA notes that goodwill of EUR 30 million, recognised in its conversion balance sheet, had been calculated for the purposes of the merger by absorption of OA's and its subsidiary Olympic Aviation's flight operations by Macedonian Airways, now

NOA, in accordance, in particular, with the provisions of Greek Law No 2190/1920 on public limited liability companies, as codified by Royal Decree No 174/1963 (FEK A 37; 'Law No 2190/1920') and Law No 3185/2003, as well as International Financial Reporting Standard No 3 'Business combinations' ('IFRS 3'). In particular, under Article 43(4)(b) of Law No 2190/1920 'an undertaking's goodwill, created on the sale or fusion of an entire economic entity, which is equal to the difference between the total purchase price and the real value of the assets, shall be recognised as the "goodwill of the undertaking" in respect of its intangible assets and shall be depreciated either in a lump sum or by instalments at a constant rate over several financial years, but the period of depreciation shall not exceed five years'. Furthermore, it follows from the Greek legislation that inputs in kind to a public limited company must be valued at their real value and not at their historic cost of acquisition.

264 OA adds that, while the valuation of the assets transferred to NOA did not correspond to their market value, the sale of NOA at less than market price would have involved State aid to the potential purchasers of NOA and disregarded the rights of OA's creditors.

265 During an attempt at privatisation of NOA which had led to the signature of a protocol agreement on 5 August 2005, NOA's value at 31 December 2004 was estimated by a private investor at a sum in excess of EUR 100 million, which was consistent with the accounting valuation made on 12 December 2003, after deduction of the losses suffered by NOA.

266 OA denies the Commission's allegations relating to the lack of an independent audit of the conversion balance sheets. Those balance sheets were entirely drawn up by a qualified auditor, in accordance with Law No 3185/2003.

267 As regards the valuation of NOA's debts, OA points out that the report accompanying NOA's opening balance sheet states that any difference between the debts appearing

in its opening balance sheet and the amounts finally recovered would be carried to the credit or debit of the accounts of OA or Olympic Aviation, so that NOA's net assets would not be affected. Furthermore, the applicants criticise the Commission for not having taken into account the expected revenue from the future sale of two aircraft already entered in OA's balance sheet.

268 Finally, as regards the Commission's statement that the contested decision leaves the amount of the overvaluation of the assets transferred to OA open to discussion, as a part of cooperation in good faith under Article 10 EC, the Hellenic Republic and OA point out the difficulties raised by the quantification of the alleged aid for the purposes of its recovery. They note that, where a debt is not for a liquidated amount, it is not enforceable under Greek law. They complain that the Commission did not reply to the evidence which the Greek authorities submitted to it by letter of 16 November 2005, including the Deloitte & Touche report, dated 27 October 2005, concerning a multitude of erroneous findings on the part of the Commission's experts relating to the quantification of the assets transferred to NOA. According to that report, the adjustments made by the Commission did not reflect the reality of the ownership structure and financial situation of NOA after the conversion, which was contrary to Law No 2190/1920 providing that its provisions could be disregarded in order to give a true picture of an undertaking's situation. The Commission's experts themselves point out that those adjustments 'do not necessarily include all those that would be required if an audit was carried out' (footnote 10 to the contested decision).

269 In addition, OA complains that the Commission failed to define the relevant markets or analyse the competitive conditions on those markets. The conclusion that the contested measure distorted competition is not only lacking in reasoning, but also erroneous. Indeed, 33 of the 38 Greek airports are served by OA on the basis of public

service obligations, without any competition, and about 30 of those airports are of no commercial interest.

270 The Commission submits that the early payment in question constituted, in itself, State aid. The applicants put forward no serious ground on which a private investor could base a firm realistic hope of obtaining a satisfactory return from that early payment, having regard to OA's particularly difficult situation, characterised by the grant of aid to that company over a period of years, the failure of attempts at restructuring and at sale, the persistence of negative results and the aggregation of debts and losses. OA's private creditors, such as the lessors of aircraft and the banks ABN Amro and Crédit Lyonnais, hastened, moreover, to obtain guarantees from the Hellenic Republic. In addition, it is apparent from the Moore Stephens report that the early payment in question was used to finance operating costs, such as the leasing by OA of aircraft sub-leased to NOA.

271 It was only in the alternative that the Commission examined, in the contested decision, whether the payment in question could be regarded as a form of compensation accorded by the State to OA for the assets which had been transferred to NOA.

272 In that regard, the Commission's experts found that the sum in question of EUR 130 million had been determined on the basis of data submitted to Deloitte & Touche by OA's management, without being evaluated by independent inspectors. In their report on NOA's financial statements for the financial year ended on 31 December 2003, the auditors, appointed by the Greek authorities, expressed their reservations as to the opening balance sheets of that company.

273 The Commission's experts estimated the value of the net assets transferred to NOA at EUR 38.5 million, after an adjustment, under reserves, of the balance sheet for the

flight operations sector. They relied on accounting data provided by the Greek authorities and used recognised accounting practices, particularly by deducting doubtful debts, the proceeds of future sales of aircraft, and goodwill, and by taking into account the total amount of the debts, depreciation of the cost of aircraft and provisions concerning certain receipts and expenses, particularly in respect of tax.

274 The Commission, supported by the intervener, denies that the conversion of the Olympic Airways Group had an accounting value of its own. The applicants misapplied the definition of the concept of 'goodwill' under accounting standards. According to IFRS 3, paragraph 51, 'goodwill' corresponds to the excess of the cost of acquisition over the acquirer's interest in the net fair value of the identifiable assets acquired and of the identifiable liabilities assumed. It is not therefore possible to speak objectively of goodwill in the absence of an open market transaction, when it is, as in this case, in the Commission's submission, a question of the simple internal restructuring of the Olympic Airways Group by the Hellenic Republic. In particular, contrary to OA's assertions, there was neither a real fusion nor purchase, since there was no market price, a necessary requirement for the existence of goodwill.

275 In addition, the accounting rules do not allow accounting for intangible assets the real value of which cannot reliably be estimated. In particular, it is not possible to determine the 'real picture of the conversion', if there is an artificial conversion balance sheet based on simple estimates by OA's management.

276 In the rejoinder in Case T-423/05, the Commission contends that, in the reply, OA explains for the first time that goodwill is made up of all the intangible assets (business name, airport slots), which is completely different from the definition given in

paragraph 51 of IFRS 3 and by the Greek legislation relied upon by OA. That argument was therefore raised too late.

277 As regards the sale price of NOA, relied upon by OA, the Commission points out that it would be fairer were it based on an actual sale, and not on arbitrary estimates, based on uncertified estimates, irrespective of the value of the aircraft, which are not an item in the balance sheet.

278 Finally, the contested decision is, in the Commission's submission, sufficiently reasoned. All the evidence taken into account by the Commission's experts, in accordance with the rules of proper reasonable management, is set out in the table in point 120 of that decision. That evidence is accompanied by comments (points 110 to 126), as is the Commission's legal assessment (points 197 to 201).

— Findings of the Court

279 It is common ground that, under Article 27 of Law No 3185/2003, the Hellenic Republic made early payment to OA in several instalments spread over the period from December 2003 to May 2004, from a special account, of a total sum of about EUR 130 million which, according to the Greek authorities, corresponded to the value of the assets transferred to NOA on its formation.

280 In fact, Article 27(1) and (5) of Law No 3185/2003 provided that all the companies' shares resulting from the conversion of the Olympic Airways Group would be vested without consideration in the Hellenic Republic, for the purposes of the privatisation of those companies, and that a special account of the Hellenic Republic, entitled 'Greek State — Olympic Airways Group Privatisation', would be credited with the proceeds of sale of the privatised companies in the Group. Under that article, in order to meet the necessary expenses of dismissing staff and covering the financial commitments of OA and Olympic Aviation during the period of conversion and winding-up, the special account would be debited with advances from the State, up to a sum corresponding to the nominal value of the shares in the new airline resulting from the conversion and vested in the Hellenic Republic.

281 In this case, it is expressly stated in Article 1(2) of the contested decision that the aid in question consisted only in the overvaluation, according to the Commission, of the amount of the assets transferred to NOA on its creation. The Commission estimated the amount of that aid provisionally at EUR 91.5 million. In the enacting terms of the contested decision, the Commission does not therefore put in issue the principle itself of early payment to OA of the total value of all the assets transferred to NOA.

282 It is true that the Commission points out, in point 196 of the contested decision, that it was contrary to the private investor test to advance about EUR 130 million to an undertaking, such as OA, which was in a very difficult financial situation, which had also just been deprived of its flight operations sector and whose tax and social security debts to the Hellenic Republic amounted, at the end of 2003, to EUR 522 million, while those debts continued to increase and the assets capable of realisation to repay them diminished. In that regard, the Commission, in reliance on the Opinion of Advocate General Mischo in Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, I-8720, points 32 to 43, points out that, in such a context, a private creditor, which would in this case also be OA's principal creditor and have little real chance of obtaining payment of its debts from OA, would have taken all lawful measures to obtain payment of the due debts or the fulfilment of its guarantees.

283 However, the Commission did not put in issue, in the contested decision, the Hellenic Republic's decision to convert the Olympic Airways Group in order to facilitate its privatisation, by transferring the assets of its flight operations sector to NOA, and by providing, in particular, for the early payment in question to OA, rather than requiring OA's immediate winding-up in order to recover at least a part of its debts from that company (see paragraphs 101 and 281 above). The Commission confined itself to finding that, in the absence of a profitable long-term outlook for OA, a private investor would not have agreed to a financial advance like the one paid to that company. The Commission does not however classify the early payment of compensation, as such, as State aid, in the grounds or in the enacting terms of the contested decision.

284 On the other hand, it is expressly stated in point 197 of the contested decision that the Commission classified as State aid the payment of the amount of the advance in question, in so far as that amount exceeded, in its view, the value of the assets transferred to NOA and could not therefore be regarded as compensation paid by the Hellenic Republic to OA for that transfer.

285 In particular, the Commission expressly accepts, in point 197 of the contested decision, that, while the sum of EUR 130 312 459 paid by the Hellenic Republic to OA from the special account corresponded to the value of OA's assets transferred to NOA, that transfer did not constitute State aid.

286 In the light of the clear content of Article 1(2) of the enacting terms of the contested decision, which is supported by the grounds of that decision, it is for the General Court to rule on the assertions relating to the valuation of the assets transferred to NOA for the purposes of calculating the amount of the compensation.

287 In that regard, the Court must examine whether the Commission's conclusion, in the contested decision, that the value of the assets transferred to NOA had been overstated, was supported by sufficient reasoning and not vitiated by manifest error of assessment.

288 The Deloitte & Touche reports, dated 29 November 2003, annexed to the opening balance sheet of NOA and to the conversion balance sheets of OA and Olympic Aviation, in accordance with Article 27 of Law No 3185/2003, state that those balance sheets — drawn up by that consultancy as qualified auditors, appointed under Article 27 — were drawn up in accordance with Greek accounting standards, including the principle of historic costs, save in so far as concerns, first, the valuation of the aircraft and engines belonging to the hived-off branches of OA and Olympic Aviation, which were valued by the specialist company Airclaims at their market value of 1 October 2003 and, second, the valuation of the goodwill. In the terms of those Deloitte & Touche reports, the goodwill was in fact valued by OA's management, in accordance with international practice, on the basis of the gross receipts of that company, of its recent results and of the interest shown in the procedures relating to its privatisation.

289 On the other hand, in the contested decision (see, in particular, points 120, 199 and 200), the Commission, relying on the Moore Stephens report, made adjustments based on their estimates, which included, as regards the aircraft, only their net book value, and had, in addition, deducted from the calculation of the compensation, among other things, the amount corresponding to the value of the intangible assets taken into account by the Greek authorities in respect of goodwill and the doubtful debts and the debt relating to the future sale of two aircraft already entered in OA's balance sheet.

290 In that regard, the applicants accuse the Commission, in particular, of having ignored the necessity, first, of valuing the aircraft at their market value and, second, of taking into account the goodwill generated on NOA's creation, as well as the expected

revenue from the future sale of two aircraft, in order to determine NOA's actual financial position. They also dispute the adjustments made by the Commission as regards doubtful debts.

291 As a preliminary point, it is appropriate to observe that, contrary to what the Commission's experts' conclusions set out in the contested decision (point 124) seem to suggest, the fact that Article 27 of Law No 3185/2003 provided for early payment of the compensation in question, up to a sum equivalent to the nominal value of NOA's shares, does not permit it to be assumed that the inputs of capital, constituted by the transfer of the assets of the Olympic Airways Group's flight operations sector, were overvalued, with a view to supporting OA, in great financial difficulties, during its conversion and winding-up. Furthermore, that same fact was not likely to prevent, in the determination of the value of NOA's share capital, the taking into account particularly, in accordance with the applicable accounting standards, of the market value of the aircraft transferred, as well as the value of the intangible assets recognised, in this case, in the conversion balance sheet of OA and the opening balance sheet of NOA in respect of goodwill, since that value could be reliably estimated.

292 In that context, it is appropriate to examine, in the light of the private operator test, the adjustments in question made by the Commission as regards, first, the exclusion of certain intangible assets from the calculation of the compensation, second, the Commission's challenge to the taking into account of the market value of the aircraft and, third, the exclusion of the revenue relating to the future sale of two aircraft.

293 First, as regards the various intangible assets taken into account in respect of goodwill, up to a sum of EUR 30 million, in the conversion balance sheet of OA and NOA's opening balance sheet, the Commission's assertion, in Case T-423/05, of the

inadmissibility of some of the applicant's arguments (see paragraph 276 above) must be rejected immediately.

294 In that regard, the reports of 29 November 2003, annexed to the conversion balance sheets of OA and Olympic Aviation and NOA's opening balance sheet list the intangible assets taken into account in respect of goodwill (see paragraph 296 below). In addition, the contested decision (point 110) expressly states that, according to the findings made by the Commission's experts, the sum of EUR 30 million in the conversion balance sheet of OA in respect of intangible assets corresponded to the valuation, by OA's management, of its business name, the logo (the Olympic rings) of the Olympic brand, its airport slots and bilateral agreements. In the decision to initiate the formal investigation procedure (point 59), the Commission had also noted that according to the Deloitte & Touche reports annexed to the abovementioned balance sheets that goodwill, 'that is to say an intangible asset, arising from the business name, airport slots, market share' had been calculated by OA's management and represented more than 20 % of the intangible assets of the undertaking.

295 In those circumstances, contrary to the Commission's assertions, OA's reliance, in its reply in Case T-423/05, on matters such as airport slots, the logo, the brand or the business name, as matters taken into account in respect of goodwill, cannot be regarded as a new plea in law. Indeed, it obviously comes within the extension of the argument between the parties at the stage of the administrative procedure, as well as the arguments advanced by OA in the application as regards the necessity to take the goodwill into consideration.

296 On the substance, it is apparent from the abovementioned reports of Deloitte & Touche, annexed to NOA's opening balance sheet and the conversion balance sheet of OA, that the assets taken into account by OA's management, in respect of goodwill, consisted of the business name and Olympic brand, the logo (the Olympic rings), slots which OA had at various airports, its bilateral agreements concluded with

non-member States of the European Union on aviation rights, as the applicants confirmed in reply to a question by the Court at the hearing, OA's reputation and market share.

297 In that regard, a distinction can be drawn, among the intangible assets mentioned above, between, on the one hand, the separable assets, which could be separated from the entity transferred and sold or transferred either individually or at the same time as a connected contract, asset or liability, which could be valued in a reliable manner, irrespective of the outcome of the planned privatisation, such as the airport slots, and, on the other hand, the non-separable intangible assets, the market value of which was not capable of being estimated reliably in the absence of a transaction, such as reputation or market shares, corresponding to goodwill generated in the sale of an undertaking or from its merger with another undertaking.

298 In the contested decision (see, among others, points 110 and 199), the Commission, adopting as its own the findings made in the Moore Stephens report 'using accountancy techniques and standards which are accepted both in Greece and internationally', refused to take into account all the various abovementioned incorporeal assets, transferred to NOA, by confining itself to stating that 'neither Greek accounting principles nor [generally accepted international accounting principles] allow internally generated intangible fixed assets or goodwill to be recognised on the balance sheet'.

299 Yet, the Commission does not deny that IFRS 3, which applies to business combinations, as set out in the annex to Commission Regulation (EC) No 2236/2004 of 29 December 2004 amending Regulation (EC) No 1725/2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Standards (IFRSs) Nos 1 and 3 to 5, International Accounting Standards (IASs) Nos 1, 10, 12, 14, 16 to 19, 22, 27, 28 and 31 to 41 and the interpretations by the Standard Interpretation Committee (SIC) Nos 9, 22, 28 and 32 (OJ 2004 L 392, p. 1), to which the parties refer before the General Court, which has been applicable since 31 March 2004 (paragraph 78 of IFRS 3) and could under certain circumstances be the subject of 'retrospective application' (paragraph 85 of IFRS 3), allows the acquirer

to recognise separately the identifiable intangible assets of the undertaking or entity acquired, where their fair value — that is to say, in essence, the amount which would have been paid in a transaction between well-informed parties acting in normal competitive conditions — could be measured reliably at the date of the acquisition (paragraphs 37, 45 and 46 of IFRS 3). In addition, under International Accounting Standard No 38 'Intangible assets', as amended following the adoption of IFRS 3 (IAS 38), the fair value of an intangible asset acquired in a business combination could normally be measured with sufficient reliability to be recognised separately from goodwill. Furthermore, International Accounting Standard No 22 'Business combinations', as set out in the annex to Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ 2003 L 261, p. 1), replaced by IFRS 3, already provided for separate recognition, at the date of an entity's acquisition, of the identifiable intangible assets the fair value of which was measured in a reliable way.

300 Moreover, the Commission does not dispute that Greek accounting standards allowed the acquirer to recognise, separately from goodwill, the separable intangible assets of the entity acquired, such as airport slots, where their value could be measured reliably.

301 As regards, among the intangible assets, those which were not separable and the fair value of which could not be determined reliably, in the absence, in this case, of an actual transaction, since, at the time of the payment of the advance in question, no precise prospect of the purchase of NOA by a private investor had yet materialised, the Court must approve the Commission's position according to which, in the absence of a transaction, the transfer of assets linked to NOA's flight operations sector, accompanied by the vesting of its shares in the Hellenic Republic, for no consideration, with a view to its future privatisation, cannot be assimilated to a purchase or merger capable of generating goodwill (see paragraph 297 above). In the absence of a precise material prospect of a transaction at that stage, the fact relied upon by OA, that NOA was created by fusion and absorption of the flight operations of OA and Olympic

Aviation by the former subsidiary Macedonian Airways, which was renamed NOA following that conversion, does not alter that analysis.

302 In that context, having regard particularly to IFRS 3, relied on by the parties (see paragraph 299 above), it was for the Commission to examine individually the various elements of the intangible assets in question, checking whether they were separable and whether their fair value could be measured reliably, and, if so, whether, in the light of the private investor test, they had to be excluded from the calculation of the compensation paid to OA.

303 However, it follows from the contested decision that the Commission — which moreover accepted at the hearing that some of the intangible assets, such as airport slots, could be sold separately and had their own market value — failed to examine individually the intangible assets in question and to set out, in the contested decision, the grounds for which it considered that the private investor test precluded, in this case, the intangible assets which were capable of being valued reliably irrespective of any transfer or fusion from being taken into consideration up to the amount of their fair value, for the purposes of calculating the amount of the compensation paid to OA. Consequently, the contested decision is vitiated in that regard by manifest error of assessment.

304 Moreover, and in any event, in the context of the creation of a new legally independent airline, to which all the assets connected with the Olympic Airways Group's flight operations sector were transferred, and since the Commission did not consider, in the contested decision, that the early payment of financial compensation to OA, for the

transfer of intangible assets to NOA, constituted, in itself, State aid, it should, at least, have given reasons, having regard to the private investor test, for its refusal to take into account all the intangible assets for the purposes of calculating the compensation.

305 In particular, in the abovementioned context, supposing even that the Commission were party to the argument that the hiving-off of the flight operations sector and the transfer of the corresponding assets to NOA had to be treated as a simple internal restructuring of the Olympic Airways Group, it should, in any event, have justified clearly and comprehensibly, having regard to the private investor test, the choice of the accounting rules on which it relied to exclude the intangible assets in question from the calculation of the compensation paid to OA.

306 However, whereas the Commission refers before the General Court, in particular, to IFRS 3 — which requires that business combinations be accounted for by applying the purchase method, according to which the acquirer recognises, in particular, the assets acquired, including those not previously recognised by the undertaking acquired (paragraph 15 of the standard) — by contrast, it relied exclusively, in the contested decision, on the accounting principle prohibiting an undertaking from recognising as an asset, in its financial statements, goodwill generated internally (IAS 38), while omitting, moreover, to specify the standard or standards on which it was relying.

307 The Commission thus failed to set forth, in the contested decision, in particular in the light of the standards applicable to business combinations, the reasons for which — although it was a question of valuing the assets in question, for the purposes not of their entry in OA's financial statements but of the determination of the amount to be paid to OA as compensation for the loss of its entire flight operations sector and corresponding assets, some of which could have been sold separately — it relied

on the rules governing the recognition of those intangible assets by the undertaking acquired.

308 Second, in the abovementioned context and for similar reasons (see paragraph 305 above), it must also be held that, in the contested decision (see, in particular, points 111 and 199), the Commission — ratifying the findings made in that regard in the Moore Stephens report which referred generally to generally accepted Greek and international accounting principles — did not state its reasons to the requisite legal standard, having regard to the private investor test, for taking into consideration, for the purposes of calculating the amount of the compensation, the net book value of the aircraft ownership of which was transferred to NOA, rather than their market value on 1 October 2003, which had led, according to the Airclaims report, to an increase of about EUR 43.2 million in the estimated value of those aircraft, compared with their net book value.

309 Third, the Commission's reliance, in the contested decision (see, in particular, points 114 and 199), on the Greek and generally accepted accounting principles which prohibit the entry, in an undertaking's annual accounts, of revenue linked to a sale not yet effected of an intangible asset which does not belong to that undertaking does not constitute a sufficient statement of reasons for the Commission's refusal to take into account, for the purposes of calculating the amount of the compensation, the net revenue expected from the current sale of two A 300-600 aircraft which were still entered in OA's balance sheet, pending the sale's completion. However, since the Commission did not put in issue the transfer to NOA of all OA's assets relating to flight operations or the early payment relating to compensation, it had to justify, in the light of the private investor test, the exclusion, from the calculation of the amount of the compensation, of the expected revenue from the sale of the two said aircraft in the sum of EUR 24.4 million.

310 In the light of all the foregoing considerations, the pleas in law alleging manifest error of assessment and failure to state the reasons for the contested decision must be held to be well founded, on the ground that the Commission excluded from the calculation of the compensation all the intangible assets which had been taken into account by OA's management in respect of goodwill. In addition, the contested decision is vitiated by a failure to state proper reasons on the ground that the Commission excluded from that calculation the revenue expected from the sale of two aircraft still entered in OA's balance sheet, and on the ground that it disregarded the valuation at their current market value of the 18 aircraft ownership of which was transferred to NOA.

311 Next, it is appropriate to hold that, as regards the doubtful debts, the Commission stated sufficient reasons, in the contested decision (see, in particular, points 112, 120 and 199), for their exclusion or adjustment for the purposes of calculating the amount of compensation paid to OA, by relying on the experts' conclusions pointing out, in particular, that, in the absence of provision for those debts in NOA's opening balance sheet, it was not prudent to enter such debts as NOA's assets. Moreover, the applicants' unsupported assertions that the debts in question were certain cannot lead to the conclusion that the Commission made a manifest error of assessment in deciding that the value of those elements should not be taken into account or that it had been overvalued. In addition, even if, as OA claims (see paragraph 267 above), the payment of the amount of the debts in question was guaranteed as regards NOA, that fact is irrelevant as regards the assessment of the amount of those debts repayment of which could reasonably be expected, at the time of the transfer of those debts to NOA, as assets linked to the flight operations sector.

312 Furthermore, contrary to OA's assertions, the contested decision is not vitiated by manifest error of assessment or failure to state proper reasons as regards the finding that the early payment of compensation the amount of which was overvalued was likely to distort or threaten to distort competition. Indeed, the Commission stated, in the contested decision (point 35), that OA was carrying on ground-handling,

maintenance and engineering services and that it was operating on the market for the supply of the services concerned. In that context, it pointed out that the grant of the alleged aid in question was capable of distorting competition with other European Union undertakings, in particular, following the deregulation of the ground-handling services market since 1996 (point 202). In accordance with Article 87(1) EC, the Commission thus established, to the requisite legal standard, a threat of distortion of competition justifying the classification as State aid, since the measure in question strengthens the recipient undertaking's position compared to other undertakings. In particular, it follows from the case-law that the fact that an economic sector has been liberalised at Community level is an element which may serve to determine that the aid has a real or potential effect on competition and between Member States (see Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraphs 56 and 57 and the case-law cited). In addition, contrary to OA's assertions, the fact that 33 of the 38 Greek airports were serviced by that company on the basis of public service obligations cannot rule out the existence of a competitive situation.

313 Moreover, as regards all the assets transferred to NOA which were the subject of withdrawal or adjustment by the Commission, other than the intangible assets taken into account in respect of goodwill, the 18 abovementioned aircraft and the asset relating to the future sale of two aircraft still entered in OA's balance sheet (see paragraph 311 above), the amount of the early payment which could be made to OA as compensation for those assets will have to be determined within the framework of the procedure for the recovery of the said aid in accordance with the duty of cooperation in good faith, on the basis of audited accounts, as the Commission claims.

314 Indeed, the Commission accepts that the adjustments made by its experts can form the subject of later discussion in the context of cooperation in good faith. It will be for OA, in the Commission's submission, to check the accounting for the assets concerned, under the supervision of the Greek authorities, and to suggest a concrete valuation of the assets transferred to NOA.

315 In that regard, it should be observed that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount (see *Spain* v *Commission*, paragraph 25, and Case C-419/06 *Commission* v *Greece*, paragraph 44).

316 In addition, in the judgment in Case C-419/06 *Commission* v *Greece* declaring that the Hellenic Republic had failed to fulfil its obligations under Articles 2 to 4 of the contested decision, the Court of Justice rejected the argument that the Commission had not provided a reliable method of calculation enabling the amount of aid to be recovered to be established (paragraph 42 et seq. of the judgment).

317 As regards, in particular, the overvaluation of OA's assets transferred to NOA, the Court held, in Case C-419/06 *Commission* v *Greece*, that the fact that the amount of that overvaluation, stated in Article 1(2) of the contested decision, was accompanied by the statement that it was a provisional estimate could not be interpreted as meaning that the contested decision lacked the precision necessary for the purposes of its implementation (paragraph 43).

318 In those circumstances, the Hellenic Republic's argument based on the national difficulties raised by the recovery of the aid at issue (see paragraph 268 above) must also be rejected. In that regard, it follows from the case-law that, where the execution of an order for recovery encounters a certain number of national difficulties, the Commission and the Member State concerned must respect the principle underlying Article 10 EC, which imposes a duty of genuine cooperation on the Member States and the Community institutions, and must work together in good faith with a view to overcoming those difficulties whilst fully observing the Treaty provisions, and in particular the provisions on State aid (Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 17; Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 24; and the judgment of 12 May 2005, paragraph 42).

319 It follows that the contested decision must be annulled in part for manifest error of assessment and failure to state proper reasons, on the ground that it excludes the taking into account of all the intangible assets in respect of goodwill, and for failure to state reasons on the ground that it excludes the taking into account of the revenue expected from the sale of the two abovementioned aircraft and on the ground that it accepts the taking into account only of the net book value of the aircraft transferred instead of their current market value. The complaints alleging manifest error of assessment and failure to state proper reasons must be rejected as regards the remainder.

Breach of Article 87(3) EC and failure to state proper reasons (Case T-415/05)

— Arguments of the parties

320 The Hellenic Republic submits, in the alternative, that the alleged aid constitutes, in any event, rescue aid which is compatible with the common market. Indeed, it submits that it fulfils or could easily have fulfilled all the cumulative conditions to which the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2; 'the 1999 Guidelines') make the compatibility of such aid subject.

321 The Commission, in the Hellenic Republic's submission, made a manifest error of assessment, in the contested decision (points 231 and 232), as regards the first two conditions for compatibility defined in the 1999 Guidelines.

322 As regards the first of those conditions, it is, the Hellenic Republic submits, possible to regard the early payment in question as a 'debt' which had to be repaid. It admits that interest had not been initially provided for on that debt. However, it could easily have been provided for if the Commission had informed the Hellenic Republic during the formal procedure, as it was bound to do, of its intention to examine the compatibility of the early payment in question with Article 87(3) EC, from the point of view of the 1999 Guidelines, following the request to that effect which was addressed to it, in the alternative, by the Greek authorities in their letter of 11 June 2004, which had been repeated in their letter of 3 November 2004.

323 As regards the second condition, the Hellenic Republic recalls that paragraph 24 of the 1999 Guidelines states:

'The rescue aid will initially be authorised for not more than six months or, where the Member State concerned has submitted a restructuring plan within that period, until the Commission reaches its decision on the plan. In duly substantiated exceptional circumstances and at the request of the Member State concerned, the Commission may extend the initial six-month period.'

324 However, in their letter of 11 June 2004 (paragraph 5.21) to the Commission, the Greek authorities stated that, if the Commission accepted that the amount of the early payment made to OA could constitute rescue aid, they would demonstrate that the restructuring measures provided for complied with the 1999 Guidelines.

325 In this case, the Hellenic Republic submits therefore that the time-limits laid down in the 1999 Guidelines were extended, since the Commission did not reply to that

request in due time, thus preventing the Greek authorities from complying with those time-limits.

326 Furthermore, in the contested decision (point 235), the Commission also misconstrued the Greek authorities' undertaking not to pay any additional aid to OA, confirmed in Commission Decision 94/696/EC of 7 October 1994 on the aid granted by Greece to Olympic Airways (OJ 1994 L 273, p. 22), approving restructuring aid (see paragraph 5 above). In fact, that undertaking covered only restructuring aid and not rescue aid. Moreover, it should thenceforth have been assessed on the basis of the new framework defined by the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2), which permitted, under certain conditions, the grant of new restructuring aid. The Commission thus based its decision on an erroneous legal basis.

327 Finally, the Commission disregarded its duty to state the reasons for its decision by failing to examine, in the contested decision, the three other conditions laid down by the 1999 Guidelines for accepting the compatibility of rescue aid with the common market.

328 The Commission, supported by the intervener, disputes those arguments.

— Findings of the Court

329 The burden of proof of the compatibility of aid with the common market, by way of derogation from Article 87(1) EC, rests, generally, on the Member State concerned, which must show that the conditions for that derogation are satisfied (*Olympiaki Aeroporia Ypiresies* v *Commission*, paragraph 34). To that end, it is for the Member State concerned to provide the Commission with all the evidence necessary to demonstrate the compatibility of the planned aid with the common market (Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20).

330 In this case, it is established that the advance in question was paid by instalments between the months of December 2003 and May 2004. Consequently, that measure's compatibility with the common market, in so far as it was State aid, had to be examined in the light of the conditions for authorising rescue aid set out in paragraph 23 of the 1999 Guidelines, which were applicable until 9 October 2004, since the new guidelines on State aid for rescuing and restructuring firms in difficulty of 2004 did not come into effect until 10 October 2004.

331 In that regard, the applicant's argument cannot establish that the first condition for authorisation defined in paragraph 23 of the 1999 Guidelines was fulfilled. In fact, the applicant has not shown that the advance in question was a debt, subject to a rate of interest at least comparable to the interest rates for loans to sound undertakings and, particularly, to the reference rates adopted by the Commission, as required by the said paragraph 23. In particular, the applicant has put forward no serious evidence leading to the assumption that the amount of the early payment had to be repaid by OA, plus interest, up to a sum exceeding the proceeds of the sale of OA, at the conclusion of the privatisation (see paragraph 280 above). On the contrary, its argument confirms that it was not a debt within the meaning of that provision, since the payment of interest was not provided for.

332 In those circumstances, since the applicant has not established that one of the cumulative conditions to which paragraph 23 of the 1999 Guidelines subject the Commission's right to declare rescue aid compatible with the common market was fulfilled, the Court must reject the applicant's complaint alleging manifest error of assessment on the ground that the Commission found that the advance in question was incompatible with the common market, irrespective of whether or not, first, the other conditions set out in paragraph 23 were fulfilled and, second, the Hellenic Republic had complied with the undertakings set forth in Decision 94/696.

333 Consequently, contrary to the applicant's assertions, the Commission did not infringe its duty to state reasons by failing to examine, in the contested decision, all the cumulative conditions set out in paragraph 23 of the 1999 Guidelines.

334 It follows that the pleas in law alleging breach of Article 87(3) EC and deficiencies in the statement of reasons must be rejected as unfounded.

(b) Execution of certain State guarantees (Article 1(3) of the contested decision) (Cases T-415/05 and T-423/05)

Arguments of the parties

335 The Hellenic Republic and OA challenge the classification as new aid concerning payments made by the State pursuant to guarantee obligations, consisting, first, in three

payments in partial settlement of the loan granted to OA by the bank ABN Amro (EUR 36.9 million), second, in the payment of a half-year's instalment of rent due under leases from OA for two Airbus A 340-300s (EUR 11.7 million) due on 29 July 2004, and, third, in direct financing to OA (EUR 8.2 million).

336 The applicants challenge, in that regard, the Commission's interpretation, in the contested decision (point 238), of Article 1 of the Decision of 11 December 2002, according to which the guarantees in question were considered to be incompatible with the common market. They allege that, had that been the case, the Commission would have required expressly, in that decision, the recovery of those guarantees. Moreover, the validity of the continuation of the guarantee obligations in question is supported by the fact that neither in the course of the procedure under Article 88(2) EC, which led to the judgment of 12 May 2005, nor in its correspondence following that judgment did the Commission raise the question of incorrect implementation of the Decision of 11 December 2002 as regards guarantees. Finally, OA submits that the contested decision is not properly reasoned as regards the statement that the Decision of 11 December 2002 entailed a change in the legal obligations arising from the guarantees in question.

337 In any event, even if it is conceded that the Decision of 11 December 2002 should be interpreted as meaning that the guarantees in question with regard to OA were amended, the Commission's inability to state that clearly in that decision, and during the entire period that followed, gives rise to legitimate expectation on the part of the Hellenic Republic and the third parties involved, which believed that those guarantees continued to have their contractually agreed legal effect. The applicants point out in that regard the necessity for the State to fulfil the guarantee obligations to which it had agreed.

338 In this case, as the guarantees in question were honoured, as the applicants submit, in accordance with the initial conditions stipulated in the contracts of guarantee, the

contested decision is vitiated by manifest errors of assessment and failure to state reasons for the decision, on the ground that the Commission found that the abovementioned payments in question were State aid for the purposes of Article 87(1) EC.

339 As regards, first, the loan received in February 2001 by OA from ABN Amro to cover the expenses arising from its premature eviction from Hellinikon airport in Athens (Greece) and its relocation to the new airport of Spata, the applicants point out that OA benefited from a guarantee from the Hellenic Republic in accordance with the Commission's approvals of 1994, 1998 and 2000. No alteration to the conditions of the contract of loan or the State guarantee has been made since 2001. In May and October 2004 and March 2005, the State made the three partial repayments, after giving the creditor bank notice to make those payments under its guarantee, because of the established inability of OA to make those payments during the relevant periods. It is also apparent from the contested decision (points 135 to 139) that the Commission knew that the payments in question had been made by the State in accordance with the initial conditions of the guarantee and that, following those payments, the debt certificates and individual corresponding payment advices had been served on OA pursuant to the general provisions of the Greek Code for the recovery of public revenue.

340 As regards, second, the guarantee of the rents due from OA under two leasing contracts of Airbus A 340-300 aircraft, the Hellenic Republic and OA state that, after being given notice to make that payment by Crédit Lyonnais, the former, as guarantor for the latter, made the payment of the half-year's amount due from that company on 29 July 2004 in favour of Crédit Lyonnais. In fact, the Hellenic Republic undertook to take over part of OA's obligations arising from the leasing contracts, in accordance with the approval decisions adopted by the Commission in 1994, 1998 and 2000. That guarantee was given up to a total sum of EUR 200 million, whereas the total financing exceeded EUR 350 million.

341 It is clear from the contested decision (points 140 and 141) that the Commission knew that the payment in question had been made in accordance with the conditions of the guarantee and that OA's corresponding debt was the subject of recovery by the competent authorities.

342 In addition, OA points out that the Commission made a manifest error of assessment of the facts by basing the illegality of the only payment under guarantee made by the Hellenic Republic, in August 2004, on the changes to those guarantees following the Hellenic Republic's subrogation to OA, in the leasing contracts (point 240 of the contested decision). In fact, that subrogation took place several months after the guarantee payment in question. The Commission was informed, by emails of 22 December 2004 and 4 April 2005, that the subrogation of the Hellenic Republic to OA had taken place on 17 December 2004 as regards the leasing contracts of two of the aircraft, and on 4 April 2005, as regards the leasing contracts of the other two aircraft.

343 Moreover, the applicants maintain that the contested decision lacks any proper statement of reasons, since the Commission refrained from examining whether the measure in question satisfied the test of the private investor or guarantor, which finds itself in the same situation and prefers to pay off the balance due gradually up to the end of the leasing contracts, rather than to pay immediately the overall amounts of the guarantees which were honoured, to the sum of EUR 200 million.

344 As regards, third, the direct payment of EUR 8.2 million to OA, the Hellenic Republic and OA explain that, in order to obtain, in accordance with the leasing contracts, the prior consent of the head-lessors to the sub-leasing of the aircraft to NOA, OA had to accept, in August 2004, that a sum of EUR 8.2 million belonging to it would be held in a blocked account of Crédit Lyonnais. When the Hellenic Republic was subrogated to OA in the abovementioned contracts, it decided to obtain the release of that sum. However, in order to follow a less exacting procedure, the State paid OA a sum

equivalent to the blocked EUR 8.2 million, in exchange for the transfer to the State by OA of the initial sum of EUR 8.2 million, with interest, under sequestration, and that was unblocked through the execution of the subrogation agreements.

345 OA admits that, in breach of its obligation to transfer the sum in question to the State, it kept the sum of EUR 8.2 million and interest, when the account in question was unblocked in December 2004. It claims that it was seeking thus to obtain compensation for its own debts due from the Hellenic Republic, as would any prudent operator.

346 The applicants explain that the sum in question was certified as a debt due from the Hellenic Republic, in accordance with the applicable national law, for the purpose of its recovery with interest.

347 The Commission, supported by the intervener, disputes all those arguments.

Findings of the Court

348 It is appropriate to note that subparagraph (b) of the first paragraph of Article 1 of the Decision of 11 December 2002 states that the restructuring aid granted by the Hellenic Republic to OA in the form of new guarantees relating to loans for the purchase of new aircraft and for the investment necessary for its relocation to the new airport in Spata is considered to be incompatible with the common market (see paragraph 6 above).

349 The Commission submits therefore correctly that, if the guarantee payments in question constituted the mere fulfilment of the initial guarantees declared incompatible with the common market by subparagraph (b) of the first paragraph of Article 1 of the Decision of 11 December 2002, those payments should also be considered, by virtue of that decision, as State aid incompatible with the common market. Moreover, it is apparent from the Decision of 11 December 2002 — requiring recovery of all the aid examined which had been paid after 14 August 1998 — that the Commission did not provide for the recovery of the guarantee payments in question, because they had not yet been made. In this case, it was for the Member State concerned, in execution of the Decision of 11 December 2002 not to make those payments, in accordance with Article 88(3) EC. In that context, the question of the failure of the Hellenic Republic to fulfil its obligations because of the non-recovery of those sums was not raised by the Commission in the case which gave rise to the judgment of 12 May 2005 because the guarantees in question had not yet been fulfilled. Finally, the proceedings for failure to execute that judgment, brought by the Commission under Article 228(2) EC, could not go beyond the limits of the force of the *res judicata* of that judgment.

350 It follows that, if, as the applicants submit, the payments in question were made under the initial guarantees, Article 1(3) of the contested decision is purely confirmatory and has no independent legal effect. In addition, the order for recovery of the corresponding sums contained in Article 2 of the contested decision in connection with its Article 1(3), is the logical consequence of the declaration of incompatibility contained in the Decision of 11 December 2002.

351 It follows therefrom that, if the guarantees in question were not amended, the application for annulment of the finding of incompatibility of those guarantees, in Article 1(3) of the contested decision, would have to be declared inadmissible, by reason of the definitive nature of the Decision of 11 December 2002. On the other hand, the application for annulment of Article 2, in connection with Article 1(3) of the contested decision, would have to be declared admissible because the order for recovery in Article 2 adversely affects the applicant.

352 In those circumstances, even assuming that the guarantees in question were not amended, which is not established, the application for annulment of Article 2 of the contested decision, in connection with Article 1(3), must, in this case, be dismissed as unfounded, on the ground that the Commission confined itself to drawing the consequences from the declaration of incompatibility already made in the Decision of 11 December 2002, which is definitive.

353 Moreover, and in any event, the Commission also claims correctly that, while the guarantee payments in question do not constitute the mere fulfilment of the above-mentioned initial guarantees, they do constitute aid which is unlawful and incompatible with the common market.

354 In fact, contrary to the applicants' assertions, the grant of State aid even in the form of guarantees cannot give rise to third parties' legitimate expectation that those guarantees were proper, if they were given in breach of Article 88(3) EC. It is, in fact, for the third parties concerned to display the required prudence and diligence and to satisfy themselves that the rules of European Union law have been complied with (see, to that effect, Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 144).

355 In that regard, as the Commission notes in the contested decision (point 239) referring to its notice on the application of Articles 87 [EC] and 88 [EC] to State aid in the form of guarantees (OJ 2000 C 71, p. 14; paragraph 5.3), if the Member State concerned makes a guarantee payment under conditions other than those initially provided for, that payment will be regarded as giving rise to a new guarantee which will be subject to the duty to notify under Article 88(3) EC.

356 Furthermore, according to the case-law, in order to enable the Commission to determine whether a measure fulfils the conditions for derogation under Article 87(3) EC, it is for the Member State concerned, within the framework of the duty of genuine cooperation between Member States and the institutions arising from Article 10 EC, to supply the Commission with the all evidence necessary to enable that institution to establish that the conditions for the derogation sought are met (*Italy* v *Commission*, paragraph 20).

357 In this case, the Commission complains that the Greek authorities, among other things, failed to supply the evidence which would enable it to determine whether the payments in question constituted the mere fulfilment of the initial guarantees. In view of the evidence available, it considered, in the contested decision (point 240), that the measures in question constituted new guarantees.

358 In that regard, it seems, in view of the parties' arguments and the documents in the case-file, that, during the administrative procedure, the Greek authorities did not, despite the order to provide information which the Commission sent them, supply any information relating to the exact terms of the contracts of guarantee, to the expiry of the time-limits laid down, to the prior notices by the creditor banks or to the dates of payment of the sums in question. In addition, they did not notify any amendments to the initial guarantees, to obtain, if appropriate, the approval of such amended guarantees.

359 In those circumstances, even assuming that the initial guarantees, declared incompatible with the common market by the Decision of 11 December 2002, were amended, it is sufficient to state that, in any event, the Commission did not exceed the limits of its discretion in finding, in the contested decision (points 204 and 241), that the new guarantees in question given by the Hellenic Republic also constituted, on even stronger grounds, unlawful aid, in the light of the private investor test, taking account of the increasing indebtedness and general insolvency of OA. In that regard, the Commission notes correctly, among other things, that the conduct of the private

creditors which tried to impose stricter conditions on the occasion of the conclusion of the sub-leases of aircraft by OA to NOA and which were accommodated only by the subrogation of the State to OA in the leasing contracts, confirms OA's and NOA's lack of creditworthiness and the unwillingness of private creditors to assume the slightest risk in their regard.

360 It follows from the foregoing that the contested decision is not vitiated by manifest error of assessment and contains a sufficient statement of reasons as regards the classification as State aid of the payments in question made by the Hellenic Republic in fulfilment of certain guarantees.

361 As for the direct payment of EUR 8.2 million to OA, made by the Hellenic Republic on 9 August 2004, as an advance against the sums paid by OA into a blocked account guaranteeing payments due from OA under leasing contracts covering two Airbus A 340-300 aircraft, it is stated in the Moore Stephens report that that payment was not itself covered by any guarantee, as the applicants have, moreover, accepted. In addition, it is common ground that, at the time of the unblocking of the abovementioned sum by Crédit Lyonnais, OA did not repay the Hellenic Republic the amount of that sum with interest (see paragraphs 345 and 346 above). In those circumstances, the Commission did not exceed the limits of its discretion and stated sufficient reasons for the contested decision, in finding that, even if the amount of the payment in question was regarded by the Greek authorities as a debt of OA to them, that payment constituted new aid, in the light of the private investor test, having regard to the low probability of its repayment by OA (point 204 of the contested decision).

362 For all those reasons, the pleas in law alleging manifest error of assessment and deficiencies in the statement of reasons for the contested decision as regards the fulfilment of the guarantees in question by the State, and the direct payment of the abovementioned sum of EUR 8.2 million, must therefore be rejected as unfounded.

(c) The forbearance with regard to the non-payment of tax and social security debts (Article 1(4) of the contested decision) (Cases T-415/05, T-416/05 and T-423/05)

Arguments of the parties

363 The applicants challenge the Commission's findings relating to the alleged forbearance with regard to the non-payment by OA of tax and social security debts. The Greek authorities had already noted, in their comments of 11 June 2004, the imprecise and unsupported nature of the complaints made in that regard by the Commission in its decision of 16 March 2004 to initiate the formal investigation procedure. The only concrete example referred to in that decision concerns, in the applicants' submission, the non-payment of a sum of EUR 26 million in respect of the tax known as 'spatosimo', imposed by the Hellenic Republic on flight tickets for the purposes of financing airport development.

364 The applicants claim that the overdue debts to the State do not automatically constitute State aid. Only the amount of the benefit conferred on a debtor by a public creditor not behaving like a private one can, in their submission, be regarded as aid. Establishing the existence of State aid, in accordance with the private creditor test, entails proof of persistent forbearance with regard to the default in payment, and, consequently, a quantification of that forbearance. The burden of proof thereof rests on the Commission.

365 In this case, the Commission made, in the applicants' submission, a manifest error of assessment and infringed its duty to state the reasons for its decision, by stating that it was only the State's intervention that enabled OA to continue its activities and by failing to evaluate the State's forbearance from the point of view of the private creditor test.

366 Indeed, the Commission proved neither the permanence of the alleged forbearance of the Hellenic Republic nor the grant of an advantage to OA compared with its competitors as regards the recovery of the unpaid debts.

367 In particular, the Commission gave no indication of the concrete evidence showing that a private creditor would not have adopted the measures in question. It particularly failed to examine whether the Hellenic Republic's alleged forbearance with regard to the debts was the result of an agreement for payment, on what terms such payment had been agreed, whether OA's debts had been certified or whether their recovery had been undertaken.

368 In this case, the Commission relies, so the applicants maintain, on persistent forbearance, although, for the debts relating to social security payments, the Commission itself accepted, in the case that gave rise to the judgment of 12 May 2005, that there was no forbearance during the period prior to December 2002.

369 In addition, the applicants complain that the Commission did not provide, in the contested decision, sufficient indications enabling not only the Member State concerned, but also all the parties concerned, to identify with precision the aid declared incompatible and to determine its amount without excessive difficulty.

370 The applicants conclude therefrom that the contested decision is vitiated by failure to state the reasons for it. They complain that the Commission only referred to a total of 'some' EUR 354 million and left to the Greek authorities the task of quantifying the actual benefit which OA received. However, since the Commission failed to state what a private creditor would have done, it is impossible to determine precisely the type of aid found by the Commission, the period of the grant of that aid or its amount.

371 In particular, the applicants submit that the Commission did not make clear, in the contested decision, whether the abovementioned sum of EUR 354 million to be recovered included only the principal of the debts or also those in respect of interest and fines. In that regard, the applicants note that, according to the Greek Code for the recovery of public revenue, the certification of debts to the State by the competent financial service is necessary for their recovery. Certified debts are subject to substantial interest and delays in payment are penalised by fines. For the execution of debt certificates, individual payment notices, demanding that the company concerned pay the sums due, are sent out.

372 In OA's submission, the manifest error of assessment made by the Commission as regards the fines and national interest is confirmed by the fact that Article 2(2) of the contested decision requires Community interest to be applied to the total amount of the tax debts including the fines and national interest.

373 However, the Commission was informed that, during the check carried out by the Commission's experts in May 2005, 90 % of OA's debts in respect of tax and social security contributions had been certified and subjected to interest and fines. As the method of recovery, first, of the debts to the State and, second, of the repayable State

aid is exactly the same, it is appropriate therefore to question the consequences, as regards recovery, of the classification of all the debts as State aid.

374 Moreover, the applicants submit that the contested decision is not properly reasoned as regards the liability of the Hellenic Republic for the acts of the national social security body.

375 Finally, OA is uncertain whether the taxes due to the AIA are included in the amount of the debts in question.

376 The Commission, supported by the intervener, disputes the applicants' arguments. It contends, in particular, that the Greek authorities are in a position to quantify precisely the debts in question, as is confirmed also by the certification of 90 % of those debts.

Findings of the Court

377 The Court must review whether the Commission has established to the requisite legal standard the continuation, after the Decision of 11 December 2002, of the Hellenic Republic's forbearance with regard to OA's non-payment of its tax and social security debts, between December 2002 and December 2004.

378 To that end, it is appropriate to note at the outset that, contrary to the applicants' assertions, the mere certification of OA's debts to the Hellenic Republic cannot guarantee their repayment (see, to that effect, order in *Olympiaki Aeroporia Ypiresies* v *Commission*, paragraph 94). Consequently, where — without any lawful justification — debt certificates are not followed by a payment notice and, if necessary, in default of payment, execution, the Hellenic Republic's forbearance with regard to the non-payment of the debts in question is continuing. In that regard, the fact referred to by the Hellenic Republic that the method of recovering the State's debts and State aid is identical is irrelevant for the purposes of determining the existence of State aid in the form of such forbearance.

379 However, in this case, the applicants have not pleaded or produced a payment notice, or alleged that execution had been enforced to obtain repayment of the debts in question from OA.

380 In addition, in reply to a question put by the General Court at the hearing, OA stated that agreements for the repayment of debts had been concluded only with the IKA. In that regard, it is stated in the contested decision (point 128) that the Commission's experts noted that the sum of EUR 7.7 million had been paid to the IKA 'relating to a Settlement Agreement for years prior to 2003'. It is clear from the content of the case-file and from the parties' arguments, so far as concerns the social security debts — the amount of which was estimated, in the Moore Stephens report, at EUR 148 million for 2003 and EUR 196 million for 2004 — and the tax debts in the sums of EUR 374 million in 2003 and EUR 431 million in 2004, according to the findings in that report, on the basis of OA's financial statements and accounts, the Greek authorities and OA did not provide the Commission, during the administrative procedure, with any substantiated information relating to the conclusion or precise content of any repayment agreements concerning OA's tax and social security debts to the State during the period concerned or in relation to the implementation of any such agreements.

381 Contrary to the applicants' assertions, the Commission cannot be criticised for not having carried out a sufficiently thorough investigation. In particular, in the circumstances of this case, the imprecision of the complaints set forth by the Commission, in the decision of 16 March 2004 to initiate the formal investigation procedure, did not relieve the Hellenic Republic or OA of the duty to supply the Commission with all the evidence they considered relevant as regards the repayment by OA of the debts in question. It is true that, in that decision (point 82), the Commission referred only to 'non-payment of tax debts' and did not refer expressly to forbearance with regard to the non-payment of social security debts. However, the Commission's complaints should be read in the context of the investigation initiated by it — in parallel to pursuing the execution of the Decision of 11 December 2002 — so far as concerns all the measures subsequent to that decision connected to the restructuring of the Olympic Airways Group and capable of including State aid. In that context characterised by the significant financial difficulties encountered by OA, which had already previously received similar measures in the form of forbearance with regard to the non-payment of its tax and social security debts, as established in the Decision of 11 December 2002, the Hellenic Republic also pointed out, in its comments of 11 June 2004, that the words 'tax debts' were not clear. In that regard, it noted in essence that, if the Commission intended to hold that the Greek authorities were supporting OA by tolerating the non-payment of certain debts, and not only tax debts, it should have adduced evidence of such forbearance.

382 In this case, the applicants have not relied on any material evidence capable of explaining the Hellenic Republic's forbearance with regard to the default in payment of the debts in question during the period under consideration.

383 In those circumstances, the Commission cannot be accused of having reversed the burden of proof by assuming that there was continued forbearance by the State with regard to OA's debts, which would not have been shown by a private creditor in a comparable situation.

384 In that regard, the applicants have not established that the Commission exceeded the limits of its discretion in deciding that, whilst it is true that a State may, in the same way as any private creditor, allow its debtors more time to repay their debts, where there is a real hope that a part of those debts will be repaid in the foreseeable and near future, such a prospect did not appear plausible in this case, without the reorganisation of OA, as the increase in its indebtedness attested. Also, on that point, the contested decision is sufficiently reasoned (see, in particular, points 203 and 205), in which the Commission lays particular stress on the increase, during the period under consideration, of OA's tax and social security debts, which were already substantial at the end of 2002.

385 In particular, the risk for the creditor of incurring additional losses was borne out by the fact that the measures in question followed certain similar measures consisting in forbearance with regard, particularly, to the perpetuation of the non-payment of social security contributions and tax debts such as the 'spatosimo' tax, already classified as State aid in the Decision of 11 December 2002. In default of any reliance by the applicants on the slightest evidence which could separate the measures in question from the earlier similar aid, the fact that such measures constituted the logical continuation of that earlier aid may be regarded as confirming that they belonged in the same category of State aid (*BP Chemicals* v *Commission*, paragraphs 171 and 176). That analysis is not undermined by the fact — solely relating to the execution of the Decision of 11 December 2002 and therefore irrelevant in this case — that the Commission, in its action for failure to fulfil obligations which gave rise to the judgment of 12 May 2005, had excluded the social security contributions from its application to the Court of Justice for a declaration that the Hellenic Republic had not adopted all the measures necessary for repayment of the aid covered by the Decision of 11 December 2002, following an agreement concluded between OA and the IKA and partial repayment of the social security debts covered by that decision, as is apparent from paragraph 10 of that judgment.

386 In this case, it is important also to point out in that regard that the Commission stated that, if the least concrete measure was provided for to guarantee the debts to the State, it would be disposed to examine it in the execution of the contested decision.

387 As regards the complaint advanced by the applicants that the aid in question was not quantified or quantified only approximately, it is sufficient to point out that, in Case C-419/06 *Commission* v *Greece*. paragraph 42, the Court of Justice has already rejected that complaint in holding that the amounts concerning the non-collection of taxes and social security contributions had been fixed in Article 1 of the contested decision.

388 In particular, the lack of a detailed schedule of OA's debts to the Hellenic Republic, apart from the distinction between tax and social security debts, does not render it impossible to quantify the aid in question, on the basis of the sufficiently precise information in the grounds of the contested decision (points 128 to 130 and 205), which cannot be severed from its enacting terms. The contested decision cannot therefore be regarded as deficient in its statement of reasons on that point. Quantification is, in any event, for the Greek authorities to undertake as part of the execution of the contested decision, cooperating in good faith with the Commission (see, to that effect, Case C-419/06 *Commission* v *Greece*, paragraphs 43 and 44).

389 In addition, the Commission stated reasons to the requisite legal standard, in the contested decision (point 206), for the State's liability for the measure in question, pointing out, in particular, that the IKA was a Greek public body responsible, under State supervision, for managing the Greek social security system and collecting mandatory social security contributions.

390 Finally, contrary to the applicants' assertions, the requirement, in Article 2 of the contested decision, of payment of Community interest on the amount of the aid in question, already subject to national interest, does not demonstrate any manifest error of assessment in the Commission's analysis, since those various interest provisions fulfil specific objectives (see paragraphs 417 and 418 below).

391 So far as concerns, more particularly, the 'spatosimo' tax, the applicants have not established that any proof of payment had been provided to the Commission. However, if a liability had been partly paid, it would have had to be taken into account in the execution of the contested decision, as the Commission points out.

392 As to the doubts expressed by OA as regards the classification as aid of the forbearance with regard to OA's non-payment of taxes due to the AIA, it is sufficient to note that the Commission did not examine that measure, as such, with regard to its possible classification as State aid. In fact, in point 179 of the contested decision, it confines itself to referring, in the course of its examination of the nature of the restructuring, to the lack of any transfer to NOA, at the date of the scission, of OA's debt to the AIA. By contrast, the Commission examined NOA's debts to the AIA. It found, in that regard, that it could not conclude definitively that AIA's acts could be imputed to the State.

393 For all those reasons, the pleas in law alleging manifest error of assessment and failure to state sufficient reasons for the contested decision must be rejected as unfounded.

4. *Breach of the right to be heard (Cases T-415/05 and T-423/05)*

(a) Arguments of the parties

394 The Hellenic Republic and OA submit that the Commission disregarded the rights of defence of the Member State concerned by refusing to disclose to it the Moore Stephens report before the adoption of the contested decision, despite its requests, reiterated, in particular, in its letter to the Commission of 26 October 2005. That report was not sent to the Greek authorities until the end of 2005, contrary to the Commission's practice in State aid matters in the air transport sector, for example in the case relating to Alitalia. In addition, the Hellenic Republic relies in that regard on breach of the principle of sound administration.

395 The applicants criticise the Commission for having reproduced in the contested decision the findings in the abovementioned report without the Greek authorities having been put in a position timeously to make their comments on the subject of the weaknesses of that report as regards the examination of the sub-leases of aircraft to NOA, the valuation of the amount of OA's assets transferred to NOA and the various direct aid allegedly granted to OA.

396 OA submits that the breach of the Hellenic Republic's right to be heard had a direct negative effect on the right of the recipient of the alleged aid to defend its interests. OA was thus deprived 'by extension' of its right to be heard on the truth and relevance of the matters revealed in the Moore Stephens report.

397 If the Greek authorities and, 'by extension', OA had had access to that report, they would have been in a position to clarify a great many misunderstandings before the adoption of the contested decision. The breach of the Hellenic Republic's right to be heard therefore justifies the annulment of that decision.

398 The Commission, supported by the intervener, disputes that argument. It makes clear that, contrary to the Hellenic Republic's contentions, it did not send a report to the Italian authorities before the decision relating to Alitalia.

(b) Findings of the Court

399 Observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of European Union law which must be guaranteed even in the absence of any specific rules, as has already been noted in paragraph 229 above.

400 In particular, in State aid matters, the Commission may, for the purposes of assessing a measure in the light of Article 87 EC, rely on evidence collected from a third party, only after having put the State concerned in a position to submit its comments on that evidence (see paragraph 250 above).

401 In this case, since the Moore Stephens report is based exclusively on the information collected from OA and NOA during the inspection on site by the Commission's

experts and therefore contains no factual evidence of which the undertakings, which were recipients of the measures in question and owned entirely by the Hellenic Republic, would have been unaware, the failure to communicate that report to the Hellenic Republic could not adversely affect that Member State's rights of defence.

402 In addition, it is appropriate to note that, in Case T-415/05, as regards the measures in question in favour of NOA, it has already been held that the Commission infringed the provisions of Article 87(1) EC, by failing to check whether the rents paid by NOA to OA and to the Hellenic Republic for the sub-leasing of aircraft were below market prices (see paragraphs 248 to 253 above), so that it is not necessary to examine, here, the effect of the failure to disclose the Moore Stephens report to the Greek authorities to decide the proceedings.

403 As regards, in Cases T-415/05 and T-423/05, the measures in question in favour of OA, it is important to point out that the applicants do not rely on any material evidence from which it could be assumed that if the Greek authorities had had the Moore Stephens report before the adoption of the contested decision they could have put forward arguments capable of affecting the outcome of the proceedings.

404 The plea in law alleging breach of the rights of the defence must therefore be rejected as unfounded. Moreover, since the applicants have submitted no specific allegation in support of the plea in law alleging breach of the principle of sound administration (see paragraph 394 above), it must be rejected in the same way as the plea in law alleging breach of the rights of the defence.

5. *Breach of the principle of proportionality (Cases T-415/05 and T-416/05)*

(a) Arguments of the parties

405 In Case T-415/05, the Hellenic Republic submits that — if the contested decision should be interpreted as meaning that NOA is also bound to repay the aid paid to OA, in execution of Article 2(1) of the contested decision, which it denies — it would be disproportionate to require the recovery from NOA, in particular, of the sum of EUR 354 million, referred to Article 1(4) of that decision, although that company did not commence its activities until 12 December 2003 and the Commission found that there was no aid in its favour in the form of forbearance with regard to the non-payment of taxes and social security contributions.

406 In its reply, the Hellenic Republic adds that such a requirement would be contrary to the duty of cooperation in good faith enshrined in Article 10 EC.

407 In Case T-416/05, NOA claims that the obligation to recover from it the aid referred to in Article 1(4) of the contested decision, prior to the hiving-off, would be contrary to the principle of proportionality, if it concerned aid granted in all OA's sectors of activity.

408 The Commission, supported by the intervener, disputes those arguments.

(b) Findings of the Court

409 In Case T-416/05, there is no need to adjudicate on the applicant's allegation of the inadmissibility of the argument relating to the Commission's uncertainty as regards the precise date of NOA's formation, which was only put forward, in the alternative, as part of the present plea in law. In fact, that argument is in any event irrelevant, as has already been decided (see paragraph 117 above).

410 On the substance, it is sufficient to point out that, in paragraph 53 of the judgment in Case C-419/06 *Commission* v *Greece*, the Court of Justice rejected the plea in law alleging breach of the principle of proportionality which had been pleaded before it by the Hellenic Republic, on the ground that the abolition of unlawful State aid by means of recovery is the logical consequence of a finding that it is unlawful, and that the Member State's obligation to abolish aid found by the Commission to be incompatible with the common market is intended to restore the previous situation.

411 In those circumstances, since it has been held that NOA could be regarded as OA's successor for the purposes of recovery of the aid at issue (see paragraphs 148 to 151 above), the recovery of that aid from NOA cannot be regarded as contrary to the principle of proportionality.

412 In addition, as regards the apportionment of the repayment obligation between OA and NOA, that question was not dealt with in the judgment of 12 May 2005 and was not examined by the Commission in the contested decision. It is therefore for the parties to regulate it within the framework of the national procedure for executing the contested decision, in accordance with their reciprocal duty of cooperation in good faith (see paragraphs 125 to 127 above).

413 For all those reasons, the plea in law alleging breach of the principle of proportionality and the complaint alleging breach of the duty to cooperate, which is not supported by any specific allegation, must be rejected as unfounded.

6. *Breach of the principle of no double jeopardy (Cases T-415/05 and T-423/05)*

414 The Hellenic Republic and OA submit that, since, in the total of EUR 354 million referred to in Article 1(4) of the contested decision, a sum of about EUR 136 million corresponded to interest and fines under national law, the requirement to charge interest on the sums to be recovered at the Community reference rate, as laid down in Article 2(2) of the contested decision, is contrary to the principle of no double jeopardy.

415 It is appropriate to point out that the Community interest due under Article 2(2) of the contested decision, from the undertakings which were recipients of the aid in question, is not a penalty, but is intended to fully restore competition by means of the repayment of the benefit conferred on those recipients from the date the aid was granted.

416 In this case, as the forbearance with regard to the non-payment of sums of various interest for late payment and increases provided for by Greek law also constitute State aid, the Commission contends, correctly, that the contested decision is to be interpreted as meaning that the interest referred to in Article 2(2) of the contested decision applies also to those sums from the time that they become payable. Moreover, the methods for capitalising the interest will be defined in the execution of the contested decision as the Commission has stated before the General Court.

417 Since, first, the interest for late payment and the fines imposed by national law and, second, the interest provided for in the contested decision in order to ensure the restoration of competition thus fulfil different objectives, the imposition of Community interest on the total amount of the aid with interest and national fines added does not infringe the principle of no double jeopardy.

418 It follows that the plea in law alleging breach of the principle of no double jeopardy must be rejected as unfounded.

419 It follows from all the foregoing that the contested decision must be annulled, first, in so far as the Commission declares incompatible with the common market the aid granted to NOA (Article 1(1)), second, in so far as it declares incompatible the aid granted to OA referred to in Article 1(2) to the extent that it relates to the amount corresponding to the value of all the intangible assets recognised as goodwill, to the value of the aircraft transferred to NOA and to the revenue expected from the sale of two aircraft, and, lastly, in so far as it requires the recovery of that aid (Article 2).

Costs

420 Pursuant to Article 87(3) of the Rules of Procedure, the General Court may order that the costs be shared or that each party is to bear its own costs where each party succeeds on some and fails on other heads. Under the third subparagraph of Article 87(4) of the Rules of Procedure, the General Court may order an intervener, other than a Member State, to bear his own costs.

421 In the three joined cases, since each of the parties has been partly unsuccessful in its pleas, it is appropriate to order each party to bear its own costs, including, in Cases T-416/05 and T-423/05, those relating to the proceedings for interim relief.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls Article 1(1) of Commission Decision C(2005) 2706 final of 14 September 2005 on State aid for Olympiaki Aeroporia Ypiresies AE (C 11/2004 (ex NN 4/2003) — Olympic Airways — Restructuring and privatisation);**

2. Annuls, in part, Article 1(2) of Decision C(2005) 2706 final to the extent that it relates to the amount corresponding to the value of all the intangible assets recognised in the conversion balance sheet of Olympiaki Aeroporia Ypiresies as goodwill, to the value of the aircraft transferred to Olympiakes Aerogrammes AE and to the revenue expected from the sale of two aircraft still entered in the balance sheet of Olympiaki Aeroporia Ypiresies;

3. Annuls Article 2 of Decision C(2005) 2706 final in so far as it relates to the measures in question in Article 1(1) and (2), to the extent that those provisions are annulled;

4. Dismisses the remainder of the actions;

5. Orders each of the parties to bear its own costs, including those incurred in connection with the proceedings for interim relief.

Jaeger Meij Truchot

Delivered in open court in Luxembourg on 13 September 2010.

[Signatures]

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