JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

25 June 2008*

In Case T-268/06,

Olympiaki Aeroporia Ypiresies AE, established in Athens (Greece), represented by P. Anestis, lawyer, T. Soames and G. Goeteyn, Solicitors, S. Mavrogenis and M. Pinto de Lemos Fermiano Rato, lawyers,

applicant,

v

Commission of the European Communities, represented by E. Righini and I. Chatzigiannis, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2006) 1580 final of 26 April 2006 concerning a State aid scheme C 39/2003 (ex NN 119/2002) which the Hellenic Republic implemented in favour of airlines following losses suffered between 11 and 14 September 2001,

* Language of the case: Greek.

THE COURT OF FIRST INSTANCE OF
THE EUROPEAN COMMUNITIES (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas (Rapporteur) and A. Dittrich, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 7 December 2007,

gives the following

Judgment

Facts

1 By its Communication COM(2001) 574 final of 10 October 2001 ('the Communication of 10 October 2001'), the Commission informed the European Parliament and the Council of its assessment of the repercussions on the air transport industry of the terrorist attacks of 11 September 2001 in the United States.

2 As regards the application of the State aid rules, the Commission considered, in the Communication of 10 October 2001, that Article 87(2)(b) EC enabled certain problems facing the airlines because of the events of 11 September 2001 to be dealt with. Having regard to the exceptional nature of the occurrences in question, the provisions of that article could, according to that communication, authorise, under certain conditions, compensation for, first, the costs caused by the closure of American airspace for four days (from 11 to 14 September 2001) and, second, the extra cost of insurance (paragraphs 28 to 41 of the Communication of 10 October 2001).

3 As regards the conditions to which any compensation should be subject, the Communication of 10 October 2001 states that it should be paid in a non-discriminatory manner, concern only costs incurred between 11 and 14 September 2001 and that its amount be calculated accurately and objectively following the specific method suggested by the Commission.

4 By letter of 14 November 2001 to all the Member States, the Commission provided additional information relating to the calculation of the amount of the compensation to be paid to each airline.

5 Following exchanges of correspondence between December 2001 and July 2002, the Greek authorities informed the Commission, by letter of 24 September 2002, of the detailed calculations of the compensation of the applicant, Olympiaki Aeroporia Ypiresies AE, on account of the losses caused to it by the events in question. In that letter, the compensation was detailed thus:

— EUR 4 079 237 for lost revenue in respect of carriage of passengers throughout the applicant's network, of which about EUR 1 212 032 concerned its network outside the North Atlantic;

— EUR 278 797 in respect of lost revenue from the carriage of goods;

— EUR 17 608 in respect of the costs of destruction of sensitive goods;

— EUR 41 086 in respect of the costs of additional security checks for goods;

— EUR 37 469 in respect of the costs of recalling flight OA 411 to New York (United States) and the costs of cancelling the return flight (OA 412) to Athens (Greece) on 11 September 2001;

— EUR 13 550 in respect of the costs connected with the landing and grounding at Halifax (Canada), from 11 to 15 September 2001, of a flight the original destination of which was Toronto (Canada);

— EUR 478 357 in respect of the expenses of implementing 'ferry flights' (extra flights on 18, 20 and 26 September 2001 to repatriate passengers to the United States and Canada);

— EUR 146 735 in respect of the costs connected with the additional hours worked by staff, the accommodation of passengers and additional security staff;

— EUR 14 673 in respect of the costs connected with additional emergency security measures.

6 From the total amount of those sums was then deducted EUR 278 797 in respect of the fuel which would have been used if the schedule of flights had not been disrupted. The final sum of EUR 4 827 586.21 had already been paid to the applicant in July 2002 under Article 45(17) of Law No 2992/2002 (FEK A' 54/20.3.2002) and the Joint Ministerial Decree of 27 May 2002 (FEK B' 682/31.5.2002).

7 By letter of 27 May 2003, the Commission informed the Hellenic Republic of its decision to initiate, as regards the measures in question, the procedure under Article 88(2) EC and requested the Greek authorities to provide it with certain documents and additional information ('the decision to open the formal investigation procedure'). Also, it requested the interested parties to submit their comments within one month from the date of publication in the *Official Journal of the European Union* (OJ 2003 C 199, p. 3) of the decision to open the formal investigation procedure.

8 The Greek authorities submitted their comments to the Commission by letter of 20 November 2003. According to that letter, the actual loss caused by the cancellation of seven return flights scheduled for the period 11 to 14 September 2001 to New York, to Tel Aviv (Israel), to Toronto via Montreal (Canada) and to Boston (United States) amounted to EUR 1 921 203.20. That figure did not include losses incurred following the cancellation of tickets on other flights with which the cancelled flights would have connected. As regards the costs connected with the flight which landed on 11 September 2001 at Halifax instead of Toronto, the Greek authorities submitted an assessment, according to which they amounted to EUR 38 056. As regards the costs of recalling the 11 September 2001 flight to New York, the Greek authorities reassessed them at EUR 3 421. As regards the cancellation of three return flights to New York and to Toronto via Montreal on 15 and 16 September 2001, the Greek authorities pointed out that the losses caused were directly connected with the closure of the airspace from 11 to 14 September and that they amounted to EUR 977 257. As for the 'ferry flights', the Greek authorities stated that they were a flight to New York on 18 September 2001 and two flights to Toronto via Montreal on 20 and 26 September 2001. The loss caused by the exceptional nature of those flights, which involved carrying no passengers on the return flights to Athens, were EUR 487 312.17. According to the Greek authorities, that loss should be regarded as being directly connected with the events of 11 September 2001.

9 In those circumstances, the Greek Ministry of Transport and Communications requested the Commission to approve an amount of EUR 3 770 717.70 as well as the amounts mentioned in the second to ninth indents of paragraph 5 above in respect of compensation for losses directly connected with the terrorist attacks of 11 September 2001. As regards those losses, the Greek authorities stated that they would soon produce supporting documentary evidence.

10 By letter of 15 March 2004, the Commission reminded the Greek authorities that they had not yet submitted the additional information mentioned in their letter of 20 November 2003 and gave them a period of two weeks for that purpose.

11 The Greek authorities did not reply to that request.

Contested decision

12 By its Decision C (2006) 1580 final of 26 April 2006 concerning a State aid scheme C 39/2003 (ex NN 119/2002) which the Hellenic Republic implemented in favour of airlines following losses suffered between 11 and 14 September 2001 ('the contested decision'), the Commission closed the formal investigation procedure and decided, in particular, that the State aid implemented by the Hellenic Republic in favour of the applicant was compatible with the common market as regards the compensation paid for the period from 11 to 14 September 2001 up to a maximum sum of EUR 1 962 680. That sum corresponds to EUR 1 921 203 in respect of the cancellation of the seven return flights to New York, to Tel Aviv, to Toronto via Montreal and to Boston, plus EUR 38 056 in respect of the landing and stay at Halifax of the flight the original destination of which was Toronto plus EUR 3 421 in respect of the recall of the 11 September 2001 flight to New York (recitals 49 and 50 in the contested decision).

13 As regards, on the other hand, the costs connected with the cancellation of three return flights, one of which was to New York on 15 September 2001 and two to Toronto via Montreal on 15 and 16 September 2001, amounting to EUR 977 257, and the costs concerning the 'ferry flights' amounting to EUR 487 312, the Commission stated that they were connected only with indirect repercussions of the terrorist attacks of 11 September 2001 which were felt in several sectors of the world economy (recital 58 in the contested decision).

14 So far as concerns, more particularly, the 15 September 2001 flight to New York, recitals 53 to 55 in the contested decision are worded thus:

'53 The Commission finds … that the situation, after 14 September, was no longer characterised by disruption to air traffic but by more limited exploitation of the air routes by the companies concerned.

54 That is the case for the measures submitted by the [Hellenic Republic] in favour [of the applicant] which concern, in the first place three return transatlantic flights which were not operated on 15 and 16 September, one to the United States and two to Canada, representing for [the applicant] a loss of 333 000 000 Greek drachmas (GRD), that is about EUR 977 257.

55 Concerning, first of all, the unavailability of slots at New York, the [Hellenic Republic] confirms that JFK airport was indeed open again on 14 September at 23.00 hours, Athens time, and [that] only the increased demand for slots did not permit [the applicant] to reserve one of them. The Commission received no other information concerning the reason for slots not being obtained although other airlines obtained them. In any event, the general impossibility of flying to the United States no longer then existed.'

15 As for the cancellation of the two flights to Toronto via Montreal, it arose from the applicant's choice, in the sense that either it did not have other aircraft available and chose to operate other scheduled flights, or the actions relating to technical inspections and to the reservation of slots could not have been carried out in time by the applicant (recital 56 in the contested decision).

16 As regards the 'ferry flights', the Commission points out that their operation resulted from the choice of the applicant, upon which it was incumbent to request compensation from the Governments of the United States and Canada, since those flights were operated at their request (recital 57 in the contested decision).

17 Accordingly, the costs in question were regarded as being ineligible for compensation under Article 87(2)(b) EC.

18 In those circumstances, the Commission decided that any sum paid to the applicant over and above the sum of EUR 1 962 680 constituted aid incompatible with the common market (Article 2 of the contested decision) and ordered the Hellenic Republic to recover it (Article 4 of the contested decision).

Procedure and forms of order sought by the parties

19 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 22 September 2006.

20 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was, consequently, assigned.

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

— annul Article 1 of the contested decision in so far as it fixes the maximum amount of compensation compatible with the common market for the period from 11 to 14 September 2001 at EUR 1 962 680;

— annul Articles 2 and 4 of the contested decision;

— order the Commission to pay the costs.

22 The Commission contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

Law

23 In support of its action, the applicant raises two pleas in law, alleging, first, infringement of Article 87(2)(b) EC and, second, failure to state reasons. The first plea in law consists, in essence, of two parts, the first alleging manifest error in the determination relating to the losses connected with the applicant's North Atlantic network and the

second alleging manifest error in the determination relating to the losses connected with the rest of its network.

1. *The first plea in law, alleging infringement of Article 87(2)(b) EC*

Applicant's arguments

24 The applicant submits that the Commission made a manifest error in the determination of the facts of the case and, therefore, infringed Article 87(2)(b) EC, by deciding that the losses suffered because of, first, the cancellation of the three return flights to New York and to Toronto via Montreal and, secondly, the operation of the 'ferry flights' had no direct causal link with the terrorist attacks of 11 September 2001 which provoked the closure of United States and Canadian airspace. In addition, by not taking account of the losses consequent upon the terrorist attacks of 11 September 2001 concerning the rest of its network, the Commission fell into error in the determination of the damage which arose between 11 and 15 September 2001.

25 The applicant submits that the fact that the Communication of 10 October 2001 excludes from the scope of Article 87(2)(b) EC any damage which arose after 14 September 2001 cannot define the nature of the direct causal connection required by that provision nor can it, consequently, relieve the Commission of its obligation to examine the circumstances of the case from that article's point of view. Indeed, the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States. In any event, the Communication of 10 October 2001 should be interpreted as meaning that it does not cover only losses caused during the closure of the airspace but also those which have a direct causal connection with its closure. Any other interpretation would be contrary to Article 87(2)(b) EC.

26 Nor can the Commission's approach be justified by referring to other decisions in which it adopted a similar point of view. In addition, since the losses sustained by the applicant after 14 September 2001 flow directly from the terrorist attacks of 11 September 2001, the applicant is in a different situation compared with other airlines with regard to which that fact had not been established. Finally, the applicant points out that the Greek authorities requested, in their letter of 24 September 2002 (see paragraph 5 above), authorisation to pay certain sums to compensate as well losses which arose after 14 September 2001 on the basis of Article 87(2)(b) EC. Therefore, the Hellenic Republic never accepted the restrictive approach suggested by the Commission in the Communication of 10 October 2001, as is also borne out by Law No 2992/2002, which provides for a broader framework of compensation.

27 Furthermore, it should be accepted that the closure of the airspace was the consequence of the terrorist attacks of 11 September 2001, which were an exceptional occurrence within the meaning of Article 87(2)(b) EC.

28 The applicant disputes the Commission's argument that it carried out an analysis of the aid not only on the basis of the Communication of 10 October 2001, but also in the light of Article 87(2)(b) EC. On the contrary, the contested decision is characterised by an automatic application of the criterion according to which any loss which arose after 14 September 2001 had no causal connection with the terrorist attacks of 11 September 2001 which provoked the closure of the airspace. However, all the losses for which the applicant received compensation had a direct causal connection, for the purposes of Article 87(2)(b) EC, with the terrorist attacks of 11 September 2001.

The losses in respect of the applicant's North Atlantic network

29 As regards the cancellation of the return flight to New York initially scheduled for 15 September 2001, the applicant points out that, in spite of its requests, John F. Kennedy international airport ('JFK') did not give it a slot for that day, but only for 16 September, as is evidenced by a telex from the United States Federal Aviation

Authority of 14 September 2001. The unavailability of a slot was due only to the exceptionally high demand from airlines immediately after the gradual reopening of the airspace, and because of the disruption caused by its closure for four days. In those circumstances, JFK was not in a position to satisfy all the applications for slots, a situation which is comparable for the applicant to the closure of the airspace. The fact that the telex was not produced by the Greek authorities during the administrative procedure is not decisive, having regard to the fact that the Commission based its determination, in accordance with the Communication of 10 October 2001, on the lack of any causal connection between the terrorist attacks of 11 September 2001 and the cancellation of the return flight to New York initially scheduled for 15 September 2001.

30 As regards the cancellation of the two return flights to Toronto via Montreal on 15 and 16 September 2001, the applicant points out that the Canadian authorities required the aircraft which provided that service on 11 September 2001 to land that day at Halifax and to remain there until 15 September 2001 inclusive. That aircraft could not return to Athens until 16 September 2001 at 5.30. The applicant's three other Airbus A 340/400s, which were the only aircraft capable of making transatlantic flights, served other destinations, which required the cancellation of the 15 September 2001 flight to Toronto via Montreal. For the same reason, the applicant was obliged to cancel the 16 September 2001 flight also to Toronto via Montreal. Indeed, because of the immobilisation of the aircraft until 15 September 2001 at Halifax, it was impossible, for the purposes of providing that flight, to carry out the major technical inspection, prepare the aircraft, notify the passengers and reserve slots at Montreal and Toronto airports, in the light, particularly, of the fact that the Canadian authorities gave no prior notice of the exact time at which the aircraft was authorised to take off on 15 September 2001.

31 In those circumstances, the Commission's argument that the cancellation of those two flights was the applicant's choice is manifestly erroneous. Those cancellations were, on the contrary, the direct consequence of the terrorist attacks of 11 September 2001 which gave rise to the closure of the airspace and were therefore outside its control. The insufficiency of aircraft relied upon by the Commission did not cause the cancellation of the flights in question but was a consequence of the terrorist attacks of 11 September 2001. Therefore, the losses relating thereto should be regarded as fit

for compensation under Article 87(2)(b) EC, irrespective of the fact that they arose on 15 and 16 September 2001.

32 The applicant also draws attention to the fact that the aircraft which should have made the flight to New York on 15 September 2001 was not used to make the flights to Canada because it was used for the 16 September 2001 flight to New York. Furthermore, the Canadian authorities did not allow it to make flights to Canada until after 16 September 2001. Finally, the applicant submits that flights to South-East Asia and Australia are made by a single aircraft which makes a stop in Asia and continues to Australia, which is its final destination. Accordingly, the five destinations (Africa, South-East Asia, Australia, the United States and Canada) could be served by four aircraft.

33 As regards the 'ferry flights' to New York (on 18 September 2001) and to Toronto via Montreal (on 20 and 26 September 2001), the applicant points out that the operation of those flights is also directly connected with the terrorist attacks of 11 September 2001 and was not caused by pressure by the Governments of the United States and Canada for the repatriation of their nationals. In fact, the length of the waiting lists for scheduled flights, because of the terrorist attacks of 11 September 2001, prevented those passengers from making reservations on the latter flights, which obliged the applicant to operate the 'ferry flights'.

The losses in respect of the rest of the applicant's network

34 The applicant submits that while the Commission decided that the payment of EUR 1 921 203 on account of the cancellation of the seven return flights to New York, to Tel Aviv, to Toronto via Montreal and to Boston constituted aid compatible with the common market (see paragraph 12 above), it did not, however, approve the compensation for the losses in respect of the rest of its network for the period from 11 to 15 September 2001. Those losses amounted to around EUR 1 212 032.

35 In that regard, the applicant notes that, according to the foregoing considerations, the losses due to the disruption to its schedule of flights on 15 September 2001 should be held to be eligible for compensation under Article 87(2)(b) EC. That approach is supported by the Communication of 10 October 2001 and by the letter of 14 November 2001 (see paragraph 4 above). The applicant points out that the losses in respect of the rest of its network amount to half of the damage suffered in the North Atlantic and Israel network. Therefore, they cannot be disregarded on the sole basis of the arbitrarily restrictive interpretation of the concept of 'causal connection' made in the Communication of 10 October 2001. In any event, the Commission should have approved the amounts paid as compensation for the losses in respect of the rest of the applicant's network for the period from 11 to 14 September 2001.

36 As regards the evidence submitted by the Greek authorities during the formal investigation procedure, the applicant argues that it could not have known of the exact content of the letter of 20 November 2003 nor, particularly, of the fact that the Greek authorities were providing additional information which did not concern all the losses sustained following the events of 11 September 2001. Furthermore, the aid scheme in question was implemented by the Greek authorities on the basis of the information with which the applicant had provided them. Nor could it have anticipated that the Commission's analysis would be based solely on the fragmentary evidence contained in the letter of 20 November 2003. The applicant also points out that the information, production of which had been mentioned by the Greek authorities in the letter of 20 November 2003, concerned the amounts mentioned in paragraph 17.2 of the decision to open the formal investigation procedure (reproduced in the second to ninth indents of paragraph 5 above) and not the losses in respect of the rest of the applicant's network to which the Commission was referring in paragraph 17.1 of that decision. Furthermore, the letter of 20 November 2003 states clearly that it did not concern the losses relating to the cancellations of tickets on other flights for which the cancelled flights served as connections. To identify the amount of those losses, it would be sufficient to subtract the amount to which reference is made in the letter of 20 November 2003 from the amount mentioned in the letter of 24 September 2002. In any event, the information provided by the Greek authorities concerns an amount greater than that declared compatible with the common market in the contested decision.

37 In addition, the applicant submits that the Commission's file contained sufficient information for all the amounts constituting the damage suffered because of the terrorist attacks of 11 September 2001, as set out in the letter of 24 September 2002.

In those circumstances, the applicant requests the Court to evaluate the completeness of the evidence submitted by the Greek authorities to the Commission during the administrative procedure in the light of the materials contained in the file of the present case.

38 Therefore, the Commission's determination with regard to the losses in respect of the rest of the applicant's network is manifestly erroneous and infringes Article 87(2)(b) EC.

Commission's arguments

39 The Commission denies that the applicant's arguments are well founded. It states that, according to settled case-law, the guidelines in State aid matters bind it in the same way as the Member States which have accepted them. The Greek authorities repeatedly stated, during the administrative procedure, that they would examine the claims for compensation submitted by the airlines within the framework of the guidelines and of the Communication of 10 October 2001.

40 In addition, the Commission points out that, contrary to the applicant's allegation, it analysed the aid paid to the applicant not only on the basis of the Communication of 10 October 2001, but also in the light of Article 87(2)(b) EC, as is borne out by recital 59 in the contested decision. To that end, the Commission took into account all the evidence submitted to it during the administrative procedure.

41 The Commission rejects the interpretation of the Communication of 10 October 2001 suggested by the applicant, according to which even the losses which arose after 14 September 2001 could come within the scope of Article 87(2)(b) EC. The terms of the Communication of 10 October 2001 exclude that eventuality. As for the identification of the exceptional occurrence in this case, the Commission emphasises that

it is the terrorist attacks of 11 September 2001 which constitute that occurrence and not the closure of the airspace, which was the consequence of those attacks.

42 The Commission contends that neither the Greek authorities nor the applicant submitted, during the administrative procedure, evidence showing that the losses which arose after 14 September 2001 were causally connected with the terrorist attacks of 11 September 2001.

43 Finally, the Commission refutes the argument that the applicant's situation was different from that of other airlines which were not awarded amounts of aid corresponding to losses which arose after 14 September 2001.

The losses in respect of the applicant's North Atlantic network

44 As regards the cancellation of the return flight of 15 September 2001 to New York, the Commission submits that, contrary to the Greek authorities' statement in their letter of 20 November 2003, they did not produce, during the administrative procedure, evidence of the impossibility of reserving a slot at JFK. In those circumstances, the Commission repeats the determination it made in recital 55 in the contested decision. The Federal Aviation Authority's telex (see paragraph 29 above) was produced for the first time before the Court and, on any view, makes no reference to 15 September 2001 and provides no explanation of why the applicant did not succeed in reserving a slot although other airlines succeeded in doing so.

45 As regards the cancellation of the return flights of 15 and 16 September 2001 to Toronto via Montreal, the Commission argues that insufficiency of aircraft is a daily problem for airlines and cannot, therefore, be classified as an exceptional occurrence within the meaning of Article 87(2)(b) EC. The Commission is not in possession of evidence proving the required causal connection with the events of 11 September

2001. On any view, the applicant's argument is contradictory since it shows that it cancelled a flight to New York on 11 September 2001 without, for that reason, using the aircraft which would have made that flight to operate the flight to Canada. In addition, the Commission doubts that it was possible for the applicant to operate, during that period, scheduled flights to Africa, South-East Asia, Australia, Canada and America, since it had only four aircraft at its disposal.

46 As regards the 'ferry flights', the Commission submits that their operation was a commercial choice made by the applicant following requests from the Governments of the United States and Canada. Those circumstances cannot be likened to an exceptional occurrence within the meaning of Article 87(2)(b) EC, which, as a provision establishing exceptions to the prohibition on granting State aid, must be interpreted strictly. Moreover, the Greek authorities produced no evidence demonstrating a causal connection between the terrorist attacks of 11 September 2001 and the operation of those flights.

The losses in respect of the rest of the applicant's network

47 The Commission submits that it has produced before the Court all the correspondence which it exchanged with the Greek authorities and all the evidence which was available to it when it adopted the contested decision. It observes that, during the administrative procedure, the Greek authorities provided no information relating to losses in respect of the applicant's network apart from those relating to the flights to and from the United States or Canada. The information provided in the letter of 24 September 2002 in that regard is insufficient, although the Greek authorities said in their letter of 20 November 2003 that they would produce the relevant documents (see paragraph 9 above) without however doing so. Moreover, the Commission notes that the applicant had the right to take part in the formal investigation procedure by formulating observations, as an interested party which had been invited to do so in the decision to open the formal investigation procedure (see paragraph 7 above). Given that the applicant made no observations during the formal investigation procedure, the Commission could not but adopt the contested decision on the basis of the information available to it.

48 It follows, in the Commission's submission, that the first plea in law should be rejected in its entirety.

Findings of the Court

49 In the first place, it should be noted that the exceptional nature of the occurrences of 11 September 2001, for the purposes of Article 87(2)(b) EC, is not disputed (see paragraph 2 above). Furthermore, it follows from paragraph 35 of the Communication of 10 October 2001, according to which 'the costs arising directly from the closure of American airspace between 11 and 14 September 2001 are a direct consequence of the events of 11 September', and from recital 51 in the contested decision, in which 'the closure of the airspace of the United States from 11 to 14 September 2001' is noted as being 'an exceptional occurrence', so that it was not only the terrorist attacks but also the closure of the airspace which were classified as exceptional occurrences. In those circumstances, the questions raised by the present proceedings require solely the examination of whether there was a direct causal connection between those events and the specific losses relied upon by the applicant.

50 Secondly, as regards the scope of the Communication of 10 October 2001 in the context of these proceedings, it is settled case-law that the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States (see Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 53 and the case-law cited). Those notices and guidelines apply primarily to the Commission itself (Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 69).

51 In addition, it must be made clear that Article 87(2) EC covers aid which is, in law, compatible with the common market, provided that it satisfies certain objective criteria. It follows that the Commission is bound, where those criteria are satisfied, to declare such aid compatible with the common market, and that it has no discretion

in that regard (see, to that effect, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 17).

52 Furthermore, since this is an exception to the general principle, stated in Article 87(1) EC, that State aid is incompatible with the common market, Article 87(2)(b) EC must be interpreted narrowly. Therefore, only damage caused by natural disasters or exceptional occurrences may be compensated for under that provision. There must be a direct link between the damage caused by the exceptional occurrence and the State aid and as precise an assessment as possible must be made of the damage suffered (see Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 79 and the case-law cited).

53 It therefore follows that where an aid measure satisfies the conditions set out in the preceding paragraph it must be declared compatible with the common market, even if the Commission adopted a different position in the context of an earlier notice concerning the measure in question. Accordingly, even if, in accordance with the Communication of 10 October 2001, any compensation paid under Article 87(2)(b) EC must concern only costs incurred from 11 to 14 September 2001, aid compensating loss which arose after 14 September 2001 but having a direct causal connection with the exceptional occurrence and being accurately evaluated must be held to be compatible with the common market. In any event, the Commission did not decide that the amounts relating to losses which arose after 14 September 2001 were ineligible for compensation under Article 87(2)(b) EC on the sole basis that they arose after that date, but it also examined whether there was a direct causal connection between the events in question and those losses (see paragraph 60 below).

54 Consequently, the Commission's argument that the Hellenic Republic expressly accepted the principle stated in paragraph 35 of the Communication of 10 October 2001, by virtue of which any compensation paid under Article 87(2)(b) EC must concern only costs incurred from 11 to 14 September 2001, must be rejected at the outset. In fact, while it is true that the Greek authorities stated in their letter of 24 September 2002 that the compensation paid was limited to making good losses suffered in the course of the days immediately following the terrorist attacks, they did however seek authorisation to pay amounts for the purposes of making good

losses which arose up to 26 September 2001 (see paragraph 8 above). It is therefore clear that those authorities understood the meaning of 'days immediately following the terrorist attacks' as covering, also, the period up to that date.

55 Finally, according to settled case-law, the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted. No one, therefore, can rely before the Community judicature on matters of fact which were not put forward in the course of the pre-litigation procedure laid down in Article 88 EC (see Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 51 and the case-law cited, and the judgment of 14 December 2005 in Case T-200/04 *Regione autonoma della Sardegna* v *Commission* (not published in the ECR), paragraph 53).

56 It is in the light of those considerations that the pleas in law relied upon in support of the present action must be examined.

The losses in respect of the applicant's North Atlantic network

— The return flight to New York initially scheduled for 15 September 2001

57 In recital 55 in the contested decision, the Commission invokes the lack of information from the Greek authorities or the applicant concerning the reason for the failure to obtain slots at JFK on 15 September 2001 and the lack of evidence concerning the reasons for that airport's refusal to give the applicant a slot for that date.

58 For their part, the Greek authorities stated, in paragraph I.3 of their letter of 24 September 2002, that the 15 September 2001 flight to New York had been

cancelled because of the lack of information relating to the possibilities for foreign airlines of landing at JFK.

59 In paragraph 41(a) of the decision to open the formal investigation procedure, the Commission requested the Greek authorities to provide it with all documents and any additional information on the way in which the United States authorities had prohibited flights by Greek airlines after 15 September 2001. In reply, in their letter of 20 November 2003, the Greek authorities explained that the 15 September 2001 flight to New York had been cancelled because of the lack of slots. That lack of slots, caused by exceptionally high demand during the days following the reopening of the airspace, was a direct consequence of the disruption of flights during the four preceding days. As regards proof of the refusal to give a slot at JFK, the Greek authorities stated that they had requested the necessary evidence from the applicant in order to communicate it to the Commission.

60 Contrary to the applicant's allegation, the Commission did not decide that the amounts corresponding to the cancellation of that flight were ineligible for compensation under Article 87(2)(b) EC on the sole ground that it was operated after 14 September 2001. On the contrary, as pointed out in the preceding paragraph, the Commission requested the Greek authorities, in the decision to open the formal investigation procedure, to provide it with any evidence relating to the manner in which the United States authorities had prohibited Greek airlines' flights after 15 September 2001.

61 It must none the less be said that the Greek authorities did not submit, during the administrative procedure, any evidence of the refusal to give a slot or the reason for such refusal, in spite of the Commission's request to them. It should be added that, according to their letter of 20 November 2003 (see paragraph 8 above), the Greek authorities requested the applicant to submit to them evidence of the impossibility of reserving a slot at JFK on 15 September 2001 in order to submit it, subsequently, to the Commission. However, no new evidence reached the Commission.

62 Furthermore, according to the case-law cited in paragraph 55 above, the applicant cannot rely on the telex which it produced for the first time before the Court of First Instance (see paragraph 29 above). In any event, it must be noted that that telex does not state that JFK did not give the applicant a slot for 15 September 2001, but only that a slot was available for the applicant on 16 September 2001. The failure to give a slot for 15 September 2001 could therefore be established on the basis of that telex only by means of a contrary interpretation in support of which the applicant has adduced no other conclusive evidence.

63 Therefore, the applicant's argument as regards that flight cannot be accepted.

— The two return flights to Toronto via Montreal initially scheduled for 15 and 16 September 2001

64 As regards the cancellation of the two return flights to Toronto via Montreal on 15 and 16 September 2001, the Commission states, in recital 56 in the contested decision, that it was due to the applicant's choice. Either the applicant had no other available aircraft and had preferred to operate other scheduled flights, or it had not the time to carry out the requisite technical checks or to reserve the necessary slots.

65 In that regard, it must be observed that, according to the letter of 20 November 2003, the 15 September 2001 flight to Toronto via Montreal was cancelled because the aircraft which should have made it had been required by the Canadian authorities to remain at Halifax from 11 to 15 September 2001 and had not been able to return to Athens until 16 September 2001 at 5.30. Since the applicant's three other Airbus A 340/400s, the only aircraft capable of making transatlantic flights, were already serving other destinations in Africa, Asia, Australia and the United States, the applicant was obliged to cancel the flight in question. As for the 16 September 2001 flight, the late return of the aircraft grounded at Halifax rendered impossible, according to the applicant, the major technical inspection, the preparation of the aircraft, the notification of the passengers and the reservation of slots at Montreal and Toronto

airports, in view, particularly, of the fact that the Canadian authorities had given no prior notice of the exact time at which the aircraft was authorised to take off on 15 September.

66 So far as concerns, first, the flight of 15 September 2001, the evidence on which the Commission relies is not sufficient to support its determination. As regards the lack of other available aircraft, to ask an airline to reserve aircraft in order to cope with the consequences of an event such as the terrorist attacks of 11 September 2001 is tantamount to denying the exceptional nature of that occurrence. If a diligent operator is required to take precautions against the consequences of an event, that event cannot, by definition, be regarded as coming within the doctrine of force majeure (see, to that effect, the judgment of 28 March 2007 in Case T-220/04 *Spain* v *Commission* (not published in the ECR), paragraphs 175 and 176 and the case-law cited) nor, with much greater reason, within the meaning of 'exceptional occurrences' in Article 87(2)(b) EC. As it is, the classification of the terrorist attacks of 11 September 2001 and the closure of the airspace resulting from it as exceptional occurrences is adopted both in the contested decision and in the Communication of 10 October 2001 (see paragraph 49 above).

67 As regards the applicant's alleged choice to operate other scheduled flights, suffice it to state that it was not a choice but a contractual obligation to the passengers of those flights, the breach of which would have entailed consequences under Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5), which was in force at the relevant time.

68 As for the fact that the damage due to the cancellation of the flight in question arose after 14 September 2001, it does not follow either from Article 87(2)(b) EC or from the case-law cited in paragraph 52 above that a direct connection between the exceptional occurrence and the damage caused presupposes that they occur at the same time. On the contrary, the possibility of recognising the existence of such a connection even where the loss arises shortly after the occurrence cannot generally be ruled out.

69 It follows from the foregoing that the Commission's determination as regards the 15 September 2001 flight to Toronto via Montreal is erroneous.

70 So far as concerns, secondly, the cancellation of the 16 September 2001 flight, in order to justify it the applicant refers to the impossibility of carrying out the major technical inspection of the aircraft, of notifying the passengers and of reserving slots at Montreal and Toronto airports.

71 In that regard, first of all, it must be held that neither the notification of the passengers nor the reservation of slots is a reason justifying the applicant's argument. In fact, from the moment that the aircraft took off from Halifax (on 15 September 2001) until the time when the 16 September 2001 flight could have been operated (the applicant does not indicate the planned timing of that flight) a not inconsiderable time elapsed. In default therefore of more detailed information as to the time absolutely necessary to notify the passengers and to reserve slots the applicant's argument in that regard cannot be accepted.

72 Next, it must be noted that the case-file contains no information concerning the time required to carry out the mandatory technical checks for the aircraft to be used for the flight in question. The Greek authorities confined themselves to stating that the available time was not sufficient to carry out the 'major inspection', whereas the Commission states, in recital 56 in the contested decision, that 'the actions in respect of the technical checks … could not have been carried out in time by [the applicant]'. It must be stated that, since the Greek authorities have relied on the constraints in question during the administrative procedure, it was incumbent upon them to inform the Commission of the time necessary for the technical checks required by the relevant manuals in order to dispel the Commission's doubts as regards the direct causal connection between the closure of the airspace and the cancellation of the flight in question. In those circumstances, it must be held that the Commission correctly ruled that the cancellation of the flight in question had no direct causal connection with the terrorist attacks of 11 September 2001 or the closure of the airspace from 11 to 14 September 2001.

— The 'ferry flights'

73 As regards the 'ferry flights' of 18, 20 and 26 September 2001, it is sufficient to point out, like the Commission, that their operation was the choice of the applicant, upon which it was incumbent to make the passengers pay a price including the costs of the aircraft's return to Athens, or to claim adequate compensation from the Governments of the United States and Canada. Therefore, those costs have no direct causal connection with the terrorist attacks of 11 September 2001 or the closure of the airspace and, therefore, do not come within the scope of Article 87(2)(b) EC.

74 Having regard to the foregoing considerations, the contested decision must be annulled to the extent that the Commission decided that the compensation paid to the applicant for losses caused by the cancellation of the 15 September 2001 flight to Canada was not compatible with the common market.

The losses in respect of the rest of the applicant's network

75 As regards the second part of this plea in law concerning the rest of the applicant's network, the applicant's argument puts in issue the soundness of the contested decision in declaring the amounts of aid relating to it incompatible with the common market. However, in the context of the second plea in law, the applicant pleads failure to state the reasons in that regard, which the Court must consider first.

2. *The second plea in law, alleging failure to state the reasons for the decision*

Arguments of the parties

76 The applicant claims that the contested decision contains no statement of the reasons relating to the Commission's refusal to approve the amounts paid as compensation for the losses in respect of the rest of its network (about EUR 1 212 032). It submits that the same applies to the amounts mentioned in the second to fourth and eighth and ninth indents of paragraph 5 above.

77 In the applicant's submission, the Greek authorities communicated to the Commission, particularly in their letter of 24 September 2002, all the evidence relating to the losses suffered over its entire network. That letter also refers to the amounts mentioned in the second to fourth and eighth and ninth indents of paragraph 5 above. In those circumstances, the Commission should have set out the reasons for which it decided that the payment of the amounts in question constituted aid incompatible with the common market.

78 The Commission disputes the soundness of that plea in law. In the decision to open the formal investigation procedure, it expressed serious doubts as to the compatibility of the aid in question with the common market. However, in spite of what had been stated in the letter of 20 November 2003, neither the Greek authorities nor the applicant submitted observations to the Commission during the administrative procedure on those amounts. Moreover, the Commission is not in a position to know what evidence was sent by the applicant to the Greek authorities. In addition, the Commission approved all the amounts relating to the period from 11 to 14 September 2001 for which the Greek authorities had submitted explanations in their letter of 20 November 2003. In those circumstances, the applicant cannot complain that the Commission did not study, on its own initiative, evidence which could have justified, in that regard, the adoption of an approach different from that expressed in the Communication of 10 October 2001 and the decision to open the formal investigation procedure.

Findings of the Court

79 The statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees or other parties to whom the measure is of direct and individual concern may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case T-323/99 *INMA and Itainvest* v *Commission* [2002] ECR II-545, paragraph 55).

80 In this case, it follows from recitals 21, 49 and 50 in the contested decision, read in conjunction with Articles 1, 2 and 4 thereof, that the Commission concluded that the payment of the amounts in respect of compensation for the losses concerning the applicant's network apart from the North Atlantic and Israel and of the amounts stated in the second to fourth and eighth and ninth indents of paragraph 5 above constituted aid incompatible with the common market and that the Hellenic Republic must seek its recovery. However, it must be held that the contested decision contains no setting-out of the grounds which led the Commission to adopt that conclusion.

81 That omission is all the more inexplicable if account is taken of the fact that the Commission sets out those amounts exhaustively in recital 21 in the contested decision, which is devoted to the conduct of the administrative procedure.

82 In addition, while it is true that the Commission stated, in paragraph 36 of the decision to open the formal investigation procedure, that, as regards the network apart from the North Atlantic and Israel, the compensation should be confined to losses

relating to the cancellation of tickets because of the cancellation of a connecting flight to or from a place closed to air traffic, the fact remains that the Greek authorities had, in essence, challenged that determination. Indeed, it follows from paragraphs I.1 and I.2 of the letter of 24 September 2002 (see paragraph 5 above) that, according to the Greek authorities, the extent of the repercussions throughout the network required them to be taken into account overall in order to calculate the loss due directly to the exceptional occurrences. It therefore behoved the Commission to set out, in the contested decision, its definitive determination as regards the amounts of aid in question.

83 Furthermore, while it is true that, in paragraph 41(d) of the decision to open the formal investigation procedure, the Commission requested the Greek authorities to produce information showing the causal connection between the losses set out in the second to fourth and eighth and ninth indents of paragraph 5 above, and the closure of the airspace, the fact remains that the Greek authorities insisted, in their letter of 20 November 2003, on the necessity of approving the amounts relating to them. It was, therefore, for the Commission to set out also, in the contested decision, its definitive determination as regards those amounts of aid.

84 As regards the Commission's argument at the hearing that the reasoning concerning the amounts of aid covered by the present plea in law is to be found in recital 59 in the contested decision, since it refers to the Communication of 10 October 2001 and the absence of an exceptional occurrence after 14 September 2001, it cannot be accepted. According to the first sentence in that recital, '[t]he Commission concludes … that the scheme does not comply with the Treaty, in that part concerning dates later than 14 September 2001, and particularly for the costs submitted by the [Hellenic Republic] for [the applicant] concerning the period after 14 September 2001[, which] amount to … about EUR 1 464 569[,] having regard not only to the expiry of the period prescribed in paragraph 35 of the Communication of 10 October 2001 but also and above all to the absence of an exceptional occurrence and to the change in the nature of the compensatable loss which that extension of time generates'.

85 In that sentence, the Commission summarises its determination set out in recitals 51 to 58 in the contested decision. However, those recitals are devoted to the losses suffered in the applicant's North Atlantic network and not to those suffered in the

rest of its network or to the specific losses mentioned in the second to fourth and eighth and ninth indents of paragraph 5 above. In those circumstances, that recital cannot be interpreted as also covering the latter amounts.

86 It must be noted, furthermore, that the Commission's argument challenging the soundness of the present plea in law (see paragraph 78 above) concerns the situation where, in the decision declaring aid incompatible with the common market, the Commission sets out reasoning based on the evidence which the Member State or parties concerned submitted to it. In such a situation, it cannot be complained that the Commission failed to take into account matters of fact or law which could have been submitted to it during the administrative procedure but which were not (*Fleuren Compost* v *Commission*, cited in paragraph 55 above, paragraph 49). However, unlike that situation, no statement of reasons which could support the operative part of the contested decision relating to the losses referred to in paragraph 80 above appears therein.

87 Therefore, the contested decision must also be annulled for failure to state reasons in so far as the Commission declared incompatible with the common market, first, the aid paid to the applicant for losses in respect of its network apart from the North Atlantic and Israel and, secondly, the aid relating to revenue lost in respect of carriage of goods, to the costs of destruction of sensitive goods, to the costs of additional security checks on goods, to the costs connected with additional hours worked by staff and to the costs connected with additional emergency security measures.

88 In those circumstances, there is no need to examine the second part of the first plea in law, alleging manifest error in the determination relating to the losses connected with the rest of the applicant's network (see paragraph 75 above).

89 It follows from all the foregoing, first, that the contested decision must be annulled in so far as the Commission declared aid paid to the applicant for the losses due to the cancellation of the 15 September 2001 flight to Canada and for the losses referred

to in paragraph 87 above incompatible with the common market and ordered its recovery and, secondly, that the remainder of the action must be dismissed.

Costs

90 Under Article 87(3) of its Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that costs be shared or that each party bear its own costs. In the circumstances of this case, each party must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. **Annuls Articles 1 and 2 of Commission Decision C (2006) 1580 final of 26 April 2006 concerning a State aid scheme C 39/2003 (ex NN 119/2002) which the Hellenic Republic implemented in favour of airlines following losses suffered between 11 and 14 September 2001, in so far as they declare incompatible with the common market aid granted to Olympiaki Aeroporia Ypiresies AE, first, for losses due to the cancellation of the flight to Canada on 15 September 2001, secondly, for losses in respect of its network apart from the North Atlantic and Israel and, thirdly, for revenue lost in respect of carriage of goods, the costs of destruction of sensitive goods, the costs of**

additional security checks on goods, the costs connected with additional hours worked by staff and the costs connected with additional emergency security measures;

2. Annuls Article 4 of Decision C (2006) 1580 final in so far as it orders the aid mentioned in the preceding paragraph to be recovered;

3. Dismisses the remainder of the action;

4. Orders each party to bear its own costs.

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 25 June 2008.

E. Coulon M.E. Martins Ribeiro

Registrar President

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