ORDER OF THE PRESIDENT OF THE FOURTH CHAMBER (EXTENDED COMPOSITION) OF THE COURT OF FIRST INSTANCE

2 April 1998 *

In Case T-86/96 R,

Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen, an association having no legal personality, constituted under German law, established in Bonn (Germany), composed of the following members:

— **Aero Lloyd Flugreisen GmbH&Co. Luftverkehrs-KG,** a company incorporated under German law, established in Oberursel (Germany),

— **Air Berlin GmbH&Co. Luftverkehrs KG,** a company incorporated under German law, established in Berlin,

— **Condor Flugdienst GmbH,** a company incorporated under German law, established in Kelsterbach (Germany),

— **Germania Fluggesellschaft mbH,** a company incorporated under German law, established in Berlin,

— **Hapag-Lloyd Fluggesellschaft mbH,** a company incorporated under German law, established in Langenhagen (Germany),

* Language of the case: German.

— **LTU Lufttransport Unternehmen GmbH&Co. KG,** a company incorporated under German law, established in Düsseldorf (Germany),

and

Hapag-Lloyd Fluggesellschaft mbH, a company incorporated under German law, established in Langenhagen,

represented by Gerrit Schohe, Rechtsanswalt, Hamburg, with an address for service in Luxembourg at the Chambers of Marc Baden, 34B Rue Philippe II,

applicants,

v

Commission of the European Communities, represented by Paul F. Nemitz, of its Legal Service, acting as Agent, assisted by Georg Berrisch, Rechtsanwalt, Hambourg and Brussels, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for interim measures in relation to Commission Decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ 1996 L 146, p. 42),

THE PRESIDENT OF THE FOURTH CHAMBER (EXTENDED COMPOSITION) OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

replacing the President of the Court of First Instance, pursuant to the second paragraph of Article 106 and the first paragraph of Article 9 of the Rules of Procedure,

makes the following

Order

Legal framework, facts and main proceedings

1 By the present application for interim measures, an association of German airlines and a member undertaking of that association are seeking interim measures in relation to a decision whereby the Commission classified as aid incompatible with the common market a German tax provision permitting a special depreciation facility to be applied to aircraft (Decision 96/369/EC of 13 March 1996, OJ 1996 L 146, p. 42, hereinafter 'the contested decision').

2 Under the German provisions governing the depreciation for tax purposes of goods utilised over a period of more than one year, the taxpayer may in certain conditions choose between various schemes, in particular depreciation by identical annual amounts ('straight-line depreciation') and depreciation by decreasing annual amounts ('accelerated depreciation').

3 The provisions which led to the adoption of the contested decision, which are laid down in Paragraph 82f of the Einkommensteuer-Durchführungsverordnung (implementing regulation on income tax, hereinafter 'the EStDV'), are additional to the straight-line depreciation scheme but exclude accelerated depreciation. Under those provisions specific categories of merchant ships, fishing boats and aircraft may, according to certain procedures and during a certain period following acquisition of the asset, be amortised at a higher rate than that provided for under the straight-line depreciation scheme.

4 The aircraft referred to are those used for commercial purposes for the international transport of goods or passengers or for other service activities performed abroad. They must be registered in Germany and must not be disposed of during the six years following acquisition. Provided that those conditions are met, Paragraph 82f provides that during the year of acquisition and the four subsequent years special depreciation of not more than 30% of the total cost of acquisition may be applied. That special depreciation amount may be used in full during the year of acquisition or spread, at the airline's discretion, over the whole five-year period. The present case concerns only the scheme applicable to aircraft.

5 The scheme dates from 1965 and was applied, after being extended in 1986, until the end of 1994 without any formal objection by the Commission. The procedure opened in respect of that extension was closed (Article 4 of the contested decision), having been accepted *de facto* by the Commission (sixth paragraph of Section II and first and second paragraphs of Section IV of the preamble to the contested decision).

6 The present dispute relates only to the extension of the scheme beyond 31 December 1994, as notified to the Commission on 8 September 1993 and implemented on 13 September 1993 by Articles 1 and 8 of the Standortsicherungsgesetz (Law concerning the improvement of tax conditions to enable Germany to maintain its position within the European market as a location for undertakings; *Bundesgesetzblatt I*, p. 1569). The purpose of the extension was to allow the taxpayers concerned, in return for complying with the abovementioned conditions, to benefit from a

special depreciation facility for aircraft 'acquired or built before 1 January 2000'. However, the extension was not to enter into force unless it was approved by the Commission (Article 20(2) of the Law).

7 On 29 November 1995, following the administrative procedure opened against that second extension, the Commission adopted Decision C(95) 3319 final (hereinafter 'the original decision'). In Article 1 the extension of the scheme was classified as State aid which was incompatible with the common market within the meaning of Article 92 of the EC Treaty and Article 61 of the EEA Agreement. In Articles 2 and 3 the Commission called upon Germany to discontinue the aid measure as from 1 January 1995 and to inform the Commission, within two months of notification of the decision, of the measures it had taken in order to comply with it.

8 The applicants lodged an application for the annulment of that decision, registered as Case T-25/96.

9 On 13 March 1996 the Commission adopted the contested decision.

10 Pursuant to Article 5 of the contested decision, the original decision was withdrawn, since, according to the final recital of the contested decision, the German version of the original decision contained numerous drafting errors.

11 Following the withdrawal of the original decision, and upon application by the Commission on 9 April 1996, the Court of First Instance (Fourth Chamber, Extended Composition) declared that it was unnecessary to proceed to judgment and ordered the Commission to bear the whole of the costs (Case T-25/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1997] ECR II-363).

12 Articles 1 to 3 of the contested decision correspond to the Articles 1 to 3 of the original decision. In particular, Article 1 of the contested decision states that the extension of the German scheme constitutes aid which is incompatible with the common market. Articles 2 and 3 call on Germany to take the same steps as those indicated in Articles 2 and 3 of the original decision (see paragraph 7 above).

13 By application lodged at the Registry of the Court of First Instance on 31 May 1996 the applicants brought an action for the annulment of the contested decision in so far as it refers to the extension of the scheme.

14 By a document lodged with its defence on 16 September 1996, the Commission submitted an objection of inadmissibility, which was joined to the substance of the case by order of the Fourth Chamber, Extended Composition, of 8 July 1997.

15 The written procedure was closed when the rejoinder was filed on 18 December 1997.

The measures adopted by Germany following the introduction of the main application

16 By the Jahressteuergesetz 1997 ('the 1997 Tax Law') of 20 December 1996 (*Bundesgesetzblatt I*, p. 2049) the German legislature amended two aspects of Paragraph 82f of the EStDV. First, the special depreciation facility is now available only in respect of aircraft acquired or built before 1 January 1999 (one year earlier than provided for in the Standortsicherungsgesetz). Second, the contract for the purchase or construction of the aircraft concerned must have been concluded before 25 April 1996.

17 An administrative directive of 17 February 1997 from the Federal Minister for Finance states: 'In the case of aircraft, the European Commission has ... approved the special depreciation facility only where the aircraft were acquired or built before 1 January 1995. By derogation from the provisions amended by the Jahressteuergesetz 1997, the special depreciation facility for aircraft can therefore be used only to the extent hitherto authorised by the Commission.'

The interlocutory proceedings

18 By a separate document lodged at the Court on 10 December 1997 the applicants sought suspension of operation of Articles 1 to 3 of the contested decision or, in the alternative, any other or additional interim measure which the Court might deem necessary or appropriate.

19 In its written observations, which were lodged at the Registry of the Court of First Instance on 28 January 1998, the Commission claimed that the interlocutory application should be dismissed in its entirety.

20 The parties presented oral argument on 3 March 1998.

21 At that hearing the applicants withdrew their application for suspension of operation of the contested decision. They stated that by their other — initially alternative — claim, they were requesting the judge hearing the application to adopt a positive measure, on the basis of Article 186 of the EC Treaty. They wished the Commission to be ordered to authorise the German authorities to apply the contested measure, on a provisional basis, for 1997 and 1998. That interpretation is apparent from the submissions made in the application for interim measures (paragraph 55). In the alternative, the applicants claim that the Commission should be ordered to grant provisional authorisation with regard to the applicants alone.

22 The Commission maintained its position that the application should be dismissed.

Law

23 Pursuant to Articles 185 and 186 of the EC Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

24 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for interim measures is to state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those measures must be provisional in that they must not prejudice the decision in the main proceedings (see, most recently, Case T-610/97 R *Carlsen and Others* v *Council* [1998] ECR II-485, paragraph 13).

Arguments of the parties

Preliminary observations on the objective of the application for interim measures

25 According to the applicants, the interim measures which they seek must permit them to benefit from Paragraph 82f of the EStDV until the end of its period of validity, namely for the 1997 and 1998 tax years, albeit only on a provisional basis, that is subject to recovery by Germany of the sums unduly received should the

Community judicature establish the existence of State aid. That objective is in danger of being definitively compromised, having regard to the average length of proceedings before the Court of First Instance and the fact that the Commission may exercise its right to appeal against the judgment.

Admissibility of the application for interim measures

26 In its observations on the application for interim measures the Commission claims that the applicants' submissions to the effect that the Court should adopt any other or additional interim measure it might deem necessary or appropriate are inadmissible. They do not state with sufficient clarity the measures sought by the applicants (See Case 92/78 R *Simmenthal* v *Commission* [1978] ECR 1129, paragraphs 20 and 21), so that the Commission is unable to defend its rights in its observations (Article 105(1) of the Rules of Procedure) and the judge hearing the application is unable to determine whether the conditions governing the granting of interim measures are met. At the hearing the Commission further stated that the grounds of the application failed to clarify the content of those submissions.

27 In any event, by issuing an order to the Commission to authorise the application of Paragraph 82f of the EStDV on a provisional basis, which is the only means of achieving the objective pursued by the applicants (see paragraph 25 above), the judge dealing with the matter would be acting, wrongly, in the Commission's place and conferring on the applicants an advantage which they would be unable to obtain in the main proceedings (see Case T-164/96 R *Moccia Irme* v *Commission* [1996] ECR II-2261, paragraph 29).

28 At the hearing the Commission expressed doubts as to whether, in the light of Paragraph 20(2) of the Standortsicherungsgesetz (see paragraph 6 above), the provisional authorisation applied for would be capable of leading to the application of Paragraph 82f. Such authorisation could not compel Germany (which, moreover, has made no application for interim measures) to apply that provision. The fact

that as German law now stands the applicants cannot seek the application of that provision, even on a provisional or retroactive basis, does not entitle them to apply for an injunction against the Commission. In any event, the measure applied for should apply only to the applicants.

29 The applicants claimed at the hearing that Article 186 allows the judge hearing an application for interim measures to require the Commission to adopt positive measures (Case 809/79 R *Pardini* v *Commission* [1980] ECR 139; Case 118/83 R *CMC* v *Commission* [1983] ECR 2583). It is clear from Paragraph 20(2) of the Standortsicherungsgesetz and from the fact that Germany has challenged the contested decision before the Court of Justice (Case C-182/96) that Germany would apply Paragraph 82f if the measure applied for were granted. There is no reason to deny judicial protection in the present case merely because, in accordance with the applicable provisions, Germany has not granted the advantage in issue in the absence of a positive decision of the Commission or because Germany has made no application for interim measures.

Prima facie case

30 The applicants maintain that their main action is admissible and submit that the contested decision is illegal in particular because the statement of reasons contains a number of manifest and serious defects.

31 First, the Commission failed to take account of the three expert reports which were available to it before it adopted the contested decision but to which there is no reference in that decision. Each of those reports concluded, following a scientific assessment of the operation of Paragraph 82f of the EStDV, that it could not lead to a tax saving or to an advantage in terms of interest. For the purpose of determining whether the scheme established by Paragraph 82f constituted aid,

those reports were the Commission's only source of scientific information. By failing to make use of them the Commission therefore failed to take account of 'all the relevant factors of the case' (see Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 32). That situation prevents those concerned from defending their rights and the Community judicature from reviewing the legality of the contested decision in full knowledge of the facts (in that regard, see, for example, Case T-471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II-2537, paragraph 29, and Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651, paragraph 52).

32 Second, the statement of reasons of the contested decision is vitiated, according to the applicants, by the fact that Paragraph 82f of the EStDV has 'general' rather than 'selective' effect and therefore does not constitute State aid within the meaning of Article 92 of the EC Treaty. Any citizen might benefit as an investor, particularly in the case of German partnerships whose shares are available to the public and whose profits are taxed in the hands of their members (the investor-members). The same considerations apply to the acquisition of aircraft used for international transport for remuneration (where, for example, an individual operates a transfrontier 'air taxi service') and the acquisition of shares in airlines by private persons.

33 Third, the applicants complain, with reference to the application and the reply in the main proceedings, of other manifest defects in the statement of reasons concerning the fact that the Commission simply made assertions without adducing evidence to support them, although the burden of proving the existence of State aid lies on the Commission. The Community judicature has full jurisdiction to determine that question. At the hearing the applicants further stated that the expert reports show that the German provisions in issue do not constitute State aid.

34 The Commission considers that the main action is both inadmissible and unfounded. It refers to its pleadings in the main proceedings.

Urgency

35 The applicants claim that the measure applied for is necessary if they are not to suffer serious and irreparable harm, namely the definitive loss of the benefit of Paragraph 82f of the EStDV.

36 As regards the irreparable nature of that damage, the applicants claim that the main proceedings would in all probability not be definitively resolved until 1999. The Commission could delay that solution (as it has already done by withdrawing the original decision and adopting the contested decision, which is substantially identical) by procedural steps such as applications for further time and, in particular, by lodging an appeal.

37 Therefore, if a solution were not reached until such a late stage, after the end of the final tax year referred to in Paragraph 82f of the EStDV (see paragraph 25 above), the applicants would be definitively precluded from any further benefit, which would deprive a judgment granting their application of all useful effect.

38 In that regard, the applicants claim, first, that the choice between accelerated depreciation and straight-line depreciation (the only method to which the special depreciation facility is applicable) must be made before a certain date. In their application for interim measures they claimed that the choice must be made 'in the year of acquisition' and referred, more specifically, to the balance-sheet date (31 December). At the hearing, however, they stated that the choice is made when the balance sheet is being prepared, after the end of the year of acquisition. The deadline for drawing up the balance sheet varies according to the type of company. At the moment the deadline for 1997 has not yet been exceeded in the case of certain small private companies. Those companies could therefore still choose between the two main types of depreciation for 1997. However, the applicants further stated at the hearing that in order to form an effective part of an undertaking's 'balance-

sheet policy' the choice must be taken by the management well before the official deadline so that the other steps reflecting that policy can be taken in good time.

39 Second, once an undertaking has (formally) chosen accelerated depreciation, under the relevant legislation it cannot subsequently change over to straight-line depreciation together with the special depreciation facility. Paragraph 82f of the EStDV cannot be applied with retroactive effect where the annual accounts have already been closed and certified. In particular, a retroactive adjustment of those accounts would be incompatible with the rule of accuracy and veracity in accounting. The applicants further stated at the hearing that Paragraph 82f cannot be applied on a provisional basis. Such an accounting measure would prevent the undertaking concerned from obtaining the necessary auditor's certificate for the balance sheet in question. Thus Paragraph 82f has no longer been applied since 1995.

40 Third, the applicants could not be compensated by the award of a sum of money, since the advantage associated with the application of Paragraph 82f is not quantifiable in monetary terms. The airlines concerned make no tax savings and derive no advantage in terms of interest over the depreciation period as a whole (the effects in a single year are not decisive, contrary to the view formed by the German Government when it adopted the 1997 Tax Law). Paragraph 82f only allows them to choose, to a certain extent, to spread the total amount over the depreciation period and thus to operate a flexible policy when drawing up their balance sheets. The airlines can thus reduce any variations in their annual results caused by investments in aircraft, which are both onerous and, owing to the succession of 'generations' of aircraft, cyclical. Undertakings must show consistent financial results if shareholders, management and employees and banks are to have confidence in their continuity and reliability.

41 For the undertakings concerned the loss of that possibility constitutes economic damage which is not only irreparable but also grave and serious.

42 At the hearing the applicants pointed out that the member undertakings of the first applicant purchased a total of 50 aircraft in 1997 and 1998 for a sum of approximately USD 2 500 million. In that regard, they observed that although leasing plays an increasingly important role in the acquisition of aircraft, owing to the increases in manufacturers' prices, German undertakings, especially the members of the first applicant, have thus far been in a position to acquire aircraft themselves. For the rest, the applicants cannot be required to provide individual figures for each undertaking concerned; moreover, those figures are confidential and would make no useful contribution to the decision to be taken on the application for interim measures. Such a requirement would amount to imposing on them a greater degree of precision than that observed in the contested decision. Be that as it may, what matters in the present case is the loss of a tool which guarantees flexibility.

43 The fact that the application for interim measures was only submitted in December 1997 may be explained by the emergence at that time of the prospect that the advantage of Paragraph 82f of the EStDV would be definitively lost, since the 1997 Tax Law had reduced its period of validity by one year. The removal of the advantage upon expiry of that period will have very serious consequences for the sector.

44 Last, with reference to the principle of proportionality and to German law, the applicants consider that the requirements associated with the criterion of urgency should not be defined too rigidly in the present case, since the illegality of the contested decision is manifest. In that regard, they refer to the first ground on which they rely to establish a prima facie case in the main action (see paragraph 31 above).

45 The Commission maintains that, according to a consistent line of case-law based on the wording of the relevant provisions (here Article 104(2) of the Rules of Procedure of the Court of First Instance), it is essential to establish urgency if interim measures are to be granted (see Case C-110/97 R *Netherlands* v *Council* [1997] ECR I-1795, paragraph 24, and the cases cited there; Case T-159/97 R *Chaves Fonseca Ferrão* v *OHIM* [1997] ECR II-1049, paragraph 11). Those provisions are sufficiently clear to preclude recourse to general principles. In German law, too,

according to the Commission, the criterion of urgency cannot be avoided by a general reference to the prospects of success in the main proceedings. In any event, the contested decision is not manifestly illegal (see paragraph 34 above).

46 The applicants have failed to demonstrate the urgency of the measures applied for, which would require, in particular, evidence that application of the contested decision is likely to entail serious and irreparable damage.

47 In that regard, the applicants should have stated the precise number of aircraft which have been or are to be purchased by the member undertakings of the first applicant or by the second applicant itself and which, because they will have been purchased or built before 1 January 1999 and the contracts for their purchase or construction were concluded before 25 April 1996, meet the conditions for the application of Paragraph 82f. The summary information provided at the hearing does not enable the Commission to put forward an adequate defence.

48 According to the Commission, the applicants should in any event have specifically explained, with supporting figures, the consequences which the loss of that opportunity would entail for each of those undertakings and in respect of each of the aircraft concerned. The Commission disputes that the requirement to do so might give rise to serious problems of confidentiality, in any event in the second applicant's case.

49 At the hearing the Commission further claimed that the undertakings could rely on Paragraph 82f on a provisional basis for the purpose of their 1997 balance sheets in order to secure its definitive application by the national authorities when judgment has been given in the main proceedings.

50 As regards 1998, the occurrence of the harm is not sufficiently imminent to justify immediate measures (see Case T-88/94 R *Société Commerciale des Potasses et de l'Azote and Entreprise Minière et Chimique* v *Commission* [1994] ECR II-263,

paragraph 39, and Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 38). The formal choice between the two depreciation methods need not be made for that year until the end of the year and the actual choice, according to the applicants' argument, should be made during the final quarter. It cannot be precluded, indeed it is probable, that judgment in the main proceedings will be given before then. If that were to appear unlikely the applicants could submit a fresh application for interim measures.

51 In that regard, the Commission denies that it has delayed the proceedings thus far and rejects the applicants' prediction of its future conduct. In particular, even supposing that the Court of First Instance were to find in favour of the applicants, the Commission would not automatically appeal, but would decide whether or not to do so only after carefully examining the grounds of the judgment. In any event, it would be obliged to adopt the measures to comply with such a judgment since, subject to any interim measures granted by the Court of Justice, an appeal by the Commission would not have suspensory effect.

52 The argument that the present application is urgent is contradicted by the fact that the amendments introduced by the 1997 Tax Law were intended to achieve budgetary savings, which shows that the damage which the applicants allegedly face is in reality pecuniary damage. It is also contradicted by the absence of any application for interim relief in Case T-25/96, by the belated nature of the present application as regards 1996 and even, in certain regards, 1997 and by the fact that the German rules are due to expire shortly.

Balance of interests

53 The applicants consider that pursuant to the third paragraph of Article 3b of the EC Treaty, which provides that any action by the Community is not to go beyond what is necessary to achieve the objectives of the Treaty, it is necessary to take account of the impact which a specific measure may have on one or the other party.

54 In the present case the applicants cannot be required to suffer the damage referred to above by definitively renouncing (for the last two tax years during which it is available) the opportunity to make use of the special depreciation facility. The Community would suffer no damage by waiting, after the adoption of the interim measure, for the judgment in the main proceedings, even if the main application were to be dismissed by the Court. Should that application be dismissed, it would mean that Paragraph 82f of the EStDV conferred a monetary advantage and therefore constituted State aid. The Commission could then order Germany to recover the aid and the Community would thereby be compensated for any damage associated with the interim measure. As regards the Community interest in there being no distortion of competition in the internal market (Article 3(g) of the EC Treaty) the applicants observe that to their knowledge during the 25 years that Paragraph 82f has been in force no competitor has ever complained to the competent authorities that German airlines were able to rely on it.

55 In the Commission's submission, the balance of interests does not favour granting the measure applied for. The fact that aid may be subsequently recovered does not prevent it from distorting competition in the mean time and does not even necessarily allow such distortion to be eliminated retroactively.

Findings of the President

56 In the light of the explanations which the applicants provided at the hearing, the President notes that they are now asking the Court to order the Commission to authorise the German measure in issue on a provisional basis for 1997 and 1998 or, in the alternative, to order its authorisation for the benefit of the applicants alone.

57 Even supposing (having regard, in particular, to the content of the application for interim relief) that those measures were applied for in the proper form, the application must be dismissed, since the legal conditions governing the granting of the measures applied for are not met.

58 It is settled law that the condition relating to urgency within the meaning of Article 104(2) of the Rules of Procedure of the Court of First Instance must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for the interim measure. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences (see, for example, Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 33).

59 The applicants' argument that the judge dealing with the matter should amend the requirements linked with that criterion on the ground that the contested decision is manifestly illegal cannot be upheld.

60 All the submissions which the applicants have put forward in order to show that there is a prima facie case in the main proceedings allege 'defects in the statement of reasons', including the complaint, on which particular emphasis is placed in the present context, that the contested decision contains no reference to the expert reports (see paragraphs 31 and 44 above). In the event that such defects were established, they would not by their nature preclude the possibility that the Commission's finding in the contested decision that the German measure constitutes State aid which is incompatible with the common market is materially justified under Article 92 of the EC Treaty. They are therefore incapable of showing that the applicants have a particular legitimate interest in obtaining an injunction ordering the Commission to grant provisional authorisation pursuant to Article 92. In any event, none of the applicants' submissions justifies, at first sight, the conclusion that they were prevented by the allegedly incomplete nature of the statement of reasons from expressing their views on that point. Each of those submissions highlights errors which the Commission is alleged to have committed in examining the case-file (i) by failing to use the expert reports, (ii) by reaching the conclusion that the German rules were selective or (iii) by failing to prove its assertions.

61 As regards the substantive legality of the contested decision, those three submissions cast doubt by implication, as does the third plea in law in the main proceedings (infringement of Article 92(1) of the EC Treaty) in express terms, on the classification of the national measure in issue as State aid. However, the question thus raised can only be resolved following a thorough examination by the court dealing with the substance of the case. That consideration applies, in particular, to the problem of whether the measure allows taxpayers to make savings, in particular in terms of interest. At the hearing the applicants themselves emphasised the importance which they attribute to the economic analyses in the three expert reports submitted during the administrative procedure. The parties disagree, moreover, as to the choice of the standard of comparison used to determine whether or not such savings are possible, which is another problem which cannot be solved without a thorough examination by the Court in the context of its assessment of the main application. The judge hearing the application for interim measures cannot anticipate that assessment.

62 In those circumstances, it is necessary, in accordance with the case-law cited above, to consider whether the applicants have sufficiently established the risk of serious and irreparable damage.

63 In that regard, it must be pointed out, first, that the risk must affect interests which are peculiar to them or, in the specific case of the applicant association, at the very least interests which it is called upon to protect (see Case T-213/97 R *Eurocoton and Others* v *Council* [1997] ECR II-1609, paragraph 46).

64 Second, to be able to determine whether the damage which the applicants fear is serious and irreparable and therefore provides grounds for, exceptionally, disapplying the contested decision, the judge hearing the application must have hard evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail for each of the undertakings concerned.

65 In the light of those criteria, the applicants should have provided detailed documentary evidence of, first, the aircraft purchased by each of the undertakings concerned which fall within the scope of the German provisions. By virtue of the amendments introduced by the 1997 Tax Law (see paragraph 16 above), the contracts relating to those purchases must have been concluded before 25 April 1996 and are therefore apparently identifiable for the entire remainder of the period during which the provisions are applicable.

66 The application for interim measures contains no such information. The mere assertion at the hearing that all the member undertakings of the first applicant bought a certain number of aircraft for a given sum, stated in approximate terms, does not suffice for the purpose of evaluating the actual material interest of each of the undertakings concerned.

67 Such precise, individual and substantiated information was all the more necessary because the applicants acknowledged at the hearing that in addition to the purchase of aircraft by airlines themselves, where their depreciation is shown in each airline's own accounts, leasing is of increasing importance owing to increases in manufacturers' prices.

68 The applicants should also have shown, on the basis of the figures relating to those purchases and at least approximately and with examples, the actual consequences which they expect if Paragraph 82f of the EStDV is not applied, as regards both differences in the undertakings' balance sheets and the harmful effects likely to result from those differences. They have not claimed that it would have been impossible to do so. Furthermore, since Paragraph 82f was applicable between 1965 and 1994 but has not been applicable since then, it cannot at first sight be ruled out that at least some of the undertakings whose interests are invoked in the present case could have compared the situations under both schemes. In those circumstances a mere reference to the advantage of being able to operate a flexible balance-sheet policy in order to maintain the confidence of third parties interested in the continuity and reliability of the undertaking is not an adequate explanation.

69 In so far as they rely on the confidential nature of the economic and accounting figures of the undertakings concerned (the second applicant and the members of the first applicant), their argument cannot be accepted. Such confidentiality cannot be invoked as against the Commission, which is bound by an obligation of professional secrecy (Article 214 of the EC Treaty). As regards confidentiality in the relations between the undertakings concerned, the applicants have provided no evidence that it would have been impossible to maintain confidentiality in regular interlocutory proceedings, in particular as regards the rights of the defence of each undertaking.

70 Furthermore, the specific circumstances in which the present application was submitted clearly disclose a number of factors which indicate that the matter is not urgent.

71 Paragraph 82f of the EStDV had no longer been applicable since the end of 1994 and it will no longer be applicable after 31 December 1998. The applicants have been unable to explain how the advantage which they associate with that provision is urgent as regards the acquisition of aircraft in 1997 and 1998 or, in particular, why they did not submit a similar application in respect of the 1995 and 1996 tax years in the context of Case T-25/96 or in the context of the main proceedings in the present case.

72 In so far as the applicants explain the date on which they chose to apply for interim measures by their fear of definitively losing that advantage, because of the danger that the advantage would no longer be available in any of the tax years under consideration, their argument cannot be accepted. As they themselves state, the present application was justified in order to enable them, within the period prescribed by national law and having regard to the irreversible nature of their choice, to choose straight-line depreciation for 1997 and 1998, while remaining assured of the possibility of subsequently making use of the special depreciation facility. However, that justification could have been invoked in the same way in relation to the corresponding periods for the previous years. The fact that the 1997 Tax Law brought forward the deadline for acquiring aircraft by one year does not

affect that reasoning. Nor does the actual adoption of that Law, in December 1996, in itself explain why the application for interim measures was submitted almost one year later.

73 Furthermore, the applicants' assertion that the choice between the different types of depreciation must be made well before the official deadline if it is to form an effective part of the undertaking's 'balance-sheet policy' tends at first sight to indicate that the present application comes too late to preserve for 1997 all the opportunities which the applicants associate with the German provisions.

74 Since the condition relating to urgency is therefore not met, the balance of interests cannot in the circumstances of the case favour the measure applied for. The applicants have not adduced any evidence giving rise to particularly obvious doubts as to the validity of the classification of the national measure as State aid (see paragraph 61 above). Furthermore, Articles 92 and 93 of the EC Treaty are intended to prevent such aid from distorting competition within the Community. The final sentence of Article 93(3) protects competition by preventing payment of the aid before the Commission has been able to satisfy itself that it is compatible with the common market. That procedure implies the exercise of a wide discretion on the part of the Commission (see Case C-169/95 *Spain* v *Council* [1997] ECR I-135, paragraph 18), whose role the judge hearing the application for interim measures cannot assume (see Case T-107/96 R *Pantochim* v *Commission* [1996] ECR II-1361, paragraph 44). In the present case the Commission, exercising that power, declared that the aid was incompatible with the common market. In the absence of sufficient evidence to establish a danger of serious and irreparable harm, therefore, the judge hearing the application for interim measures cannot disapply the rules on the protection of competition laid down in Articles 92 and 93 of the EC Treaty. That finding is not affected by the applicants' claim that the German rules have not hitherto been the subject of a complaint.

75 It follows from all the foregoing that the legal requirements governing the granting of interim measures are not met in the present case. The application must therefore be dismissed.

On those grounds,

THE PRESIDENT OF THE FOURTH CHAMBER
(EXTENDED COMPOSITION)
OF THE COURT OF FIRST INSTANCE

replacing the President of the Court of First Instance in the present interlocutory proceedings,

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 2 April 1998.

H. Jung
Registrar

P. Lindh
President