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

15 September 1998 *

In Case T-140/95,

Ryanair Ltd, a company incorporated under Irish law, established in Dublin, represented by Trevor Soames and Alan Ryan, Solicitors, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

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

defendant,

supported by

* Language of the case: English.

Ireland, represented by Michael Buckley, Chief State Solicitor, acting as Agent, assisted by Joseph Finnegan SC, of the Irish Bar, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

and by

Aer Lingus Group plc, a company incorporated under Irish law, established in Dublin, represented by Paul Gallagher SC, of the Irish Bar, and by James O'Dwyer and Patrick McGovern, Solicitors, with an address for service in Luxembourg at the Chambers of Maître René Faltz, 6 Rue Heine,

interveners,

APPLICATION for annulment of the Commission decision of 21 December 1994 (OJ 1994 C 399, p. 1), authorising the Irish Government to pay the second tranche of the aid to the Aer Lingus group approved by Commission Decision 94/118/EC of 21 December 1993 concerning aid to be provided by the Irish Government to the Aer Lingus group (OJ 1994 L 54, p. 30),

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

composed of: A. Kalogeropoulos, President, C. P. Briët, C. W. Bellamy, A. Potocki and J. Pirrung, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 27 May 1998,

gives the following

Judgment

Background to the dispute

1 In August 1993 the Irish Government notified the Commission, in accordance with Article 93(3) of the Treaty, of its intention to make a capital injection of IR £175 million into the Aer Lingus group in the context of a restructuring plan entitled 'Strategy for the Future' (hereinafter 'the Cahill plan'). That injection was to be made in three tranches: IR £75 million to be paid in 1993, IR £50 million in 1994 and IR £50 million in 1995.

2 On 21 December 1993, following a procedure initiated pursuant to Article 93(2) of the Treaty, in which Ryanair Ltd, a company governed by Irish law, established in Dublin, had participated, the Commission adopted Decision 94/118/EC concerning aid to be provided by the Irish Government to the Aer Lingus group (OJ 1994 L 54, p. 30, hereinafter 'the 1993 Decision').

3 Article 1 of the operative part of the 1993 Decision provides as follows:

'The restructuring aid to Aer Lingus in the form of IR £175 million equity injection to be awarded in three tranches in 1993, 1994, and 1995 is considered to be compatible with the common market pursuant to Article 92(3)(c), provided that the Irish Government:

(a) fulfils its commitment not to proceed with the payment of the second and third tranches should Aer Lingus fail to achieve the IR £50 million annual reduction in costs, and obtains an independent verification that the cost reductions are implemented in full;

(b) fulfils its commitment to provide a report to the Commission on the progress of the restructuring programme, on the financial and economic development of the Aer Lingus group and its companies, in particular with regard to the productivity improvements as referred to in their letter of 24 November 1993. The report will be given at least four weeks before the payment of the second and third tranches of the aid in 1994 and 1995 in order to give the Commission, if necessary, the possibility to comment;

...

(d) fulfils its commitment not to expand Aer Lingus' operating fleet over the period of the restructuring plan other than for transatlantic operations where additional aircraft may be required to maintain capacity levels;

...

(g) fulfils its commitment that the number of seats offered for sale to the public on Aer Lingus' scheduled services will not exceed in the calendar year 1994, for United Kingdom/Ireland routes, 3.42 million seats as a whole and, for the Dublin-London Heathrow route, 1.43 million seats for the same year;

(h) fulfils its commitment that by agreement between the Commission and Ireland, independent assessors will be appointed in mid-1994 to review actual and prospective performance for 1994. If the growth of the Ireland/United Kingdom market so warrants, the figures set out in (g) will be adjusted to reflect such growth. At the same time, an independent assessment of actual and prospective market growth will be drawn up in order to determine Aer Lingus' additional capacity for 1995 in line with any increase in the total market;

...'

4 On 23 December 1993 the Irish Government subscribed IR £75 million for new shares in Aer Lingus Group plc.

5 On 3 November 1994 the Irish Government submitted its first annual report, in accordance with Article 1(b) of the 1993 Decision. At the Commission's request, it submitted additional information on 17 November 1994.

6 On 30 November 1994, in accordance with Article 1(h) of the 1993 Decision, the Commission adopted Decision 94/997/EC concerning the approval of the revised figures of Aer Lingus' seat capacity restrictions set out in the 1993 Decision (OJ 1994 L 379, p. 21). By that decision, the Commission increased the limit on the number of seats, set out in Article 1(g) of the 1993 Decision, which Aer Lingus could offer on the Ireland/United Kingdom routes and on the Dublin-London Heathrow route in 1994 and 1995.

7 A meeting was held on 8 December 1994, at the request of the applicant, between the applicant and Commission officials to consider, *inter alia*, whether Aer Lingus had complied with the 1993 Decision.

8 On 21 December 1994, the Commission adopted, in the form of a letter addressed to the Irish Government, the decision entitled 'Payment of the second IR £50 million tranche of aid No C 34/93 approved by [the Commission in the 1993 Decision]' (OJ 1994 C 399, p. 1, hereinafter 'the contested decision').

9 In that decision, the Commission found that the Aer Lingus group had not achieved the IR £50 million reduction in costs required by Article 1(a) of the 1993 Decision. However, after studying the implementation of the restructuring plan as regards, *inter alia*, the airline itself and Team Aer Lingus, a maintenance subsidiary, (hereinafter 'Team') as well as the financial situation of the group, the anticipated sale of the Copthorne hotel chain and the profitability of the various groups of routes operated by Aer Lingus, it concluded, in the 25th paragraph, that:

'... the progress of the restructuring and the results already achieved are satisfactory, despite the fact that the objective of the annual cost reduction has been achieved only by the airline and not by the whole group because of the abovementioned circumstances which could not have been anticipated in the restructuring plan. Therefore, the Commission has decided to derogate from its [1993 Decision]

and to authorise the Irish Government to pay the second tranche of the aid to Aer Lingus. In order to ensure the effectiveness of the Decision of 21 December 1993, Ireland shall, prior to payment of the third tranche:

— submit, by 30 June 1995, a report to the Commission on the progress of the restructuring programme at Team and on its financial and economic development, including financial projections on which the company's strategy is based; Team's restructuring programme needs to be implemented without any further delay on the basis of an adequate business strategy and a sound capital structure,

— provide the Commission, pursuant to Article 1(b) of the [1993 Decision], with a report at least eight weeks before payment of the third tranche in 1995, setting out in detail the annual reduction in costs of IR £50 million, including a statement linking the cost savings to specific management action, detailed and fully evaluated annual financial projections for the group and its companies for the period to 31 December 1999 (and for the transitional 12-month period to 31 March 1995 following the change in the end of the fiscal year), reflecting the effects of the restructuring measures, the consequences of the revised plan for Team and of the eventual sale of the Copthorne hotel chain. The report should also include a route group profitability analysis.'

10 On 22 December 1994 the Irish Government subscribed IR £50 million for new shares in Aer Lingus Group plc.

11 The *Official Journal of the European Communities* No C 399 of 31 December 1994, containing the text of the contested decision, was published on 13 April 1995.

Procedure and forms of order sought by the parties

12 The applicant brought the present proceedings by application lodged at the Registry of the Court of First Instance on 5 July 1995.

13 By letter lodged at the Registry of the Court of First Instance on 18 December 1995, the Commission withdrew the plea of inadmissibility raised in its defence, alleging that the action was out of time, and it subsequently stated, in its rejoinder dated 25 March 1996, that Commission officials had informed the applicant that the time-limit for instituting proceedings laid down in Article 173 of the Treaty would start to run on the date of publication of the contested decision.

14 By orders of 14 February 1996 the President of the Second Chamber (Extended Composition) granted Ireland and Aer Lingus Group plc leave to intervene in the proceedings in support of the forms of order sought by the Commission.

15 Acting on the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry.

16 The parties presented oral argument and their replies to the Court's questions at the hearing on 27 May 1998.

17 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

18 The Commission and the interveners claim that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

19 Aer Lingus submits that the application was submitted outside the time-limit laid down in the fifth paragraph of Article 173 of the EC Treaty. It notes that, in its defence, the Commission claimed that the applicant had known of the existence of the contested decision in December 1994, and at the latest on receipt of a letter from the Commission dated 12 January 1995, and had not asked for a copy of the full text of the contested decision within a reasonable period.

20 The applicant contends that its application is admissible, since the time-limit laid down in the fifth paragraph of Article 173 of the Treaty started to run when the contested decision was published in the Official Journal of 13 April 1995.

Findings of the Court

21 The fourth paragraph of Article 37 of the EC Statute of the Court, which applies to proceedings before the Court of First Instance by virtue of Article 46, provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. Furthermore, according to Article 116(3) of the Rules of Procedure, the intervener is to accept the case as he finds it at the time of his intervention.

22 Since the defendant withdrew its plea of inadmissibility by a letter received on 18 December 1995, that is to say before Aer Lingus was granted leave to intervene in support of the forms of order sought by the Commission, Aer Lingus is not entitled to raise an objection of inadmissibility and the Court is not therefore required to consider the pleas of inadmissibility on which it relies (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 76).

23 However, since it concerns an absolute bar to proceeding, the Court of First Instance may at any time, of its own motion, consider the admissibility of the application, pursuant to Article 113 of the Rules of Procedure.

24 Under the fifth paragraph of Article 173 of the Treaty, proceedings must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

25 It is clear simply from the wording of that provision that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (see Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35, and, concerning State aid, the Opinion of Advocate General Capotorti in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, 2695).

26 It is not disputed that, in the present case, the contested decision was published in the Official Journal. Since the contested decision allows a derogation from the 1993 Decision, which was itself published, and Commission officials informed the applicant that the time-limit for instituting proceedings against the contested decision would start to run on the date of publication of the contested decision, it was reasonable for the applicant to anticipate that the contested decision would be published in the Official Journal.

27 It follows that, in the present case, the time-limit for instituting proceedings began to run on the date of publication, that is 13 April 1995.

28 The period of two months provided for by the fifth paragraph of Article 173 of the Treaty, calculated from the end of the 14th day after the date of publication of the measure in the Official Journal, in accordance with Article 102(1) of the Rules of Procedure, and extended by ten days on account of distance for an applicant living in Ireland, in accordance with Article 102(2) of the Rules of Procedure, expired on 7 July 1995. It follows that the application, which was lodged at the Registry of the Court of First Instance on 5 July 1995, was submitted within the time-limit.

29 The application is therefore admissible.

Substance

Arguments of the parties

Arguments of the applicant

30 In its application, the applicant relies on two main pleas alleging, first, breach of essential procedural requirements in so far as the Commission failed to re-open the procedure under Article 93(2) of the Treaty and to hear the applicant before adopting the contested decision and, second, that the Commission's finding that payment of the second tranche of the aid was compatible with the common market within the meaning of Article 92(3)(c) of the Treaty was vitiated by manifest error. It also raises certain other grounds of challenge.

31 As regards the first plea, alleging breach of essential procedural requirements, the applicant submits that the Commission was not entitled to adopt the contested decision without re-opening the procedure under Article 93(2) of the Treaty or, at the very least, without again hearing the applicant. Article 1(a) of the 1993 Decision prohibited the payment of the second tranche of aid, since the annual reduction in costs of IR £50 million foreseen in that decision had not been achieved. It follows that the second tranche of aid could be paid only if the Commission took a new decision following a *de novo* examination of the circumstances of the case, and finding the aid to be compatible with the common market in accordance with Article 92(3)(c) of the Treaty.

32 The applicant refers to the case-law of the Court, according to which the Commission is obliged to initiate the procedure under Article 93(2) of the Treaty if its initial examination of the aid does not enable it to overcome all the difficulties involved in determining whether it is compatible with the common market (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 29). In the present

case, the Commission's initial examination of the compatibility with the common market of the second tranche of aid could not, and did not, overcome all the difficulties, particularly as regards the question whether the conditions laid down in Article 92(3)(c) of the Treaty were satisfied.

33 In support of its assertion that the Commission should have had doubts as to the compatibility of the second tranche of the aid with the common market, the applicant relies on a number of factors concerning Team, the United Kingdom provincial routes, the BAe 146 aircraft, the financial situation of the Aer Lingus group and of the airline and the sale of the Copthorne hotel chain.

34 The applicant relies on those same factors as the basis for its second plea, alleging that the Commission committed a manifest error of assessment when it decided that payment of the second tranche of the aid would be compatible with the common market within the meaning of Article 92(3)(c) of the Treaty.

35 The arguments put forward by the applicant in the context of those two pleas should be dealt with together.

— Team

36 As regards the subsidiary Team, the applicant submits that it is clear from the contested decision that the Commission itself had doubts as to whether the conditions laid down in Article 92(3)(c) of the Treaty were satisfied and, in particular, the condition that the aid should facilitate the development of certain economic

activities. It points out in that respect that, in the 14th paragraph of the contested decision, the Commission considers that 'failure to address the problem of continuing losses at Team might have an impact on the restructuring plan'.

37 The Commission thus acknowledged that it did not know whether Team would implement the necessary cost reductions. It was consequently not able to verify whether the second tranche of the aid would indeed be used for 'restructuring' purposes and would facilitate 'the development of certain economic activities' within the meaning of Article 92(3)(c) of the Treaty.

38 Furthermore, the very fact that the Commission required the Irish authorities, in the contested decision, to submit, by 30 June 1995, a report on the progress of the restructuring programme at Team, and the proposed strategy for resolving the company's difficulties in the longer term, demonstrates that, when the contested decision was adopted, the Commission was not in a position to establish that the second tranche of the aid would facilitate the development of certain economic activities, within the meaning of Article 92(3)(c).

39 Moreover, the Cahill plan had been abandoned as regards Team following a strike in the summer of 1994 and pursuant to the Labour Court's recommendations in November 1994, which prevented cost reductions and, in particular, additional redundancies. At the time of the contested decision, Aer Lingus and the Irish Government did not therefore know whether Team could be restructured. In support of that assertion, the applicant refers to statements made by the Chairman of Aer Lingus in the company's annual report for the period ended 31 December 1994, approved on 31 March 1995, and to a statement made by the Minister for Transport, Energy and Communications to the Dail on 21 February 1995.

40 It follows that, at the time of the contested decision, Team and, consequently, Aer Lingus, were not viable and there was no restructuring plan which would allow

Team to achieve viability. In the absence of any such restructuring plan, the Commission was not authorised to approve the second tranche of aid (see, for example, the Commission guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 91 of the EEA Agreement to State aids in the aviation sector, OJ 1994, C 350, p. 5, paragraph 38) and, *a fortiori*, was not able to overcome the difficulties in such a way as to justify its not initiating the procedure under Article 93(2) of the Treaty.

41 Furthermore, the applicant disputes the following assertion, in the 13th paragraph of the contested decision:

'According to the latest projections, Aer Lingus envisages that Team will return to profitability at the operating level in 1995.'

42 The conditions for the return to work agreed following the involvement of the Labour Court prevented implementation of the Cahill plan and, therefore, the cost reductions necessary in order for Team to become profitable.

43 For the same reasons, the applicant challenges the assertion immediately following that passage in the contested decision, that '[t]his forecast is based on the continued reduction in the cost base of the company, combined with the securing of additional maintenance contracts with third parties ...'.

44 In the applicant's assertion, Team did not reduce its cost base at all in 1994, because of union resistance. In that respect it refers to a newspaper article (*Irish Independent*, 27 March 1995), according to which the Minister for Transport, Energy and Communications stated that Team's workforce had never been below 1 750. Similarly, Team had allegedly lost all of its maintenance contracts with third

parties, including those with Virgin Atlantic Airways and Federal Express, as a result of the strike in 1994.

45 Finally, the applicant considers that the finding, in the 25th paragraph of the contested decision, that Team's difficulties could not have been anticipated in the restructuring plan is clearly erroneous. Notwithstanding the assertion in the 1993 Decision that the cost cutting programme had been agreed between the company and the unions, there was no agreement with the unions at Team. It was therefore foreseeable that no such agreement would be reached by the management of Team.

— Competition on the United Kingdom provincial routes

46 The applicant considers that, when examining the compatibility of the second tranche of aid with the common market, the Commission was unable to overcome the difficulties relating to Aer Lingus' activities on the routes between Dublin and United Kingdom provincial cities.

47 The applicant points out that, according to the contested decision, (pp. 3 and 4) Aer Lingus was operating those routes at a loss and the strategy adopted appeared 'to be justified by short-term considerations' (21st paragraph). In those circumstances, the Commission should have considered whether Aer Lingus was able to restructure its activities on those routes in such a way as to enable it to achieve a certain level of viability, in accordance with Article 92(3)(c). Instead, the Commission simply imposed a new condition that 'the Irish Government [would] justify the operation of the routes in the longer term', at the same time asking Ireland to submit to it detailed information concerning the profitability of the routes in question 'to demonstrate that, as initially projected, the aid it [had] received [would not be] used to subsidise routes, or a group of routes, which in all likelihood [would] not become profitable in the foreseeable future' (22nd paragraph).

48 It follows that, at the time the contested decision was adopted, the Commission had doubts as to the long-term viability of Aer Lingus' activities on United Kingdom provincial routes and was therefore unable to verify whether the aid would facilitate the development of certain economic activities.

49 Furthermore, the routes in question were operating at a loss because, following the 1993 Decision, Aer Lingus had significantly increased the number of low-fare seats available on its services between Dublin and Birmingham, (a route which the applicant had entered in November 1993), which prompted the applicant to submit a formal complaint to the Commission under Article 86 of the Treaty. Aer Lingus did the same on the routes between Dublin and Glasgow and Dublin and Manchester, on which it was also subject to competition from the applicant. Aer Lingus thus pursued a policy of low fares and high volumes, intended to capture as large a share of the market as possible, in particular in the leisure market, which is the applicant's main market, contrary to the assurances of the Irish Government recorded in the 1993 Decision.

50 The applicant submits furthermore that the justification, put forward in the 21st paragraph of the contested decision, for the 'short-term' strategy adopted by Aer Lingus on those routes, namely 'for example, bringing additional passengers onto its North Atlantic routes from feeder services from the United Kingdom' was clearly erroneous, since only two out of the 16 daily flights linking Birmingham, Manchester and Glasgow with Dublin carried transatlantic feeder passengers.

— The new BAe 146 aircraft

51 The applicant submits that, at the time the contested decision was adopted, the Commission was aware that Aer Lingus was proposing to use the aid to acquire a

fleet of three 110-seat BAe 146-300 aircraft to replace its fleet of four 34-seat Saab SF 340 aircraft for use in particular on the provincial routes between the United Kingdom and Ireland. In the 22nd paragraph of the contested decision the Commission stated that 'the replacement of small turbo-prop aircrafts by jets on UK commercial routes could give rise to concerns as to whether the increase in capacity offered is appropriate'. The Commission thus asked Ireland (in the same paragraph) to submit to it detailed information setting out the profitability of the routes at issue, to demonstrate that the aid '[would not be] used to subsidise routes ... which in all likelihood [would] not become profitable in the foreseeable future'. It follows that the Commission had doubts as to whether the aid created or exacerbated a situation of surplus capacity which could affect trading conditions to an extent contrary to the common interest (*Philip Morris* v *Commission*, paragraph 26, and Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and Glaverbel* v *Commission* [1988] ECR 1573, paragraphs 30 and 31).

52 The applicant adds that, since Aer Lingus suffered a pre-tax loss of IR £128.8 million in the period ended 31 December 1994, it did not have sufficient cash to acquire the BAe 146 aircraft and must have used the second tranche of aid in order to do so. Furthermore, it is clear from Aer Lingus' annual report that it had made a provision of IR £6.5 million for costs relating to the termination of the contracts for the four Saab SF 340. Aer Lingus could not have done so without the aid at issue.

53 The applicant also refers to statistics to establish that an increase in capacity on the routes at issue was totally inappropriate in view in particular of Aer Lingus' declining passenger traffic on those routes and its low load factors. The Commission has no authority to approve aid pursuant to Article 92(3)(c) of the Treaty where such surplus capacity exists (*Philip Morris* v *Commission*, *Exécutif Régional Wallon and Glaverbel* v *Commission* and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 38).

54 Finally, the applicant submits that the introduction of the BAe 146 aircraft infringed Article 1(d) of the 1993 Decision. That provision should be interpreted as prohibiting Aer Lingus from increasing the total seat capacity of its fleet during the period of the restructuring programme. Since, on the one hand, in the 1993 Decision the Irish Government is reported as stating that Aer Lingus would not increase its market share and would not pursue a policy of expansion and, on the other, market share does not depend on the number of aircraft allocated to a particular route, but on the number on seats available, Article 1(d) can only be interpreted as meaning that it was intended to ensure that Aer Lingus would not increase the total number of seats offered by its operating fleet. Otherwise, Aer Lingus would be in a position to pursue a policy of unlimited 'over-expansion'.

— The financial situation of the airline and of the Aer Lingus group

55 According to the applicant, the Commission committed a manifest error by concluding, in the contested decision, that the IR £50 million cost reduction target had been achieved by Aer Lingus' airline business.

56 Although the 1993 Decision anticipated 1 280 redundancies within the airline, Aer Lingus' annual report for the period ended 31 December 1994 indicates that only 841 redundancies had been made. In the applicant's view, even if the Commission's assertion that 935 employees left under the severance scheme is accepted, that is still less than two thirds of the target set in the Cahill plan.

57 The introduction of market rates for maintenance services paid to Team, and the resulting forecast of increased losses for Team, which are mentioned in the contested decision, probably means that the prices had been adjusted to levels below market rates. Maintaining that practice of transfer pricing jeopardises the restructuring of the airline. It also indicates that it was not possible to determine the airline's true costs — and thus any cost reductions made.

58 Furthermore, the conclusion in the 23rd paragraph of the contested decision, that 'the results of the airline business, in line with the final objective of the restructuring, demonstrate the group's potential to achieve a viable position' is not supported by any explanation or indication of the data analysed by the Commission. Such an explanation was particularly necessary because of Aer Lingus' previous opaque accounting practices.

59 The manifestly incorrect nature of the Commission's conclusion that the Aer Lingus group had the potential to achieve a viable position is, furthermore, demonstrated by the amount of operating aid from which the airline benefited in 1994, which is indicated by the exceptional items of IR £30 million ('repositioning — air transport and Team') and IR £5.4 million ('other') in the published accounts for the period ended 31 December 1994. Furthermore, Aer Lingus' accounts showed pre-tax losses of IR £147 million (excluding the write-off of an investment in an aircraft leasing company) for the 12 months to 31 March 1993, and IR £128.8 million for the 21 months to 31 December 1994. Those figures contrast with the forecast in the Cahill plan of a loss of IR £63 million in the 12 months to 31 March 1994 and a profit of IR £1 million in the 12 months to 31 March 1995.

— The sale of the Copthorne hotel chain

60 The applicant argues that the sale of the Copthorne hotel chain by Aer Lingus was mentioned in the 1993 Decision as an integral part of the Cahill plan. In the 18th paragraph of the contested decision, the sale of that chain was described as the prime asset disposal provided for in the restructuring programme.

61 In the contested decision, however, the Commission stated that the sale had been delayed, thus also delaying achievement of the March 1997 gearing and interest-cover ratios until mid-1999. Furthermore, it simply stated, in the 19th paragraph, that 'the chain should be sold as soon as market circumstances are appropriate', thereby releasing Aer Lingus from any obligation to sell the Copthorne hotels within a specified period of time. That is confirmed by Aer Lingus' annual report for the period ended 31 December 1994, which states that its directors 'intend to retain this investment for the foreseeable future, based on expert advice, to ensure that the sale proceeds of this investment will be optimised'.

62 In those circumstances, the Commission could not have concluded that the grant of the second tranche of aid would facilitate the development of certain economic activities. It did not know when, or indeed if, Aer Lingus could achieve a healthy balance sheet. The aid could not therefore be approved as restructuring aid. Moreover, Aer Lingus' failure to reduce its high debt burden by disposing of the hotel chain resulted in the use of the State aid to finance its short term liabilities, including high borrowing costs. For that further reason, the second tranche of aid was not genuine restructuring aid.

63 In any event, the disposal of the Copthorne hotels would not have been sufficient to give Aer Lingus a healthy balance sheet. *The Sunday Independent* of 10 July 1994 reported that, 'Accountants preparing the results are also said to be concerned that the balance sheet may be overstating the value of the Aer Lingus Copthorne Hotel chain'. In that respect, Aer Lingus wrote off IR £17.2 million in its accounts for the period ended 31 December 1994. The Commission thus committed a manifest error in concluding that disposal of the Copthorne hotels would reduce Aer Lingus' debts to the level originally planned, and in not requiring Aer Lingus to divest additional assets of IR £17.2 million. The Commission also failed to explain how the anticipated gearing and interest-cover ratios could be achieved.

64 The applicant concludes from all the foregoing, either that the Commission was not able to overcome its difficulties as regards the compatibility of the second tranche of aid with the common market and thus committed a breach of procedural requirements by failing to initiate the procedure under Article 93(2) of the Treaty, or that it committed a manifest error of assessment in deciding, in the contested decision, that the second tranche of aid was compatible with the common market. It follows that the applicant's two main pleas alleging, respectively, breach of essential procedural requirements and manifest error of assessment are well founded.

65 In addition to its two main pleas, the applicant also puts forward the following additional grounds of challenge:

— it is clear from the contested decision that the Commission never really examined the effect of the aid at issue on competition nor did it take account of the development of the competitive situation following the 1993 Decision;

— Ireland infringed Article 1(b) of the 1993 Decision, which required the Irish Government to ensure that Aer Lingus implemented the Cahill plan as notified to the Commission;

— the Commission committed an error of law in that, in approving the second tranche of aid notwithstanding the infringement of Article 1(a) of the 1993 Decision, it necessarily applied a different test from that applied in that decision;

— the contested decision is vitiated by a failure to state reasons, in particular as regards the following: the Commission's request to the Irish Government to supply an additional report concerning Team and Aer Lingus by 30 June 1995; the conclusion that the Aer Lingus group had the potential to achieve viability; the conclusion that the second tranche of aid could be compatible with the common market in the absence of any restructuring plan intended to restore Aer Lingus to long-term viability; the reason for which the Commission did not require Aer Lingus to sell the Copthorne hotels; the conclusion that the aid

could be approved notwithstanding the financial situation of the Aer Lingus group and of the airline; and the amount of time necessary to complete the restructuring plan.

Arguments of the Commission and the interveners

66 The Commission submits first that the contested decision is a hybrid instrument in that it contains both a derogation from Article 1(a) of the 1993 Decision and also some comments made pursuant to Article 1(b) of that decision. Such comments do not constitute an actionable measure under Article 191 of the Treaty, and are not therefore open to review by the Court (Case 35/80 *Denkavit Nederland* [1981] ECR 45, paragraph 35).

67 The basic assessment of the compatibility of the aid as restructuring aid within the meaning of Article 92(3)(c) of the Treaty was made in the 1993 Decision. That decision had already authorised the payment of IR £175 million to Aer Lingus.

68 It follows that, when considering the release of a subsequent tranche of aid under a restructuring plan which has already been approved, the Commission is not authorised nor, *a fortiori*, obliged to examine *de novo* whether payment of that subsequent tranche would be compatible with Article 92(3)(c) of the Treaty (see Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635). It is entitled to carry out such an examination only if it has either made a specific reservation to that effect in its initial approval or if, following a preliminary examination, it concludes that the conditions laid down in the initial decision have not been fully complied with.

69 Consequently a new decision was necessary only if the cost reduction of IR £50 million required by Article 1(a) of the 1993 Decision had not been achieved. In its re-examination of the compatibility of the aid under those specific circumstances, the Commission was required to take into account the circumstances already considered in the 1993 Decision and the obligations which that previous decision may have imposed on the Member State (Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437). Thus the Commission was not required to re-examine *de novo* all the elements of the restructuring plan. It was sufficient for it to focus only on the factors which had changed since its initial assessment.

70 Furthermore, the Commission is required to initiate the procedure under Article 93(2) of the Treaty only if it entertains doubts as to the compatibility of aid and those doubts cannot be overcome in the course of the preliminary examination. According to the Commission, whatever doubts it may initially have entertained were never serious and were in any event overcome in the course of the preliminary examination.

71 The Commission points out that, before adopting the contested decision, it received a report from the Irish Government dated 3 November 1994 confirming that the conditions laid down in the 1993 Decision had been complied with (except as regards the IR £50 million cost reduction at group level) together with a status report from Aer Lingus on the restructuring programme and a report by Arthur Andersen & Co, who had been appointed by the Irish Government as independent accounting experts to verify the financial information provided by Aer Lingus. Furthermore, the Commission itself verified the information provided by instructing Coopers & Lybrand, experienced consultants in the field, who submitted their report on 9 December 1994.

72 It is clear from those reports that significant progress had been made as regards the various restructuring measures described in the Cahill plan. The verifications carried out by Arthur Andersen & Co and Coopers & Lybrand showed, in particular, that the profitability of the airline and debt reduction were ahead of the targets set in the plan. Although exceptional items were higher than expected — due to

higher severance payments than forecast — the consultants concluded that the results were consistent with the objective of restoring Aer Lingus to viability, notwithstanding difficulties and delays as regards Team.

73 As regards the annual reduction in costs of IR £50 million, it is clear from the experts' reports that the airline had achieved a IR £61.1 million reduction in costs. The target of IR £50 million had not however been achieved at group level because some of the savings made by the airline were at the expense of Team. Whilst, until the revision of the airline's maintenance contracts with Team in 1993, the airline paid above the market rate, cross-subsidising Team, following the revision of the contracts the airline paid the market rate for maintenance by Team. The Commission considered that the savings made by the airline in the context of its contract with Team could not be regarded as a true cost reduction for the group and concluded that the actual cost reduction at group level was IR £42.4 million, or IR £7.6 million below the target of IR £50 million. Subject to that reservation, the Commission considered that Aer Lingus had broadly achieved the objectives of the Cahill plan, and that all the other conditions of the 1993 Decision had been satisfied.

74 In those circumstances, given the complexity of a reorganisation such as that undertaken by Aer Lingus and the fact that, by its very nature, any reorganisation is based on forecasts, some of which may subsequently prove to be incorrect, the Commission found that the deviations from the Cahill plan were relatively minor and concerned only one of the conditions under which the restructuring aid had been authorised, with the result that the feasibility of the Cahill plan and the realisation of the objective of restoring the Aer Lingus group as a whole to self-sustaining financial viability were not threatened.

75 As regards more specifically the question whether the aid facilitates the development of certain economic activities within the meaning of Article 92(3)(c) of the Treaty, the Commission concluded that the restructuring programme was

progressing well and that the overall objective could still be achieved, even if the cost reduction target had not been fully achieved.

76 As regards the effect of the aid on trading conditions, the fact that the restructuring costs were higher than anticipated did not affect competition between carriers. Most of the first tranche of aid (IR £57 million out of IR £75 million) had been used to finance redundancies and related costs and the balance used to reduce debt. The fact that the cost reduction target of IR £50 million had not been achieved had no negative consequences for Aer Lingus' competitors.

77 Finally, the Commission challenges the validity of the applicant's specific arguments concerning Team, the United Kingdom provincial routes, the BAe 146 aircraft, the financial situation of the airline and of the Aer Lingus group, and the Copthorne hotel chain. It considers that the decision is not vitiated by a failure to state reasons.

78 Aer Lingus and Ireland support the Commission's arguments. Aer Lingus points out, in particular, that there was no strike at Team but, rather, the management laid off a large proportion of the staff. The restructuring plan has since been completed, the third tranche of the aid having been authorised by the Commission in its decision of 20 December 1995 entitled 'Payment of the third tranche of aid in favour of Aer Lingus approved by [the] Commission Decision of [1993]' (OJ 1996 C 70, p. 2). The Copthorne hotels were sold in 1995. Aer Lingus adds, as regards the BAe 146 aircraft, that they were not introduced until May and June 1995. The monthly leasing charges for the BAe 146 aircraft are lower than the previous charges relating to the Saab aircraft which they replaced.

Findings of the Court

The nature of the contested measure

79 It is first necessary to consider the Commission's argument that the contested decision has a 'hybrid' character and contains, on the one hand, some findings concerning Aer Lingus' failure to comply with the condition set out in Article 1(a) of the 1993 Decision and, on the other hand, mere 'comments,' which are not open to review, made by the Commission on other aspects of the progress of the restructuring programme and the Aer Lingus group pursuant to Article 1(b) of the 1993 Decision.

80 In that respect, it is clear from the contested decision that, before approving payment of the second tranche of aid, the Commission considered not only the reasons for which Aer Lingus had been unable to comply with the condition set out in Article 1(a) of the 1993 Decision, but also the progress of all aspects of the restructuring plan, the financial situation of the Aer Lingus group and of the airline, the strategy adopted on the United Kingdom provincial routes, the proposed changes to the Aer Lingus fleet and the progress of the proposed sale of the Copthorne hotel chain. It is also clear from the 25th paragraph of the contested decision that it was only 'in the light of' its assessment of all those elements, that the Commission derogated from its 1993 Decision and authorised the Irish Government to pay the second tranche of aid to Aer Lingus.

81 It is also clear from the same paragraph of the contested decision that the additional obligations imposed on Ireland related not only to the cost reduction of IR £50 million referred to in Article 1(a) of the 1993 Decision, but also to all the matters assessed by the Commission in that decision.

82 Consequently, the grounds of the contested decision, other than those relating directly to the annual reduction in costs of IR £50 million referred to in Article 1(a) of the 1993 Decision, cannot be regarded as being mere 'comments' devoid of legal effect, but form an integral part of the contested measure in the present case. It also follows that, by its very nature, it is the contested decision as a whole which adversely affects the applicant.

83 It follows that the whole of the contested decision is subject to judicial review by the Court of First Instance, under the conditions laid down in the second paragraph of Article 173 of the Treaty.

The plea alleging a breach of essential procedural requirements

84 It is not disputed that, pursuant to the condition imposed by Article 1(a) of the 1993 Decision, Ireland undertook not to release the second tranche of aid if Aer Lingus did not achieve a cost reduction target of IR £50 million per annum. It is also clear from the Section VI of the 1993 Decision that the conditions referred to in Article 1(a) were imposed 'to ensure that the aid [would] not adversely affect trading conditions to an extent contrary to the common interest'. According to Section V, (21st paragraph, point 4) of that decision, the cost reduction envisaged in the restructuring plan was, for the Commission, 'an essential condition' of the payment of the second and third tranches of the aid.

85 In the present case the question therefore arises as to which administrative procedure should be followed by the Commission when it has approved State aid payable in tranches under Article 92(3)(c) of the Treaty, following a procedure under Article 93(2), subject to the fulfilment of a certain number of conditions, but it subsequently becomes apparent that one of those conditions has not been fulfilled.

86 First, the Court considers that the effect of failure to comply with a condition imposed in a decision approving aid under Article 92(3)(c) of the Treaty is to raise a presumption that subsequent tranches of the aid are incompatible with the common market. It follows that the subsequent tranches cannot be released without a new Commission decision granting a formal derogation from the condition in question.

87 In those circumstances, the Commission must initially consider whether such a derogation can be granted, whilst ensuring that the subsequent tranches of the aid are still compatible with the common market under the conditions laid down by Article 92(3)(c) of the Treaty (see, by analogy, C-47/91 *Italy* v *Commission*, cited above, paragraphs 24 to 26). If such an examination leads the Commission to conclude that the subsequent tranches of the aid are no longer compatible with the common market, or if it does not enable it to overcome all the difficulties involved in determining whether the subsequent tranches of the aid are compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and, for that purpose, to initiate or, where appropriate, to re-open, the procedure under Article 93(2) of the Treaty (see, by analogy, *Cook* v *Commission*, cited above, paragraph 29, and Case C-367/95 P *Commission* v *Sytraval* [1998] ECR I-1719, paragraphs 38 to 40). It also follows, by analogy with Article 93(3) of the Treaty, that in such a case payment of the aid at issue must be suspended until the Commission adopts its final decision.

88 Furthermore, the Court considers that, once the Commission has adopted a decision approving aid subject to conditions at the end of a procedure under Article 93(2), it is not entitled to depart from the scope of its initial decision without re-opening that procedure. It follows that, if one of the conditions to which approval of an aid was subject is not satisfied, the Commission may normally adopt a decision derogating from that condition without re-opening the procedure under Article 93(2) of the Treaty only in the event of relatively minor deviations from the initial condition, which leave it with no doubt as to whether the aid at issue is still compatible with the common market.

89 It should be added that in respect of aid already approved in principle, paid in successive tranches over a relatively long period in association with a restructuring plan, the results of which will be achieved only after a number of years, as in the present case, the Commission must enjoy a power to manage and monitor the implementation of such aid in order, in particular, to enable it to deal with developments which could not have been foreseen when the initial decision was adopted. It is therefore possible that, in the light of a change in external circumstances which occurs after the initial decision, the Commission might, *inter alia*, vary the conditions governing the implementation of the restructuring plan or of its monitoring, without re-opening the procedure under Article 93(2) of the Treaty, providing none the less that such variations do not give rise to doubts as to the compatibility of the aid at issue with the common market.

90 It is therefore necessary to ascertain whether, in the present case, the applicant has established either that the Commission departed from the scope of the 1993 Decision without re-opening the procedure under Article 93(2) of the Treaty, or that the findings on which the Commission based the contested decision raised difficulties such as to justify re-opening that procedure (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 34). It is settled case-law that, as regards the application of Articles 93(3) and 92(3)(c) of the Treaty, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature. Review by the Court of First Instance must therefore be restricted to determining whether the Commission has exceeded the limits of its discretion or committed a misuse of powers or abuse of process (*Matra* v *Commission*, cited above, paragraphs 23 to 25). That judgment applies by analogy to the present case.

91 As regards the question whether the Commission departed from the scope of the 1993 Decision by granting a derogation from the condition set out in Article 1(a), the Court notes, first, that it is clear from the contested decision that the Commission drew the following conclusions, on the basis of the verifications carried out by Arthur Andersen & Co and by Coopers & Lybrand:

— 'the results of the airline business, in line with the final objective of the restructuring, demonstrate the group's potential to achieve a viable position allowing

it to contribute to the development of air transport activity in a peripheral area of the Community', so that, 'subject to the matters set out above, which mainly address the problem of structural and strategic changes, the Commission concludes that Aer Lingus has met the reasonably expected objectives of the programme for the period under review' (23rd paragraph);

— the conditions laid down in Article 1 of the 1993 Decision have been complied with, except for those in Article 1(a) (24th paragraph);

— 'the progress of the restructuring and the results already achieved are satisfactory, despite the fact that the objective of the annual cost reduction has been achieved only by the airline and not by the whole group because of the above-mentioned circumstances ...' (25th paragraph).

92 Second, the Court notes that in the contested decision the Commission did not dispense Aer Lingus from compliance with the condition laid down in Article 1(a) of the 1993 Decision but merely extended the time-limit within which that condition was to be fulfilled. It is clear from the contested decision as a whole that, even though the Commission derogated from the wording of Article 1(a) of the 1993 Decision, according to which a IR £50 million annual reduction in costs was to be achieved before payment of the second tranche of the aid, anticipated for the end of 1994, it stressed the fact that that requirement was to be satisfied before payment of the third tranche of aid, anticipated for the end of 1995.

93 Third, the Court considers that the purpose of the condition in Article 1(a) of the 1993 Decision was broadly respected even if the annual cost reduction threshold of IR £50 million was not achieved. Indeed there is no reason to question the Commission's assertion that, at the end of 1994, the airline had achieved a reduction in costs of IR £61 million. However, since that result was due in part to a reduction in the prices stipulated in the maintenance contract between the airline and Team (see paragraph 73 above), which had the effect of increasing the latter's losses, the

Commission concluded that the true reduction in costs, at group level, was IR £42.4 million. It follows that the cost reductions obtained at group level at the end of 1994 were only IR £7.6 million below the formal threshold of IR £50 million. The Court considers that to be a relatively minor deviation from the condition set out in Article 1(a) of the 1993 Decision.

94 Fourth, as is not disputed, the fact that the annual cost reduction threshold of IR £50 million was not achieved is due, essentially, to the social conflict which occurred at Team in the second half of 1994. Although it is regrettable that negotiations between Aer Lingus and its unions, within the framework of the Cahill plan, did not involve the representatives of employees of Team, the Court considers that the social conflict which took place at Team in 1994, and the resulting reference to the Labour Court, were not foreseeable at the time the 1993 Decision was adopted.

95 Fifth, the Court points out that the contested decision does not comprise only a derogation from Article 1(a) of the 1993 Decision but also contains conditions which are more stringent than those originally laid down by Article 1(b) of the 1993 Decision. The contested decision imposes new conditions, requiring Aer Lingus, first, to submit, by 30 June 1995, a detailed report on the progress of the restructuring programme at Team and to implement that programme without delay and, second, to provide the Commission with an extremely detailed financial report, at least eight weeks before payment of the third tranche of aid, relating, in particular, to the reduction in costs of IR £50 million, the sale of the Copthorne hotel chain and the profitability of Aer Lingus' various route groups.

96 It follows from the foregoing that, by granting a temporary derogation from Article 1(a) of the 1993 Decision, the Commission did not depart from the scope of that decision. It merely rebalanced the conditions in Article 1(a) and (b) of the 1993 Decision in order, *inter alia*, to deal with unforeseen developments in the situation since the adoption of that decision and to take into account factors revealed by the detailed examination carried out by the Commission, and its

experts, of the progress of the restructuring plan up to the end of 1994. The Court considers that such an approach was, furthermore, consistent with the purpose of the restructuring plan approved by the 1993 Decision, namely to restore the Aer Lingus group and, in particular, the airline, to viability.

97 In those circumstances, the Court considers that the Commission was justified in adopting the contested decision provided that it was able to overcome all the difficulties involved in determining whether the tranche at issue was compatible with the common market.

98 It is therefore necessary to establish whether, notwithstanding the considerations set out above, the specific factors relied on by the applicant should have led the Commission to entertain doubts as to the compatibility of the second tranche of the aid with the common market, thus obliging it to re-open the procedure under Article 93(2) of the Treaty.

— Team

99 As regards the applicant's arguments concerning Team (see paragraph 36 et seq. above), it is true that the Commission stated, in the contested decision, that 'failure to address the problem of continuing losses at Team might have an impact on the restructuring plan'. It is also true that, at the end of 1994, there was no adequate restructuring plan intended to restore Team to viability, as is confirmed both by the statements by the Chairman of Aer Lingus and the Minister for Transport, Energy and Communications (see paragraph 39 above) and the fact that the Commission itself required such a plan to be submitted to it before 30 June 1995.

100 Nor is it disputed that, in order to overcome those difficulties, the Commission decided to subject Ireland to the new condition set out in the contested decision (25th paragraph, first indent) pursuant to which, prior to payment of the third tranche of the aid, Ireland was, on the one hand, to 'submit, by 30 June 1995, a report to the Commission on the progress of the restructuring programme at Team and on its financial and economic development, including financial projections on which the company's strategy [was] based', and, on the other, to implement Team's restructuring programme 'without any further delay on the basis of an adequate business strategy and a sound capital structure'.

101 The Court considers that, by applying itself to resolving Team's problems in that way, rather than by initiating the procedure under Article 93(2), the Commission did not exceed the limits of its power to manage and monitor aid payable in tranches.

102 First, the Court can establish no reason to question the assertion in the Commission's pleadings that, after the return to work at Team following the recommendations of the Labour Court, cost reductions evaluated at IR £18 million had been made at Team, which consequently no longer constituted an obstacle to the achievement by the Aer Lingus group of an annual reduction in costs of IR £50 million.

103 Second, the applicant has not provided any concrete evidence such as to undermine the contested decision in so far as it states that Team 'will return to profitability ... in 1995' taking into account Aer Lingus' latest projections and new maintenance contracts. It is clear, in particular, from the Commission's pleadings that, by the end of 1994, 250 of Team's employees had been made redundant since 1992/93, at a cost of IR £24 million. Similarly, the applicant has not challenged the list of maintenance contracts held by Team at the end of 1994, which was produced to the Court by the Commission.

104 Third, although it is true that the social conflict in 1994 was provoked by the implementation of the Cahill plan with regard to Team, it is not disputed that the subsequent need to prepare a new plan for Team, at the beginning of 1995, arose as a result of two other external factors which could not have been foreseen, namely fluctuations in the exchange rate against the dollar and a recession on the global maintenance market (see the statements by the Chairman of Aer Lingus in that respect in Aer Lingus' annual report for the period ended 31 December 1994).

105 Fourth, Team was only a subsidiary activity of the Aer Lingus group, representing 12% of its turnover.

106 In those circumstances, the Court considers that, having regard in particular to the secondary importance of Team in the context of the overall activities of the Aer Lingus group and the unforeseeable nature of the factors which resulted in Team's losses, the Commission was justified in deciding that the difficulties presented by Team's situation could be overcome by imposing the aforementioned additional condition, without there being any need to re-open the procedure under Article 93(2) of the Treaty.

107 Such a solution enabled the Commission to satisfy itself, on the one hand, that Team's problems did not jeopardise the restructuring plan for the group as a whole and, on the other, that the success of the restructuring plan would not be jeopardised by the suspension of the payment of the second tranche of the aid, which would have resulted from initiation of the procedure under Article 93(2) of the Treaty.

— The United Kingdom provincial routes

108 As regards the applicant's arguments concerning the United Kingdom provincial routes (see paragraph 46 et seq. above) it is clear from the 21st paragraph of the contested decision that, at the time it was adopted, those routes were operating at

a loss, in contrast to Aer Lingus' services to North America, the route between Dublin and London and the European routes, where the results were satisfactory. It is also clear from the 1993 Decision (section II, 1st paragraph, point 5) that the Irish Government confirmed that the equity injection '[would] not be used to subsidise loss-making routes' and that, '[a]s a follow-up to the restructuring, [it would] require the airline to operate on each major route group in a commercially viable fashion'.

109 It must none the less be pointed out that Article 1 of the 1993 Decision does not contain any express provision intended to ensure that a group of Aer Lingus routes would never operate at a loss.

110 The Court considers, furthermore, that the Irish Government did not undertake, even implicitly, to take the necessary steps to ensure that all Aer Lingus' loss-making routes were eliminated prior to payment of the second tranche of the aid, that is to say during the first year following approval of the restructuring plan which, it was anticipated, would be implemented over three years.

111 Furthermore, it is clear from the parties' pleadings that competition on the United Kingdom provincial routes has evolved since the adoption of the contested decision, in particular because of the introduction of new services by the applicant itself.

112 As was confirmed before the Court, it was in those circumstances that the Commission had considered, on the basis of the study carried out at its request by Coopers & Lybrand at the end of 1994, that it was premature to decide whether Aer Lingus' strategy on the United Kingdom provincial routes would be justified in the long term.

113 It therefore stated in the contested decision (21st and 22nd paragraphs):

'... The Irish Government will justify the operation of the routes in the longer term. This justification is to be made on the basis of a comparison of revenues against the fully allocated costs for the route in question, and the need to generate an adequate return on its capital investment. In this respect, the year 1995 will be decisive in confirming that Aer Lingus will continue to move in the right direction, leading to sustained commercial viability.

Aer Lingus will have therefore to demonstrate that it can operate on these routes at an acceptable level of profitability ...'

114 Even if it is true that the strategy referred to in the contested decision, according to which the United Kingdom provincial routes are used to feed Aer Lingus' North Atlantic routes, is only partial justification for accepting the continuing losses on the provincial routes at issue, the evidence adduced by the applicant is not such as to enable the Court to reject the Commission's explanation that, at the time, it considered it to be premature to take a decision as to the long-term justification for Aer Lingus' policy on those routes.

115 In view of all those circumstances, and in particular the way in which competition evolved after the adoption of the 1993 Decision, and the fact that the United Kingdom provincial routes represented only a part of Aer Lingus' airline activity, the Court considers that the applicant has not established that the Commission exceeded the limits of its power to manage and monitor aid payable in tranches, in deciding that it should address any problems raised by Aer Lingus' operation of the United Kingdom provincial routes by requiring detailed justification of the operation of those routes in the long term before payment of the third tranche of

the aid, rather than initiating the procedure under Article 93(2) of the Treaty prior to payment of the second tranche.

116 The solution adopted by the Commission enabled it to satisfy itself in an appropriate manner that the routes at issue would become profitable before payment of the third tranche, that is to say during the period prescribed for completing the restructuring plan, without running the risk of jeopardising the success of that plan by re-opening the procedure under Article 93(2) of the Treaty.

— The BAe 146 aircraft

117 The Court considers, first, that it cannot accept the applicant's argument that the acquisition by Aer Lingus of three 110-seat BAe 146 aircraft to replace four 34-seat Saab SF 340 aircraft was in breach of Article 1(d) of the 1993 Decision because of the resulting increase in seat capacity (see paragraph 54 above).

118 The Court considers that the commitment 'not to expand Aer Lingus' operating fleet' referred to in that provision concerned only the number of aircraft which that company had at the time the 1993 Decision was adopted.

119 Such an interpretation is consistent, *inter alia*, with the wording of the 1993 Decision which:

— refers (section II, first paragraph, point 5) to the indication by the Irish Government that 'Aer Lingus will not expand its existing operating fleet over the restructuring period, other than for the transatlantic routes where additional

aircraft may be required for the peak summer season to maintain capacity levels, in the event that the 747-100 aircraft currently operated is replaced by a smaller aircraft';

— specifies (in a footnote) the aircraft involved at the time.

120 By contrast, the Court notes that the number of seats is referred to in Article 1(g) of the 1993 Decision, adjustable in accordance with the procedure referred to by Article 1(h). It is those provisions which reflect the Irish Government's undertaking (section II, first paragraph, point 5, of the 1993 decision) to limit the number of seats offered for sale on Aer Lingus' scheduled services on Ireland/United Kingdom routes.

121 Since the replacement of the four Saab SF 340 aircraft by three BAe 146 aircraft serves to reduce Aer Lingus' fleet by one aircraft, there has been no breach of Article 1(d) of the 1993 Decision. As to the fact that the number of seats was thereby increased, it is sufficient to note that Aer Lingus has not exceeded the ceilings laid down in Article 1(g) of the 1993 Decision, as adjusted in accordance with Article 1(h) by the Commission's decision of 30 November 1994 (see paragraph 6 above).

122 As regards the applicant's argument that the use of the aid had the effect of increasing surplus capacity on the routes at issue, even though Aer Lingus' load factors on some of those routes were relatively low at the time, the Court considers that the applicant has not established that the aid was used to subsidise the acquisition of the aircraft in question. It is clear from the discussions before the Court that the BAe 146 aircraft were not purchased by Aer Lingus, but were leased. Furthermore, the applicant has not adduced any evidence such as to rebut the assertions of the Commission and Aer Lingus that the lease charges for the BAe 146 aircraft were lower than those paid for the Saab SF 340 aircraft.

123 The mere fact that, in its annual report for the period ended 31 December 1994, Aer Lingus made a provision of IR £6.5 million for the costs resulting from termination of the contracts for the Saab SF 340 is not sufficient to establish that the aid to which the 1993 Decision relates was used as operating aid. As the Commission stated in its pleadings, without being contradicted by the applicant on that point, most of the first tranche of the aid (IR £57 million out of IR £75 million) was used to finance redundancies, and the balance was used to reduce debt.

124 Nor has the applicant challenged Aer Lingus' assertion that the new BAe 146 aircraft were not introduced until May and June 1995, six months after the adoption of the contested decision.

125 In those circumstances, the fact that the Commission expressed certain reservations, in the contested decision, as to whether it was appropriate to increase Aer Lingus' capacity on certain United Kingdom routes and stated that, in view of that increase in capacity, it would require certain detailed information concerning the profitability of the Ireland/United Kingdom routes before approving the third tranche of aid, is not sufficient to establish that it had doubts as to whether the second tranche of the aid was compatible with the common market.

— The financial situation of the Aer Lingus group and the airline

126 As regards the applicant's arguments concerning the financial situation of the Aer Lingus group and the airline (see paragraph 55 et seq. above), the Court points out, first, that the applicant's claim that the IR £50 million cost reduction objective was not achieved by the airline is contradicted by the Commission's contention that the airline achieved a reduction in costs of IR £61 million. Similarly, there is

nothing in the documents before the Court to support the applicant's assertion that the transfer prices between Team and the airline were adjusted to levels below market rates.

127 Similarly, the mere fact that the accounts for the periods ended 31 March 1993 and 31 December 1994 showed that Aer Lingus suffered considerable losses, in particular in respect of Team, does not establish that the Commission committed an error in holding, in the 10th paragraph of the contested decision, on the basis of the reports prepared by Arthur Andersen & Co and Coopers & Lybrand, that 'the airline business has improved its profitability ahead of the programme ... Viability is now forecast earlier than in the programme and could be achieved in 1994 ... this trend should be considered encouraging and should indicate a successful completion of the restructuring programme'.

128 In fact, it appears from Aer Lingus' accounts for the period ended 31 December 1994, which is the relevant period for the purposes of the contested decision, that the Aer Lingus group made a profit of IR £71.1 million before tax and exceptional items. The profits of the airline, after tax but before deduction of exceptional items, was IR £40.9 million. It follows that the applicant has in no way demonstrated that the airline's situation was not satisfactory at the end of 1994.

129 As regards the Aer Lingus group, although it is true that it had not yet achieved a healthy financial situation at the end of 1994, it is not disputed that that was due to a combination of factors, in particular the continuing losses at Team, higher restructuring costs than anticipated and the postponement of the sale of the Copthorne hotels. Furthermore, the group losses of IR £129.9 million for the period ended 31 December 1994, after tax and exceptional items, can be explained to a large extent by the exceptional items of IR £139.2 million which were not recurring.

130 As regards more specifically the higher restructuring costs than anticipated, it is clear from the 15th paragraph of the contested decision that that state of affairs can be explained by the fact that '[m]ost of the additional costs arise from the redundancy costs, which were higher than anticipated, the remainder arising principally from the disposal of surplus aircraft'. The Commission then accepts, in the 16th paragraph of the contested decision, that 'the additional costs were, for most part, a consequence of the restructuring measures and, in so far as they concern redundancy payments, do not affect competition between carriers'. Nothing that the applicant has put before the Court undermines that conclusion by the Commission.

131 It follows that the applicant's arguments concerning Aer Lingus' financial situation do not suffice to establish that the Commission should have entertained doubts as to whether payment of the second tranche of the aid would be compatible with the common market. On the contrary, the fact that the restructuring costs were higher than anticipated, and the disposal of the surplus aircraft, indicates that the restructuring referred to in the Cahill plan had indeed been implemented. In those circumstances, it is clear that Aer Lingus had even greater need for the second tranche of the aid in order to complete the restructuring and to reduce its debts, in accordance with the plan approved by the Commission.

132 Similarly, the fact that the Commission strengthened the condition in Article 1(b) of the 1993 Decision, by requiring that it should receive, eight weeks before payment of the third tranche of the aid, a report setting out in detail the annual reduction in costs of IR £50 million, the cost savings linked to specific management action and the financial projections for the period to 31 December 1999 (25th paragraph, second indent, of the contested decision), does not in itself establish that it entertained doubts as to the compatibility of the second tranche of the aid with the common market. On the contrary, that new condition, imposed by the Commission in accordance with its power to manage and monitor aid payable in tranches, is intended merely to ensure that Aer Lingus maintained the progress so far achieved, and to enable the Commission to carry out a new assessment of Aer Lingus' financial situation at the appropriate time before payment of the third tranche of the aid.

— The sale of the Copthorne hotel chain

133 As regards the applicant's arguments based on the fact that, at the time the contested decision was adopted, the Copthorne hotels had not yet been sold in accordance with the Cahill plan (see paragraph 60 et seq. above), it should be pointed out that:

— the 1993 Decision did not lay down any precise time-limit for the sale of the Copthorne hotels;

— the contested decision reminded Aer Lingus (19th paragraph) that 'the chain should be sold as soon as market circumstances [were] appropriate'

— it is not disputed that the Copthorne hotel chain was sold before the payment of the third tranche.

134 In those circumstances, the applicant has not established that the fact that the Copthorne hotels were not sold before the payment of the second tranche of the aid gave rise to such doubts concerning the compatibility of that tranche with the common market that the Commission should have re-opened the procedure under Article 93(2) of the Treaty.

135 It follows from all the foregoing that the applicant has not established that, in the circumstances of the present case, the Commission should have re-opened the procedure under Article 93(2) of the Treaty. Similarly, the Court considers that the Commission was not required to hear the applicant before adopting the contested decision (see *Commission* v *Sytraval*, paragraph 58).

136 The applicant's plea alleging breach of essential procedural requirements must therefore be dismissed.

The plea alleging manifest error of assessment

137 In support of its plea alleging manifest error by the Commission in its assessment of the compatibility of the aid with the common market in accordance with Article 92(3)(c) of the Treaty, the applicant essentially relies on the arguments already raised in respect of Team, the United Kingdom provincial routes, the BAe 146 aircraft, the financial situation of the airline and of the group, and the sale of the Copthorne hotel chain. It follows from all the foregoing that the applicant has not established any such manifest error of assessment, either as regards whether the aid facilitated certain economic activities or whether it operated in a manner contrary to the common interest. It should be pointed out that, to the extent that the Commission's examination at the end of 1994 revealed certain difficulties in the implementation of the restructuring plan, in particular as regards Team and the United Kingdom provincial routes, the Commission was correct in imposing additional conditions intended to ensure that the aid would continue to be compatible with the common market.

138 It follows that the plea alleging manifest error of assessment as regards the compatibility of the second tranche of the aid with the common market must be dismissed.

The other grounds of challenge raised by the applicant

139 As regards the applicant's other grounds of challenge (see paragraph 65 above), the Court notes, first, that, contrary to the applicant's assertion, the Commission did

consider the effects of the aid at issue on competition, in particular as regards the various route groups operated by Aer Lingus, as is clear from the contested decision itself.

140 The Court cannot detect any error of law in the Commission's application of Article 92(3)(c) of the Treaty.

141 The Court considers that Article 1(b) of the 1993 Decision cannot be interpreted as imposing a legal obligation on Aer Lingus to implement every detail of the Cahill plan without any possibility of adjusting it in the light of circumstances which were not foreseen at the time it was adopted. The applicant's argument alleging an infringement of Article 1(b) of the 1993 Decision must therefore be rejected.

142 As regards the statement of reasons for the contested decision, it is settled case-law that the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (*Commission* v *Sytraval*, paragraph 63).

143 The Court's examination has not revealed any failure to state reasons such as to lead to the annulment of the decision.

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

Costs

145 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the forms of order sought by the Commission and the intervener, Aer Lingus, be ordered to pay the costs incurred by those two parties.

146 Pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure the Member States and institutions which intervened in the proceedings are to bear their own costs. Ireland must therefore bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs incurred by the Commission and Aer Lingus Group plc;

3. Orders Ireland to bear its own costs.

Kalogeropoulos Briët Bellamy

Potocki Pirrung

Delivered in open court in Luxembourg on 15 September 1998.

H. Jung A. Kalogeropoulos

Registrar President