# ORDER OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
14 March 1997 *

In Case T-25/96,

**Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen,** an association without legal personality, governed by German law, established in Bonn, composed of the following members:

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

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

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

— **Germania Fluggesellschaft mbH,** a company governed by German law, established in Berlin,

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

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

* Language of the case: German.

and

**Hapag-Lloyd Fluggesellschaft mbH**, a company governed by German law, established in Langenhagen, acting on its own behalf,

represented by Gerrit Schohe and Philipp von Dietze, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of Marc Baden, 24 Rue Marie-Adelaïde,

applicants,

v

**Commission of the European Communities**, represented by Anders Jessen and Paul Nemitz, of its Legal Service, acting as Agents, and Georg M. Berrisch, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision C (95) 3319 final of 29 November 1995 concerning fiscal aid given to German airlines in the form of a depreciation facility,

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

composed of: K. Lenaerts, President, P. Lindh, J. Azizi, J. D. Cooke and M. Jaeger, Judges,

Registrar: H. Jung,

makes the following

## Order

1 On 29 November 1995 the Commission adopted Decision C (95) 3319 final concerning fiscal aid given to German airlines in the form of a depreciation facility (hereinafter 'the contested decision').

2 Article 1 provided that the extension from 1 January 1995 to 31 December 1999 of the provisions of Article 82f of the *Einkommensteuerdurchführungsverordnung* (implementing regulation on income tax) establishing a special depreciation facility for aircraft constituted State aid which was incompatible with the common market within the meaning of Article 92 of the EC Treaty. Article 2 required the Federal Republic of Germany to discontinue that aid measure as from 1 January 1995.

3 By application lodged at the Registry of the Court of First Instance on 28 February 1996, the applicants requested the Court to annul the contested decision and to order the Commission to pay the costs. They claimed in particular that the statement of reasons of the decision was defective and hence that the decision was in breach of Article 190 of the Treaty.

4 On 13 March 1996 the Commission adopted Decision 96/369/EC concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ 1996 L 146, p. 42; hereinafter 'Decision 96/369').

5 The last paragraph in the statement of reasons of Decision 96/369 states that 'the [contested] decision taken ... on the same subject ... and notified to the German authorities on 15 December 1995 should be withdrawn as the German version contained numerous errors, although the substance was the same as this Decision'. Article 5 provides that 'the [contested] Decision [...] is hereby withdrawn'. For the rest, the operative part is, in essence, identical to that of the contested decision.

6 The same applicants have also brought an application for annulment of Decision 96/369 in Case T-86/96, lodged on 31 May 1996.

7 By letter lodged at the Registry on 9 April 1996 the Commission requested the Court to declare that the present action should not proceed to judgment. It submits that the action has become devoid of purpose since, after it was brought, the contested decision was annulled by Decision 96/369.

8 By documents lodged at the Court Registry on 6 May 1996 the applicants opposed the Commission's request.

9 Principally, they submit that the action has not become devoid of purpose. Decision 96/369 cannot validly replace the contested decision. First, the substance of Decision 96/369 is strictly identical to that of the contested decision and so it constitutes a purely confirmatory measure which, as such, does not have any legal effect. Second, the adoption of Decision 96/369 merely aims to eliminate *ex post*

*facto* the defects vitiating the reasoning of the contested decision and, therefore, manifestly infringes Article 190 of the Treaty. The fact that the contested decision is unlawful in that respect means that Decision 96/369 is a nullity.

10 In the alternative, if the Court were to take the view that the action has in fact become devoid of purpose, the applicants observe that, since the Commission itself has made it unnecessary for the case to proceed to judgment, it cannot rely on that fact. Moreover, the request for a declaration that the case should not proceed to judgment is intended solely to reduce the chances of success of the present action and, as a result, the judicial protection afforded to the applicants. In any event, they claim that the Commission should be ordered to pay the costs.

11 The Court considers that the Commission's letter of 9 April 1996 raises a procedural issue which can be dealt with without an oral hearing in accordance with Article 114(3) of the Rules of Procedure.

12 In their application the applicants claimed that the contested decision should be annulled. However, after they made that application, that decision was expressly withdrawn by Decision 96/369. It follows that the contested decision has ceased to exist.

13 In that regard, it should be noted that, inasmuch as Decision 96/369 repeals and replaces the contested decision, it does not constitute a purely confirmatory measure but a new measure capable of having legal effects.

14 As to the argument that Decision 96/369 is a nullity, the Court cannot in these proceedings consider such pleas in law as the applicants may raise as to the illegality of that decision in support of their claim in Case T-86/96 (see the order of

18 September 1996 in Case T-22/96 *Langdon* v *Commission* [1996] ECR II-1009, paragraph 13).

15 The argument to the effect that the sole aim of a request for a declaration that the case should not proceed to judgment is to reduce the chances of success of the present action and, as a result, the judicial protection afforded to the applicants, must also be rejected.

16 Admittedly, in the context of an action for annulment, the applicant may retain an interest in seeking annulment of a measure repealed in the course of the proceedings, if the annulment of that measure is capable of having legal consequences *per se* (see Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 59 to 62, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraphs 46, 47 and 48, and, by contrary inference, the order of the Court of Justice of 8 March 1993 in Case C-123/92 *Lezzi Pietro* v *Commission* [1993] ECR I-809, paragraph 8, and the order in *Langdon* v *Commission*, cited above, paragraphs 11 and 12).

17 Where an act is annulled, the institution which adopted it is required under Article 176 of the Treaty to take the necessary measures to comply with the judgment. Those measures do not involve the elimination of the act as such from the Community legal order because that is the very essence of its annulment by the Court. They involve, rather, the removal of the effects of the illegalities found in the judgment annulling the act. The institution concerned may thus be required to take adequate steps to restore the applicant to its original situation or to refrain from the adoption of an identical measure (*Antillean Rice Mills and Others* v *Commission*, paragraph 60).

18 However, in the present case, the applicants have not produced any evidence to suggest that, notwithstanding the repeal of the contested decision, they retain an interest in seeking its annulment.

19 In those circumstances, the Court considers that the repeal of the contested decision by Decision 96/369 has procured the applicants the result which they sought to obtain in this action, namely the elimination of that decision from the Community legal order.

20 It follows that the present application has become devoid of purpose and that it is no longer necessary for the case to proceed to judgment.

21 The Court considers that the submission that the Commission itself brought about the situation in which it is unnecessary to proceed to judgment has a bearing on the question as to who must pay the costs.

## Costs

22 Article 87(6) of the Rules of Procedure provides that, where a case does not proceed to judgment, the costs are to be in the discretion of the Court.

23 It is common ground that Commission Decision 96/369, repealing the contested decision previously adopted, was adopted after the present action was brought. Moreover, it is expressly stated in the last paragraph of the statement of reasons of Decision 96/369 that the Commission decided to repeal and replace the contested decision on the ground that the German version of that decision, although substantively identical to Decision 96/369, contained numerous errors.

24 In those circumstances, the Commission must be ordered to bear the whole of the costs.

On those grounds,

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

hereby orders:

**1. It is unnecessary to proceed to judgment.**

**2. The Commission shall bear the whole of the costs.**

Luxembourg, 14 March 1997.

H. Jung

Registrar

K. Lenaerts

President of the Fourth Chamber