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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 December 2002

on aid granted by Greece to Olympic Airways

(notified under document number C(2002) 4831)

(Only the Greek version is authentic)

(Text with EEA relevance)

(2003/372/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

(1) On 12 October 2000, the Hellenic Air Carrier Association (hereafter 'HACA') lodged a complaint (registered as TREN(2000) A/69305) against the Greek State for continuing to give Olympic Airways SA (hereafter 'OA') various aids and hence being in breach with the Commission decisions 94/696/EC ⁽²⁾ and 1999/332/EC ⁽³⁾ on aid granted to OA. The complaint was transmitted to the Greek authorities for comments by letter of 5 December 2000 (registered as TREN(2000) D/17807). By letter of 19 February 2001 (TREN(2001) A/53318), the Greek authorities submitted their comments. On 24 July 2001 (TREN(2001) A/63511), HACA lodged a supplementary complaint against the Greek State on the same ground in the light

of new developments occurred in 2001. The supplementary complaint was transmitted to Greece for comments by letters of 22 August 2001 (TREN(2001) D/11863) and 6 December 2001 (TREN(2001) D/18948) to which the Greek authorities replied by letters of 7 November 2001 (TREN(2001) A/70124), 11 December 2001 (TREN(2001) A/72694) and 12 March 2002 (TREN(2002) A/55191).

(2) By Decision of 6 March 2002, notified to the Hellenic Republic by letter dated 11 March 2002 (SG(2002) D/228848), the Commission initiated the procedure laid down in Article 88(2) of the Treaty. The procedure has been registered under C 19/2002.

(3) The Commission decision to initiate the formal investigation procedure has been published in the *Official Journal of the European Communities*. The Commission invited interested parties to submit their comments on the subject.

(4) Greece forwarded comments to the Commission by letter of 12 April 2002 (TREN(2002) A/57066).

(5) Within the timeframe indicated in the publication, 23 May 2002, the Commission received no comments from any interested parties.

(6) Having not received all the relevant information from the Greek authorities, as requested in the opening of the procedure, the Commission adopted an injunction of information on 9 August 2002, notified to Greece by letter dated 12 August 2002 (SG(2002) D/231156). By letter of 13 September 2002 (DG TREN(2002)

⁽¹⁾ OJ C 98, 23.04.2002, p. 8.

⁽²⁾ OJ L 273, 25.10.1994, p. 22.

⁽³⁾ OJ L 128, 21.05.1999, p. 1.

A/66323), Greece informed the Commission that a reply would be completed by 25 September 2002. The reply by the Greek authorities was sent on 1 October (DG TREN(2002) A/67131).

- (7) On 16 of October 2002, a meeting was held with the Greek authorities concerning the state of play on OA's financial developments and progress realised to that date. During this meeting, the representatives of Greece remitted a document called 'Reporting to the Commission' which has been registered under the reference DG TREN(2002) A/69882. This document, along with other information and with a report on a limited review of 'Olympic Airways Performance as compared to its Financial Plan' in 2002 done by Deloitte & Touche, has been sent by Greece on 14 November 2002 and has been registered under the reference DG TREN(2002) A/70592.
- (8) On 21 November 2002, Mr. Verelis, Minister of Transport for the Hellenic Republic sent a new report to Ms. Loyola de Palacio, Vice President of the Commission, giving a 'Synopsis of Hellenic Republic's Case for Olympic Airways on key issues'. This additional information has been registered under the reference DG TREN (2002) A/70782.
- (9) Mr. Verelis also informed Ms. Loyola de Palcio by letter of 2 December 2002 (DG TREN (2002) A/71671) that the privatisation process of Olympic Airways was well under way and that six expressions of interest to acquire a majority stake in the company had been submitted to Greece.

2. THE FACTS

2.1. Past Commission decisions regarding OA and its subsidiaries

2.1.1. The 1994 Decision

- (10) On 7 October 1994 the Commission adopted the decision 94/696/EC (hereafter 'the 1994 decision') according to which aid granted or to be granted by Greece to OA was declared compatible with the common market under Article 87(3)(c) (then 92(3)(c)) of the EC Treaty and under Article 61(3)(c) of the agreement on the European Economic Area (hereafter 'the EEA agreement') provided that Greece met a series of commitments listed therein. The aid package consisted of the following measures:

- Loan guarantees extended to OA to 7 October 1994 pursuant to Article 6 of Greek Law No 96 of 26 June 1975;
- New loan guarantees totalling USD 378 million for loans to be contracted before 31 December 1997 for the purchase of new aircraft;
- Easing of OA's debt burden by GRD 427 billion;
- Conversion of GRD 64 billion of OA's debt into equity;
- A capital injection of GRD 54 billion in three instalments of GRD 19, 23 and 12 billion in 1995, 1996 and 1997 respectively.

The last four of these five measures formed part of a restructuring and recapitalisation plan for OA, which had initially been submitted to the Commission. On this basis, the Commission considered that the aid would facilitate the development of air transport activity by restructuring the main air carrier of a fragmented, peripheral region of the Community, of which Greece is one of the least developed parts.

- (11) The compatibility of the aid was, however, conditional on compliance by Greece with the 21 commitments, which were given to ensure that the aid did not adversely affect trading conditions to an extent contrary to the common interest. According to these commitments, which concerned both OA and its subsidiary Olympic Aviation, Greece was required to meet among the 21 commitments the following:

- (a) To repeal by 31 December 1994, Article 6 of the Greek Law No 96/75 of 26 June 1975 which permitted the Greek State to extend guarantees for the loans contracted by OA;
- (b) Not to interfere in the management of OA except within the strict limits of its role as shareholder;
- (c) To give OA, by 31 December 1994, the fiscal status of a public limited company comparable to that of Greek undertakings under ordinary law, except, however, for exonerating OA from any taxes likely to affect the recapitalisation operations envisaged in the recapitalisation and restructuring plan communicated to the Commission;
- (d) Not to grant any further aid to OA in any form whatsoever, in conformity with Community law;

- (e) To have adopted immediately the legislation necessary for the effective implementation of the salary, social and financial aspects of the restructuring plan;
- (f) To submit to the Commission each year, at least four weeks before payment of each instalment of the capital increase scheduled in January 1996 and January 1997, a report on the implementation of the restructuring plan to enable the Commission to comment and to postpone by four weeks payment of those instalments should the Commission wish to submit the report in question for scrutiny by an independent consultant;
- (g) Not to carry out the capital increases scheduled in 1995, 1996 and 1997 if the objectives of the restructuring plan, as set out in the 1994 decision, had not been attained for the previous years;
- (h) To ensure that OA did not act as price leader on the scheduled routes Athens-Stockholm and Athens-London during the period 1994 to 1997 inclusive;
- (i) To ensure that throughout the entire duration of the restructuring plan, the number of seats offered by OA on scheduled flights within the European Economic Area (EEA), including addition and seasonal flights, but excluding domestic flights to the Greek islands, would not exceed what has been offered by OA in the EEA market in 1993;
- (j) To ensure that the remaining loan guarantees extended to OA and the new guarantees to be extended before 31 December 1997 explicitly provided for by the restructuring plan to the amount of USD 378 million, comply with the conditions set out in the letter of 5 April 1989 from the Commission to the Member States;
- (1) The commitment by Greece not to interfere in the management of OA in future except within the strict limits of its role as a shareholder. Indeed, it appeared at the time that the Greek Government interfered in the management of OA, either directly or through the board.
- (2) The commitment by Greece not to grant any further aid, as OA had been exempted from taxation or public levies for the years 1995, 1996 and 1997, from all taxes and other expenses in respect of the loan guarantees, as well as from costs related to the military service by OA's employees. These benefits amounting to GRD 11 billion. Also, it appeared that OA was not paying landing and parking fees since the 1994 Decision was notified to Greece.
- (3) The commitment by Greece to bring the agreements with OA in line with the provisions of the third package appeared to be not complied with as Greece delayed unduly the abolition of OA's exclusive right to operate domestic flights within continental Greece.
- (4) The commitment by Greece to give OA the fiscal status of a public limited company comparable to that of Greek companies under ordinary (company) law appeared to be not complied with, as various provisions of Greek Law No 2271/94 exempted OA generally from taxation inasmuch this was linked to the reorganisation of the structure of OA's balance sheet.
- (5) The commitment by Greece to accept that airlines other than OA are authorised to operate flight to countries outside the EEA appeared to be not complied with, as there was still no legislation in force terminating OA's exclusive rights on such routes.

2.1.2. The 1998 Decision

- (12) However, due to the fact that several of the conditions attached to that decision had not been observed, the Commission decided on 30 April 1996 ⁽⁴⁾ to reopen the procedure provided for by Article 87(2) of the Treaty, and to initiate proceedings with regard to new and non-notified aid of which it had been informed.
- (13) In particular, the Commission's doubts concerned the following:
 - (14) On 14 August 1998, the Commission adopted decision 1999/332/EC (hereafter 'the 1998 decision') according to which the aid granted or to be granted by Greece to OA was compatible with the common market by virtue of Article 87(3)(c) of the EC Treaty (then Article 92(3)(c)) and of Article 61(3)(c) of the EEA agreement. The aid comprised:
 - (a) Loan guarantees granted to the company until 7 October 1994 pursuant to Article 6 of Greek Law No 96/75 of 26 June 1975;
 - (b) New loan guarantees totalling USD 378 millions for loans to be contracted before 31 December 1997 for the purchase of new aircraft;

⁽⁴⁾ OJ C 176, 19.6.1996, p. 5.

- (c) Easing of the undertaking's debt burden by GRD 427 billion;
- (d) Conversion of GRD 64 billion of the undertaking's debt to equity;
- (e) A capital injection of GRD 40,8 billion, reducing the originally foreseen GRD 54 billion and in three instalments of GRD 19, 14 and 7,8 billion respectively in 1995, 1998 and 1999.
- (15) The aid measures approved by the 1998 decision were accompanied by a revised restructuring plan (hereafter 'the plan'). This plan ⁽⁵⁾ concerned the period 1998-2002. The initial restructuring plan provided for the improvement of yield and revenue management, operating cost reduction based on organisational restructuring and changes in the working terms (freeze of salaries, reduction of allowances, decreased overtime in relation to permanent personnel, reduction of the number of the seasonal staff), changes in the management. The 1998 plan confirmed the initial measures and contained additional measures to achieve the reorganisation of the cost structure of the company (wage freezing, reduction of staff etc.) and an improvement of the yields through the introduction of yield management. It also foresaw the redimensioning of the network, a company-wide reorganisation of the company's internal structure and in relation to investment for the acquisition of aircraft. Other measures referred to the relocation of OA to Athens International Airport of Spata (hereafter 'AIA') and additional infrastructure investment to take place without new capital to be drawn from the shareholder.
- (16) The implementation of the 1998 restructuring plan and the achievement of the financial estimates have been based on the following indicators

	1998	1999	2000	2001	2002
Financial indicators					
Turnover (GRD millions)	324 234	329 071	344 829	359 057	380 626
Operating result after interest (GRD millions)	14 610	21 294	9 622	1 644	8 470
Profit before tax (GRD millions)	5 120	20 914	22 587	2 697	6 590
Long term debt (GRD millions)	59 501	123 993	191 542	171 625	151 708
Operational indicators					
Average stage length (km)	1 014	1 053	1 087	1 097	1 110
Load factors	66,3 %	64,4 %	61,8 %	62,3 %	64,3 %
Yields (GRD/RPK ⁽¹⁾) — 1998 Prices	100	106	110,4	107,2	106,1
Number of employees (FTEs)	8 875	8 467	8 256	8 078	8 032
Total number of aircraft	35	37	40	40	40
Average Network Capacity	395 595	365 717	357 409	378 745	386 329
Financial ratios					
Operating result turnover	4,5 %	6,5 %	2,8 %	0,5 %	2,2 %

⁽⁵⁾ This plan was submitted to the Commission with letters dated 3 and 6 July 1998.

	1998	1999	2000	2001	2002
Gearing	2,22	2,42	2,76	2,57	2,34
Productivity ratios					
ASK ⁽²⁾ s Number of employees	1 560 092	1 598 148	1 731 631	1 875 440	1 923 950
Staff expenditure ASKs	8,46	8,30	7,86	7,54	7,64
Cockpit crew expenditure ASKs	1,38	1,38	1,31	1,27	1,29
Cabin crew expenditure ASKs	1,43	1,43	1,39	1,37	1,40
Costs ratios					
Aviation operating costs ASKs	21,20	21,61	22,37	22,56	23,04
Staff expenditure total operating costs	37,8 %	36,5 %	33,5 %	31,9 %	31,7 %
Cockpit crew expenditure aviation operating costs	6,5 %	6,4 %	5,9 %	5,6 %	5,6 %
Cabin crew expenditure aviation operating costs	6,8 %	6,6 %	6,2 %	6,1 %	6,1 %

⁽¹⁾ RPK: Revenue passenger per kilometre.

⁽²⁾ ASK: Available seat per kilometre.

(17) The whole scenario has been based on the assumption that OA's aviation revenues would increase by 25,5 % over the duration of the plan (from GRD 269 billion in 1998 to GRD 337,6 billion in 2002) while ground handling revenues would decrease by 28,2 % during the same period (from GRD 46,5 billion in 1998 to GRD 33,3 billion in 2002) as a result of the liberalisation of this activity.

(18) The aid approved by the 1998 decision was subject to the respect of four conditions listed in Article 1 of that decision. These were the following:

(a) The integration into the 1998 decision of the twenty-one commitments given by the Greek authorities at the occasion the 1994 decision.

(b) Note had been taken of Greece's commitment to ensure that OA would not act as price leader on the scheduled routes Athens-Stockholm and Athens-London during the period 1998 to 2002 inclusive;

(c) Note had been taken of Greece's commitment to ensure that until 31 December 2002, the number of seats offered by OA on scheduled flights in the EEA, including additional and seasonal flights and including services between continental Greece and

the Greek islands, would not exceed what OA had offered in the EEA market during 1997 (7 792 243 seats), taking into account, however, a possible increase proportional to the growth of the market in question;

(d) Note has been taken of Greece's commitment to ensure that by 1 December 1998, OA would have implemented a fully operational and adequate Management Information System. Greece was requested to submit by 1 December 1998 a report to the Commission on this matter.

(19) Moreover, the decision stipulated, that the payment of the instalment of GRD 7,8 billion was to be subject to compliance with all the conditions attached to the decision in order to secure the compatibility of the aid with the common market and the actual implementation of the revised restructuring plan and achievement of the expected results, in particular as regards the cost and productivity ratios set out in that decision.

(20) In order to take into account the fact that the 1998 restructuring plan extended the original plan beyond 1997 and allowing OA to reach viability by 2000, the Commission requested further commitments to ensure the effectiveness of the aid and its compatibility with the common market.

(21) Accordingly, the 1998 decision foresaw, that Greece had the obligation to submit a report to the Commission in the following cases:

(a) at least ten weeks before the payment of the above mentioned second instalment planned for 15 June 1999 and,

(b) by the end of the months of October 1999, March 2000 and October 2000.

(22) The reports would confirm that all conditions imposed were fully respected to ensure the compatibility of the aid and the implementation of the revised restructuring plan and thus eventual achievement of the estimated results. Accordingly, payment of that instalment was not to be released if all or part of the conditions were not respected and/or the objectives of the revised restructuring plan were not met. The decision did not foresee any contingency plan nor provided for any exemption to that obligation.

2.1.3. The 2000 Decision

(23) By letter of 17 July 2000 Greece notified the Commission its intention to use the remaining authorised aid for loan guarantees to be contracted before the end of 2000 for investment in relation to the relocation of OA from Hellinikon airport to the new Athens international airport at Spata, and to extend the deadline for the loan guarantees to 31 March 2001. By then the Greek State had issued loan guarantees totalling USD 201,6 million for the purchase of four Airbus 340. By letter of 10 November 2000 (SG(2000)D/108307), the Commission informed the Greek authorities of its decision to amend Article 1 (1)(ii) of the 1998 decision with regard to the aid measure concerning the loan guarantees totalling USD 378 million. Following this modification, the aid measure in question consisted of new loan guarantees totalling USD 378 million for loans to be contracted before 31 December 2000 for the purchase of new aircraft and for investment necessary for the relocation of Olympic Airways to the new airport at Spata. These loan guarantees could be issued by 31 March 2001.

(24) In February 2001, OA contracted a loan of approximately GRD 62 billion from ABN-AMRO in this respect.

2.2. OA's economic and management development from 1998 to 2002

(25) Following the adoption of the 1998 Decision, the Greek government released in September 1998 to OA the

second tranche of the capital injection of GRD 15 billion and issued part of the State guarantees, which were authorised for an amount of USD 378 million for the fleet renewal of OA, in particular in respect to four new Airbus 340-400 aircraft.

(26) In May 1999 Greece submitted to the Commission a report on the implementation of OA's 1998 restructuring plan and supplemented it by a Memorandum in June 1999. This report was scrutinised by an independent expert (Deloitte & Touche) in accordance with the provisions of the 1998 decision (Article 1(a) of that decision and Article 1 — commitment (h) of the 1994 decision).

(27) The report was based on 1997 audited results, on 1998 management estimates and budgeted forecasts for 1999. The report came to the result that OA had significantly under-performed the plan. Hence, a number of projected targets of the 1998 decision had not been achieved on time since, according to the Greek authorities 'The actual 1997 results exceeded the most pessimistic estimate made in late February 1998'. Indeed, the actual 1997 operating result after interest amounted to a loss of GRD 28 billion (approx. EUR 82 million) against a previewed profit of approx. GRD 1.7 billion (approx. EUR 5 million). This poor performance had been caused by loss of revenue due to reduced activity levels, for which labour disruption were partly responsible. While load factors had not deviated from the plan, the report indicated that this was achieved at the expense of yield. The main cause for such degradation was due to agents' commissions discounts larger than expected. Management had suffered from a lack of control over behaviour in relation to agents' incentives and it was doubtful whether instruments allowing such control were yet put in place at that moment. In addition, performance has been poor due to lack of punctuality, ageing aircraft, strikes and resulting flight cancellations.

(28) To counterbalance this underperformance the company claimed to have undertaken austerity measures and to have introduced strict financial practice from February 1998 to August 1999. Despite these efforts and given also the labour unrest experienced during that period — it should be noted however, that the restructuring Plan had estimated costs amounting to GRD 15 billion for such disruptions. In actual terms, costs generated were of GRD 12 billions and thus 3 billion less than estimated (Report Deloitte & Touche, 21 July 1999, p. 22 — the objectives set in the plan for 1998 could not

be reached and an operating loss after interest of GRD 10,4 billion (EUR 30,4 million) against a previewed profit of GRD 14,6 billion (EUR 42,3 million) was accumulated. Contrary to this, Greece confirmed the management's commitment to the restructuring plan and to the objectives laid down therein.

philosophy of the previously authorised plan since it was mainly focusing on expansion and revenue maximisation than on the cost side'.

(29) The analysis of the shortcomings in the state of implementation of the 1998 plan by the report of Deloitte & Touche showed that it would not allow the Commission to take a positive decision on the release of the last instalment. The Commission transmitted this analysis to the Greek authorities by letters of 12 and 19 May and of 27 July 1999. The Commission also invited Greece to submit an updated restructuring plan for OA, which would then be examined by the Commission in relation to the capital injection of GRD 7,8 billion (EUR 22,8 million). In their reply to the Commission of 26 August 1999, Greece accepted that implementation of the 1998 to 2002 restructuring plan would have to be further revised to meet the previewed results and to allow the Commission to consider positively the granting of the last instalment.

(30) To address these concerns, and in order that 'no more restructuring time would be wasted' (Memorandum of Greek authorities of 11 April 2002.) the Hellenic authorities had already decided and informed the Commission by letter of 7 July 1999 of their intention to appoint, through an international open tender, an experienced international management to run the airline. Speedwing the consultancy subsidiary of British Airways (hereafter 'BA'), was finally awarded the management contract, which also provided for BA's option to purchase a stake of up to 20 % in OA within one year from signing the management contract.

(31) After a meeting in August 1999 between the new management team formed by Speedwing and Commission's officials in Brussels, the Greek authorities submitted by letter of 18 November 1999 a modified restructuring plan for OA prepared by Speedwing. Both companies, however, already started its implementation before its formal approval by the Commission. Deloitte & Touche examined the plan and expressed concern on some of its aspects. The key difference between the Speedwing plan and the plan approved in the Commission's decision of 1998 as applied in 1998 and early 1999 was a focus on revenue increase and expansion of the company's activities. Deloitte & Touche qualified in their initial report the Speedwing plan as 'ambitious'. The Greek authorities themselves confirmed in their memorandum of 11 April 2002 that 'the philosophy of this plan was far distant from the

(32) By letter of 20 March 2000, the Commission submitted the final draft of the Deloitte & Touche report, confirming the initial concerns to the Greek authorities. Therein, the Commission expressed its concerns about the failure to implement the revised restructuring plan as authorised by the 1998 decision. Speedwing contested the conclusions of the Deloitte & Touche report and replied to the Commission before departing from the management of OA in mid-2000. By letter of 29 August 2000 to the Commission, the Greek Authorities confirmed that OA had no official results for 1999 in the form of audited accounts and committed themselves not to grant the last capital injection. Greece asked the Commission to abstain from adopting a decision with regard to that matter.

(33) In parallel, the Greek authorities and the new management, put in place after Speedwing's departure wanted to re-assess the overall financial situation of the company in order to make 1999 a sound basis for further OA restructuring. In addition, the management intended to 'neutralize' some of the long-term effects of decisions taken by Speedwing management that would have a negative impact on the finances of the Company and to 'start to put emphasis on the cost efficiency of the airline' (Greek reply of 11 April 2002). In autumn 2000 PriceWaterhouseCoopers (PwC) were asked by OA to provide a compilation report on un-audited preliminary consolidated balance sheet as of 31 December 1999. The findings made by PwC mentioned, among others, that, in application of Law 2271/94 as amended by Law 2465/97 (Article 14), corporate tax was payable by OA and its subsidiary Olympic Aviation on taxable profits as from 1994. However, from PwC's report it resulted that books and records of the companies forming the OA and Olympic Aviation had not been audited by the tax authorities for a number of years, as early as 1988 (Olympic Aviation) or 1992 (Olympic Airways). Furthermore, the 1999 statutory financial statements for OA and Olympic Aviation had not at the time (December 2000) been approved by the respective general meetings of shareholders.

(34) After this thorough examination of the financial situation of OA, following the departure of the Speedwing management, the Greek authorities acknowledged in summer 2000 that it would not be possible to achieve the restructuring of OA solely on the basis of own funds or a sale of a minority stake. In early summer 2000 the Greek authorities informed the

Commission of their decision to proceed with the sale of a majority stake of OA in order to achieve the financing of the airline. In September 2000, the Greek authorities appointed Credit Suisse First Boston, as financial advisor, as well as a number of other advisors as required by the Greek Law on privatisation 2000/91. Meanwhile, the reports due for March and October 2000 in application of the 1998 decision had not been communicated to the Commission.

- (35) The 1998 decision also provided as part of the plan that OA's move to AIA would be financed by cash flow and compensation (point 82 of the 1998 decision). The company would, however, have been granted compensation by the Greek State for the loss of investments at Hellenikon airport as a result of its closure (estimated at GRD 35 billion). With regard to this compensation, the Greek State had confirmed to the Commission by letter of 3 July 1998 that the compensation would not involve any element of aid to OA and that it would strictly correspond to what any other company in a similar situation would be entitled to receive. In addition, in order to react to the Commission's concerns with regard to the timing of this compensation, Greece had also reassured the Commission that on the basis of the agreement to be reached between OA and the Greek State, payment would coincide with the company's expenditures incurred by its move to AIA airport.
- (36) By letter of 12 December 1999 Greece informed the Commission that the compensation to OA directly linked with its move to AIA was estimated by the consultancy American Appraisal, UK, employed by the Greek State to determine the losses that OA would incur as a result of the closure of Hellenikon and its move to AIA at GRD 33,66 billion as of 20 April 1999.
- (37) This report was transmitted to the Commission, without however a formal notification for additional State aid. The Commission appointed Alan Stratford to verify whether the appraisal carried out by the consultancy American Appraisal was based on the 'fair market value' principle and whether it involved any overcompensation. Alan Stratford, after having examined OA's situation at Hellenikon and the method of application of the fair market value principle, concluded in its final report of May 2000, that the calculations and the resulting amounts were reasonable. Nevertheless, it also questioned the necessity of including equipment as a compensation item and whether certain historic benefits enjoyed by OA at Hellenikon should be offset by compensation. According to the consultant if Greece had used another methodology proposed by Alan Stratford (especially in respect of life assumptions on buildings) 'the calculated

compensation figure would be significantly increased'. OA moved its operations in time to Athens International Airport at Spata, which opened on 28 March 2001. The same day Hellenikon was closed.

- (38) At the end of January 2002, OA contracted a loan of EUR 19,5 million from the Commercial Bank of Greece, a public commercial bank, on the basis of an assignment from OA to that bank of its claims against the Greek State for unpaid air tickets for an amount of EUR 22 millions. The loan was granted for one year.

2.3. *The HACA complaints*

- (39) The Commission received two sets of complaints on 12 October 2000 and 24 July 2001 by HACA. Members of the HACA are the following air carriers: Aegean Airlines, Cronus Airlines, Hellenic Star Airways, Cal Aviation, Trans European Airlines, Interjet, Avionic and Aviator. They concerned:
- (a) preferential payment allowances to OA workforce,
 - (b) unclarity of the Greek Law 2733/99 providing for the offset of debts between OA and the Greek State,
 - (c) the non payment in time of some landing and parking charges at Hellenikon Airport and the non payment of airport charges to AIA;
 - (d) the arrears in payment of the Spatosimo (a passenger tax for the development of Greek airports) of ca EUR 47 million (GRD 16 billion),
 - (e) default or substantial delay for paying rent of premises and landing charges to other Greek airports that Hellenikon and/or AIA;
 - (f) VAT relief on fuel and spare parts for Olympic Aviation for a financial benefit of EUR 2,6 million,
 - (g) default or substantial delay for paying social security contributions, default or substantial delay for paying VAT at 8 % on domestic fares, default or substantial delay for paying amounts due to Olympic Catering.

3. THE DECISION OF 6 MARCH 2002

3.1. *Grounds for investigation*

- (40) The replies given by the Greek authorities to the complaints on 19 February 2001, 7 and 11 December 2001, as well as 12 March 2002 did not dissipate the Commission's doubts, hence it decided to reopen the formal investigation procedure laid down in Article 88(2) of the Treaty. The grounds for investigations were twofold and are cited below:

1. **Abusive application of aid granted in the 1994 and 1998 Commission Decisions**

- (41) a) The non respect of the restructuring plan: The restructuring plan that served as the basis for the 1998 authorisation has apparently not been implemented as foreseen. In particular, the changes in the organisational structure of the company have not taken place, the management layers having essentially remained the same. The number of employees have decreased more than what was foreseen in the restructuring plan (see paragraphs 11-17), however, this appears to be due only to the spinning-off of activities into its subsidiaries previously carried out by OA. While employees' salaries have been frozen for 1996 to 1997, the resulting reduction in production costs was largely cancelled by significant raise in salaries in 1998.
- (42) It is worth noting that the objectives of the restructuring plan that served as a basis for the 1998 decision were never achieved. This resulted from OA's financial situation as described earlier herein. Based on the information given above the Commission had doubts as to whether OA's economic and financial development corresponded to the plan covering the period 1998 to 2002 on the basis of which the aid measures were approved with the 1998 decision. In particular, since the Commission had not received any information about the financial results of the company in 2000 or any estimates for 2001 and given that Speedwing failed to produce a business and restructuring plan observing the targets set out in the 1998 decision, the Commission had serious doubts as to the current financial situation of the company being further apart from the targets set out for the years 2000 to 2002 in the restructuring plan.
- (43) Against the requirements of Article 1 paragraph 2 of the 1998 decision, no report on the implementation of the plan was submitted to the Commission in March

and in October 2000. Moreover, the absence of information and of credible accountancy on the results of the company does not enable in any case the Commission to fully verify the respect of this essential condition without further investigation.

- (44) It resulted from the above that the economic and financial projections upon which this plan was elaborated by the Greek State and approved by the Commission have not been continuously met. Monitoring of the implementation of the restructuring plan indicated the existence of serious doubts as to the continuous compatibility of OA's current economic and financial situation with the operational and financial indicators of that plan. These doubts were of such nature that justify that the Commission re-examined the 1998 decision with regards to the correct implementation of the restructuring plan.
- (45) b) The non-respect of the conditions and commitments of the previous decisions. Article 1(d) of the 1998 decision requires Greece to ensure that OA would have implemented a fully operational and adequate management information system (hereafter 'MIS') by 1 December 1998. To date, the Greek authorities have not submitted a report to the Commission about the MIS nor have they informed it about the degree of its implementation and its results.
- (46) The 1998 decision required Greece to have set up a fully operational and adequate management information system by 1 December 1998. The purpose of setting up the MIS was to allow the management of OA to receive adequate information to monitor the results of the restructuring plan and further amend the plan if necessary. Also, it should be noted that on the basis of the restructuring plan which formed the core of the 1998 decision, the Greek State was obliged to establish consolidated accounts for OA and its subsidiaries. Accurate input for setting up such accounts would stem from a fully operational and adequate MIS.
- (47) The Commission had put emphasis on the absolute necessity of this step, not only for the respect of the decision's condition itself, but much more for the own sake of the company. The experience of the 1997 accounts, described earlier (see paragraph 26), easily proved the difficulty to reach targets set in a plan without a proper starting point. Generally speaking, this implies that the management of a company can only take the right decisions to address a situation for the future if it has a coherent, precise, accurate and timely prepared picture of the past actions and achievements and/or failures. Such a management tool also implies that the underlying information, recorded in the accounting systems of the companies is timely and accurately processed, controlled and reported to the management.

- (48) Article 1(a) of the 1998 decision requires Greece to fulfil the undertakings referred to in Article 1(a) to (u) of the 1994 decision. For better understanding of the legal context within which OA should have been functioning as any other commercial company since 1994 under common commercial law, the following is being recalled: OA is a public undertaking, that does not form part of the Greek public administration and is subject to the provisions of private law, most notably those of Law No 2190/1920 governing the form and functioning of private limited companies ('Anonymos Eteria' – 'Société Anonyme'). Such companies are subject to strict publicity obligations. However, even though OA was listed under registry No 422/01/B/86/423, its articles of association do not form part of either this publication or any other, according to information available to the Commission.
- (49) Also, Law No 2190/1920 in its article 25 requires the general meeting of shareholders to meet within six months after the end of each financial year in order to discuss and approve the financial statements of the company for the year which has ended. Also, according to article 43b §5 of the same law, the managing board of a private limited company has to publish the financial statements of the company for the previous financial year at least 20 days before the general meeting of the shareholders. However, OA published its financial statement for the year 1999 only on 28 December 2001. This statement was established on 31 March 2001 by the CEO (Chief Executive Officer) of the company and the general manager. It was examined by auditors on 11 December 2001. Clearly, these dates indicate that the requirement of the law that is applicable to any other private limited company was not respected. Without prejudice to any further action by the Commission that this situation may give rise with regards to the application of Articles 3(1) and 5 (6) of Council Regulation (EEC) 2407/92 of 23 July 1992 on air carrier licensing ⁽⁶⁾, this matter is of particular importance for the competitive position in the market of OA and its competitors when considering that the statement of the auditors, for the year ended on 31 December 1999, draws the attention to the fact that the own funds of the company have fallen below 50 % of the share capital. In fact, it appears that for the financial year 1999 own funds (GRD 33 699 706 104 or EUR 98,89 million) correspond only to 27,8 % of the share capital (GRD 120 947 970 000 or EUR 354,94 million). This situation has according to article 47 of Law No 2190/1920 the consequence, that the managing board has to call a meeting of the shareholders to decide the dissolution of the company or other measures to redress the financial situation of the company.
- (50) This particular aspect raises further serious doubts. Therefore, it appears necessary to examine the conditions under which OA and its subsidiaries have been able to remain active after 1999 without restructuring measures and against what is foreseen in normal Commercial law. The Commission recalls that such situation, apart from being a breach of the commitments and conditions foreseen in the previous decisions, may also imply an aid element (see Court of Justice, Case Magefesa, C-480/98).
- (51) The same can be said ⁽⁷⁾ about both OA's legal and fiscal status as well as the situation of its payments to the Greek State. These indicate, that the undertaking has been able to continue its business at least since 1999 without complying with their tax, and social security obligations as well as with their obligations to make due payments for airport charges, levies, rentals and fees to various Greek airports and to the Greek State itself.
- (52) The current situation of default on or deferred payments of airport charges, taxes, rentals, fees and any other levies to Greek airports and the Greek State raises doubts as to whether OA is granted new state aid, which is contrary to the 1998 decision and apparently further distorts competition among air carriers operating services to/from Greece.
- (53) The Commission draws particularly the attention of the Greek authorities to the extremely difficult situation of OA's competitors. In that context, particular reference is made to Axon Airlines. Also, other competitors such as Cronus Airlines and Aegean Airlines are facing significant difficulties, which appear to be partially due to the fact that, legally and financially, OA is not treated even-handedly by the Greek State. It appears therefore likely that OA's current situation regarding the payment of its obligations to Greek airports and the Greek State constitute aid against the common interest.
- (54) OA's legal and fiscal status. A series of laws subject OA to the direct supervision and control of Ministries providing for rights and obligations, which deviate explicitly from that law. Also, certain other Greek laws

⁽⁶⁾ OJ L 240, 24.8.1992, p. 1.

⁽⁷⁾ See in particular case C-480/98, points 20-21, European Court Reports 2000, Page I-8717.

provide OA exclusively with fiscal benefits, which do not apply to private limited companies or any other form of commercial company.

(55) These provisions appear to be against the commitment of the Greek State to ensure that:

- (a) from a management and status point of view (part VII of the 1994 decision and Article 1(a) and (c) thereof), OA would have the fiscal status of a public limited company become an undertaking subject to ordinary law on the same footing as the other Community airlines with no special privileges or constraints,
- (b) it would not interfere in the management of OA except within the strict limits of its role as shareholder (Article 1(b) of the 1994 decision),
- (c) it would have adopted immediately the legislation necessary for the effective implementation of the salary, social and financial aspects of the plan (Article 1(f) of the 1994 decision).

The legislation in question is the following:

(56) Law 2271/94 and Law 2602/98: In the 1998 decision the Commission considered that Article 2(12)(a) and Article 4 of Law 2271/94 which aims at implementing the restructuring plan of OA was not comparable to that of a private undertaking as regards staff management. Furthermore, the Commission took into account that Article 4(4) of Law 2271/94 re-qualified in practice OA and its subsidiaries as a public sector company for the purpose of recruitment of staff.

(57) In particular, as far as the system of recruitment is concerned, the Commission took note in its 1998 decision of the provisions of Law 2190/94 concerning the public undertakings and undertakings of public law belonging to the public sector. The only exemptions are provided in article 14(2)(j) of that Law concerning OA pilots.

(58) Furthermore, the Commission stated in that decision (point 66) that 'the cumbersome administrative procedure regarding permanent staff 'was not unsuited to flexible personnel management as needs for such personnel were usually planned in advance.' The provisions in question of Law 2271/94 have been supplemented by Law 2602/98 on the completion of the implementation of the restructuring plan of OA. Article 3 paragraph 2 of this Law provides that all personnel (flying crew, technical, ground staff) are all submitted to the provisions of Law 2190/94.'

(59) Therefore, it appears that the flexibility previously existing for the recruitment of flying crew (and pilots) has been removed. Furthermore, it is not clear whether the provisions of Law 2527/97, which, as stated in the 1998 decision, provide for a specific recruitment procedure for OA's seasonal staff, have not been implicitly abrogated by the provisions of Law 2602/98. This appears to be the case as this latter Law does not exclude explicitly seasonal staff from the provisions of Law 2190/94 concerning the public undertakings and undertakings of public law belonging to the public sector, so as to further maintain the recruitment flexibility for seasonal staff.

(60) Additionally, it should be noted that OA's management is not subject to the provisions of Law 2190/94 as stipulated in Article 2 of Law 2608/98 containing OA's staff regulations (preamble, paragraph 3 thereof). However, as OA is a public utility company according to the provisions of Law 2414/96 as is explained below, its management and in particular the CEO and Chairman of the Board of Directors, the Director General, the general and legal Counsels are appointed by the State. These aspects bring OA's recruitment conditions further afar from the private ordinary law applying to private or public limited companies.

(61) Law 95/76. Article 3 paragraph 2 of the Law provides that claims by the Bank of Greece against OA for loans granted by the State to OA as from 1 January 1975 are to be considered as claims against the State, which can thereafter be offset against any claims by OA against the State.

(62) Article 3 paragraph 3 of the Law provides, that all contractual transactions entered into by OA for the transfer of any assets, real estates or any other property of OA, in particular aircraft, aircraft engines, helicopters etc., as well as any other notary transactions are to be free of any notary or registration fees. Article 4 paragraph 2 of the Law provides, that by act of the Cabinet of Ministers OA's shares can be transferred to the Hellenic Bank of Industrial Development (ETVA) in contravention of otherwise applicable Greek legislation. Article 4 paragraph 3 of the Law stipulates that OA is subject, in any event to the control and supervision of the Minister of Transport and Communications. The scope of this provision is very broad and covers every activity or managerial aspect of OA. It constitutes one of the most important differences between an undertaking such as OA and any other private or public limited entity. Article 4 paragraph 4 of the Law provides that any contractual transactions for the transfer of any assets or any other property of OA to any entity of private or public law) will be carried out free of any taxation or any other fees or public levy. Article 6 paragraph 2 of the law stipulates that the meal allowance paid in cash to the personnel of OA working

at the airports does not constitute a part of its wage and thus is not subject to withholdings in favour of the Social Security Fund or other pension schemes. This particular aspect was also addressed in the complaint lodged by HACA with the Commission against the Greek State on 12 October 2000. Article 6 paragraph 3, last indent stipulates that any reevaluation of OA's property and any resulting readjustments are exempt from any taxation or any other fee.

(63) Law 2414/96. This Law concerns the 'modernisation of the public undertakings and organisations and other provisions'. This Law includes OA and all its subsidiaries in the list of 'public undertakings' to which the law applies and qualifies as 'public utilities' ('DEKO' in Greek). Most of the companies subject to this law are already private limited companies. Those who are not must be transformed to such company form as required by Article 2 of that Law.

(64) However, the provisions of this law, which apply also to OA, clearly derogate from those applicable to ordinary private limited companies. DEKOs are considered to be undertakings offering services to the general interest and, therefore, the Greek Government's involvement in the management and the overall operation of such undertakings is more intensive. Furthermore, there is no standard legal environment for DEKOs. Therefore the scope of intervention of the State can vary.

(65) With the exception of Articles 14, 19 and 20, which are not applicable to OA, all other Articles of that Law (24 total number of Articles) constitute significant deviations from the provisions of Law 2190/1920. On the one hand the Greek State, as sole shareholder of OA, may appoint and revoke OA's members of the Board of Directors at any time, as is the case of ordinary private limited companies, where the Board is appointed by the General Assembly of the shareholders. On the other, according to the provisions for DEKOs the State can de facto intervene and OA has accordingly to follow different procedures for the appointment of the members of its Board and their decision-making procedures. In particular, the Chief Executive Officer is appointed by the State as representative of the Government and may be at the same time the Chairman of the Board of the company. Also, DEKOs have, unlike ordinary private limited companies, an extra body, the Directorate's Board, the main tasks of which, is to ensure that the company's policies are coordinated with State policies. Moreover, DEKOs (and therefore also OA) are given preferential access to state funded programmes for projects with national, Community or international interest.

(66) The Commission considers that these measures specific to OA raise doubts as to their compatibility with the abovementioned commitment entered into by the Greek State. This is so in particular because Article 1(c) of the 1994 decision referred to tax exoneration affecting the recapitalisation and the restructuring of OA as they resulted directly from the restructuring plan. Inasmuch as they confer to OA exclusively specific financial benefits they also constitute new aid. The measures provided for by Law 75/96 and 2414/96 go beyond this provision of the 1994 decision. Also, they clearly show that OA is still not given the status of an ordinary private or public limited company against the provisions of Article 1(a), (b) and (f) of the 1994 decision.

2. Initiate the procedure with regard to new illegal aid.

(67) The Commission considers that the following measures, apart of being a possible violation of the prior decisions, seem particularly likely to constitute State aids:

- (a) Greece tolerance with the non-application of normal Commercial law rules to OA (Laws 2190/1920, 2271/94, 2602/98, 95/76 and 2414/96)
- (b) Greece tolerance with the default on or deferred payment of Social Security and Tax obligations by OA.
- (c) Greece tolerance with the default on or deferred payment of the different kind of airport charges.
- (d) The exemptions from taxes, notary or registration fees for OA transactions.
- (e) The possibility of offsetting debts of the State and of OA, or between airports and OA, including the 'Spatosimo' tax, in a non-transparent way.
 - (i) The fact that by Presidential Decree 138/97 OA is required to pay airport charges and is not exempt from any rentals or other fees and levies for the use of space at Greek airports, does not in itself mean that OA factually complies with its obligation to pay such charges, fees and

levies. In fact, the Greek authorities accept in their submissions to the Commission regarding the complaint by HACA that OA has been in arrears with payments and that it has indeed requested that its debts be offset against its claims against Greece.

- (ii) The same argument applies to the offset of debts between OA and the Greek State, as implemented by virtue of Law 2733/99. It should be stressed, that as such the offset of debt is not considered incompatible with Articles 87 – 89 of the Treaty. This particular measure, however, does not provide in an objective, relevant, transparent, neutral and non-discriminatory way the debt accrued on each side. Therefore, serious doubts arise as to how the amounts concerned by the offset have been calculated. For that reason serious doubts exist about the compatibility of the calculation method and the amounts offset by Law 2733/99, i.e. GRD 9 862 639 493 (EUR 28,9 million) as outstanding amounts by 31 December 1998, which appear also to include tax payable by OA for overdue payments for airport charges and space rentals until 31 May 1999.

- (iii) Furthermore, serious doubts exist about the payment conditions for the landing charges at Athens International Airport as well as for the payment of the airport development tax 'Spatosimo'. Furthermore, the Commission is particularly concerned with the statement of the Greek authorities in their observations on the supplementary complaint, that OA has requested the offset of amounts of EUR 15 million due as Spatosimo, as well as of the amounts outstanding for airport charges and space rentals at other Greek airports. Given that OA is the biggest operator at all Greek airports, default on payment of such charges and rentals deprives these airports of significant revenue and creates important distortions of competition among the air carriers which use these airports.

- (iv) It appears that the Greek State tolerates that OA is in arrears in its payments of airport charges, taxes, rentals and other levies to the airport and to the Greek State itself, because it has not made full payment to OA of that compensation. Therefore, the state of payment by the Greek State of any amounts agreed and/or outstanding at this moment to OA for the loss of investment

at Hellinikon raises doubts as to the compatibility of such payment. In that context, particular consideration is given to what the Greek authorities assert in their observations on the supplementary complaint lodged by HACA.

- (f) The granting of the operation of the fuelling facility to an OA subsidiary without an open tender and the tariff conditions applied. With regard to the fuelling facility two aspects raise concerns: OA is the largest shareholder of OFC (Olympic Fuel Company) (66 %); OFC was selected by the Greek State in the course of a tender procedure for the construction and operation of the fuelling facility at AIA. There are significant discrepancies between the final cost as opposed to planned cost for that facility. Serious doubts arise on whether the amounts charged by OFC as fuelling fees to recoup this investment only reflect differences in the exchange rate or whether they also contain elements of State aid.
- (g) The granting of a loan of EUR 19,5 millions by a public commercial bank (Commercial Bank of Greece) to OA on the basis of an assignment from OA to that bank of its claims against the Greek State for an amount of EUR 22 millions for unpaid tickets.

- (68) In the same opening of the procedure, the Commission issued an information injunction in application of Article 10 of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁸⁾ with regard to all the information necessary for the Commission to decide about the alleged violation of the commitments and conditions included in the 1998 decision, about the implementation of the restructuring plan at the basis of such decision and about the alleged new unlawful aid referred to above. This information should include all the relevant elements and in particular:

- (a) the audited financial accounts for the years 2000 and 2001;
- (b) the use of the loan guarantees provided for in the 1998 decision with regards to the purchase of aircraft and with regards to the relocation of Olympic Airways to AIA;

⁽⁸⁾ OJ L 83, 27.3.1999, p. 1.

- (c) the State of all financial and operational leases for the aircraft operated by Olympic Airways and its subsidiaries;
- (d) all information regarding the introduction of a yield management policy and programme;
- (e) all information regarding the State of relocation of all activities of Olympic Airways to AIA;
- (f) the reports on the implementation of the restructuring plan as due by March and October 2000;
- (g) the State and details of payment by Olympic Airways of the 'Spatosimo' tax as well as of VAT concerning the company and its subsidiaries, the airport charges at Hellinikon and AIA, all rentals, fees and levies payable to Hellinikon, AIA and all other Greek Airports since 1998 until today;
- (h) all information and particular all payment details and conditions regarding the loan guarantee of EUR 19,5 million extended in February 2002 by the Greek State (Commercial Bank of Greece) to OA to cover operational costs.

(69) The Greek authorities replied on 11 April. Although the information sent was extremely dense, the audited accounts for 2000 and 2001 were still missing, as well as the reports on the implementation of the restructuring plan as due by March and October 2000. In the same letter, Greece informed the Commission that a new process of privatisation of OA is triggered.

3.2. Information injunction

(70) As a result a second information injunction was adopted by the Commission on 9 August 2002, it requested from the Greece:

- (a) The information already requested in the decision of 6 March 2002:
 - (i) the audited financial accounts for the years 2000 and 2001.
 - (ii) Precise and quantitative information on the payment of the operating costs Olympic

Airways did not met in 2001 ⁽⁹⁾ (further enlightening the charges for the year 2001 on the one hand, and the charges for the previous years on the other hand), as well as the repayment plan of those debts from 1 January 2002.

(b) The following additional information:

(i) Precise and quantitative information on all the current debts in any financial institutions and others, as well as the repayment plan of the debts ⁽¹⁰⁾.

(ii) Concrete economic data of Olympic Airways for the first six months of 2002, as well as an objective analysis for the company to reach viability in 2002. This analysis shall be controlled and certified by an independent expert.

(iii) The legislation modifying the Law 2414/96 and Articles 3 paragraph 2, 3 paragraph 3, 4 paragraph 2 to 4, 6 paragraph 2, 6 paragraph 3 of the Law 95/76, which would permit to Olympic Airways to act as an effective private limited company, independent from any other State influence than this resulting from its shareholder position.

(71) By 1 October 2002, Greece sent a reply and asked the Commission to convene a meeting on this issue. However, the 2001 audited accounts were still missing from the information sent to the Commission. The 2002 analysis certified by an independent expert has eventually been transmitted on 14 November 2002.

4. COMMENTS BY THE GREEK AUTHORITIES

(72) The Commission would like to emphasise the fact that the information transmitted by Greece following the opening of the procedure and the two injunctions of information, notably by letters of 11 April 2002 and 1 October 2002, and by hand at the occasion of the meeting of 16 October, have been often late and incomplete. The situation according to the Greek authorities concerning first the abusive application of the aid granted in 1994 and 1998 and secondly the new illegal aid is as follows:

⁽⁹⁾ It concerns debts, which have to be paid to suppliers and other third parties (airport charges, social security etc.).

⁽¹⁰⁾ It concerns financial debts (banks) or possibly debts related to the financing of the fleet.

1. Abusive application of aid granted in the 1994 and 1998 Commission Decisions

has increased the operational landing costs by 1000 %). The first estimations for 2002 made by OA's management would show that the company would have a positive EBITDA of EUR 11 million.

(a) The non respect of the restructuring plan

(73) The Greek authorities underlined that the 1997 results exceeded the most pessimistic results. In addition, in 1998, because of strikes, financial crisis, shortfall of aircraft as well as significant personnel retirements, it was not possible to achieve targets for the year, especially as far as productivity was concerned. Efforts were nevertheless undertaken (strict management, introduction of a Frequent Flyer Programm, progress in the development of a Management Information System). On 18 November 1999 Speedwing presented a new restructuring Plan. However, due to the disagreement with the expert appointed by the Commission, Deloitte & Touche, such a plan was never accepted. A privatisation process started in 2000. In parallel, the management of OA rationalised OA's operations (reduced capacity and costs etc.).

(74) In the meeting held in Brussels on 16 October between DG Energy and Transport officials and the Greek authorities, accompanied by OA representatives, it was specified that OA had made significant progress since the arrival of the new management, in summer 2000, in terms of reduction of costs, as well as efforts not to maximise revenue.

(75) By doing so the domestic market share of Olympic Airways in the first half of 2002 was 57 %, as against 53 % in the same period of 2001. The international market share was 25,2 %, as against 22,6 % in 2001. The load factor indicator for the network as a whole rose to 63,7 % in the first half of 2002 from 60,84 % in the same period of 2001.

(76) On the economic side, and in spite of such progress, the Greek flag carrier still recorded losses. Earnings Before Interest, Taxes, Depreciation of Assets ('Earnings Before Interest Taxes and Depreciation of Assets', hereinafter: EBITDA) amounted to a loss of EUR 132 million in 2000. Such results are due, according to OA to the change of management and the increase of USD and petrol. In 2001 the EBITDA estimation is a loss EUR 149 million (mainly due to the move to Spata, which

(77) Indeed the new Deloitte & Touche report submitted by Greece points out the recent achievements of the company in its operation and financial result. It states, nevertheless, that depending on the hypotheses taken into account, the EBITDA would however range from EUR 10 to EUR 58 million, with a 'most likely' scenario being a loss, of EUR 39 million. The differences are mainly linked to variances in revenue estimations but also, according to the report, to a negative impact of staff cost vs. Plan objectives up to EUR 7,4 million. Deloitte explains that this impact may be linked to the still unsatisfactory staff productivity; indeed 'Staff productivity, however, when compared to 2000 productivity per ASK (Available seat-kilometres) has deteriorated by 5,7 %'.

(78) Once all operational costs (i.e. depreciation of assets and interest charge) are included, the operating result 2002 shown by OA's management would be a loss of EUR 41 million. The review made by Deloitte & Touche also gives a lower figure, with a loss ranging from EUR 63 to EUR 111 million and a most likely scenario of EUR 92 million. Although these estimates tend to show an improvement from the previous years operating results (2001: EUR 194 million and 2000: EUR 164 million), they remain in all cases negative.

(79) In addition, the profit and loss accounts include exceptional results of about EUR 60 million in 2002 (EUR 57 million in 2001 and EUR 69 million in 2000), which would enable the company, according to its projection, to post a net profit in 2002 for EUR 18 million. On the basis of the operating result reviewed by Deloitte, the net result would remain, according to management expectations, a loss and could range from EUR 3 to EUR 50 million and a most likely scenario of EUR 31 million. OA informed the Commission that these incomes would come from the next sale of planes, Galileo Hellas, Olympic Catering etc. Such possible actions have not been quantified in the report of Deloitte and have only been mentioned as expectations from the management. On the other hand, the consultant takes note of the possible necessity for OA to build up a provision, therefore an additional expenditure, of EUR 23,5 million in relation to fines

and surcharges for past-due payments indicated as pendent for settlement with the Greece.

considered unrealistic for a company, which had to implement such a system from the start.

(80) On the balance sheet side, the company has a negative stockholders equity since end 2001 for EUR 136 million. No comments on this side have been made by Deloitte in their new report.

(81) In the light of such late achievements, the Hellenic authorities consider that they have made progress towards the restructuring of the company. Hence, the Commission should not assess a formalistic attachment to a plan.

(82) As far as the absence of reporting for March and October 2000 is concerned, the Greek authorities considered that they could have only been able to send a report on the basis of the Speedwing report. Given, however, that it became apparent that the results of the plan up to the summer 2000 were not satisfactory against the time frame of the restructuring of OA (non achievement of revenue targets, costs increase), Greece took the view that a realistic assessment of the situation of the airline (i.e. the PriceWaterhouseCoopers report) had to be made before the adoption of a decision for its restructuring. Greece considered therefore appropriate to inform the Commission once such assessment and verification of the situation had been achieved.

(83) To conclude, Greece insist in their comments of 21 November 2002, that the restructuring process has been impeded by 'insurmountable obstacles': First, OA has always operated under a situation of unrest due to the several changes of management; second, no restructuring Plan has ever had the chance of being fully implemented; third, the authorised aid has been delayed by the Commission. In particular the payment of the last tranche of GRD 7,8 billion (EUR 22,9 million) has not been authorised, preventing the restructuring effort to bear its fruits; fourth and final point, a number of critical external factors (i.e. September 11th, Relocation to AIA, aviation market downturn etc.) have negatively affected OA's performance.

(b) The non-respect of the conditions and commitments of the previous decisions

(84) Article 1(d) of the 1998 decision regarding the MIS system. The Greek authorities argue that by imposing the 1 December 1998 deadline to implement the MIS, the 1998 Decision actually required OA to put in place such a system within four months. This requirement is

(85) Article 1(a) of the 1998 decision requires Greece to fulfil the undertakings referred to in Article 1(a) to (u) of the 1994 decision. In general Greece considers that all these conditions were fully complied with in the context of the 1998 decision. Indeed, they were a prerequisite for the adoption of the said decision. Hence, the application of normal commercial law to OA was one of the basic issues at stake for the 1998 Decision. As far as OA's articles of association are concerned they have been published in the Government Gazette 4518 of 15 June 2000. Concerning Article 47 of Law 2190/1920 Greece draws the attention of the Commission to the fact that as sole shareholder it could not have been able to convene a meeting for the dissolution of the company. Instead, it has decided to privatise the company, taking also into account the fact that the last instalment of GRD 7,8 billion of the capital injection had not been released. The delay for presenting the 1999 accounts are due to the fact that OA needed to have a sound basis for future decisions and could not rely on best estimates any longer. 1999 was chosen to constitute such a basis. Nevertheless, Greece insists that sufficient financial information was available to the management well before the audit of accounts.

(86) As for the legal and fiscal status, Greece maintains that Law 2271/94 has been repealed or modified in accordance with Commission suggestions, as the adoption of the 1998 Decision was conditional on this aspect. Besides, the provisions of Law 2602/98 have not abrogated Law 2527/97, providing for a specific sui generis recruitment procedure for OA. The former, adopted in March 1998, has been carefully examined by the Commission before the adoption of the 1998 Decision and was accepted. The same explanation applies to Law 2414/96 of which most aspects have been implicitly repealed by Article 1 of Law 2602/98 before the adoption of the 1998 Decision. The application of Law 2414/96 to OA was formally repealed following the adoption of the Interministerial Decision for the privatisation of the company. Law 2602/98 was a precondition for the adoption of the 1998 Decision, it is, according to the Greek authorities, in full compliance with the requirement of the 1994 and 1998 Decisions to enact legislation necessary for the implementation of the Plan.

(87) Concerning Law 95/76, the Greek authorities stress that Article 1 of the 1994 Decision required the Hellenic Republic to repeal Article 6 in so far as it concerned the extension of guarantees for the loans contracted by Olympic Airlines. The Greek authorities were not required to repeal the second paragraph of this article, this explains why such a request was not formulated for instance during the opening of the investigation

procedure in 1996. In substance, Law 2602/1998 (Article 1(3)) repealed food allowance for the entire flying crew and reduced it to 10 % of the gross monthly salary for the rest of OA's employees. Consequently, the social security contribution exemption corresponding to this 10 % of monthly salary of ground staff is insignificant. If the Commission still finds this Law incompatible, it is up to the European institution to propose appropriate measures for its modification since Law 96/75 pre-dates accession.

- (88) In general Greece considers that the 'mere fact that delays or deviation occurred during the implementation of a restructuring plan does not suffice in itself to characterise the aid granted as misused'. They consider that those elements are not a proof of contravention of the decision. Moreover, an amendment to a restructuring plan is always possible.

2. The granting of new illegal aid

- (89) A. The State tolerance with the non-application of normal Commercial law rules to OA. The Greek authorities categorically deny such allegation. They considered that the measures involved in this case should not be considered as State aid measures, but can only be assessed in the context of an examination of compliance with conditions. As such, there is no causal link between the delay of publication of 1999 OA accounts and the ability of the company to survive since 1999. With regard to the alleged support to OA via defaulted or deferred payments, the Greek authorities refers to the poor functioning of Greek administration, which is not in possession of modern and efficient resources and infrastructure. However, both the law and the administration practice are applicable in a general fashion and do not discriminate in favour of OA.
- (90) The Magefesa case is not applicable in the present case, as the Greek authorities consider they have used all available legal measures to ensure payments of the amounts due. Such a treatment of OA did not provide for any discrimination since it is identical to what happens in every similar case. OA competitors also have outstanding debts to the State (~ GRD 1,5 billion) and some of them intend to settle due outstanding debts to AIA exactly the same way OA has. Even in the case of an extremely limited number of legal provisions which

still apply to OA there is no pecuniary element of support to OA and thus no State aid within the meaning of Article 87 of the EC Treaty. As for OA's competitors, Greece fails to see why their financial difficulties should be attributed to the Greek State, as for instance in the case of Axon, it ceased operation solely on business grounds. Its shareholders did not want to accumulate losses in this difficult period of time for the air industry. Moreover, in its comments of 21 November, Greece insists that the plaintiffs are insignificant players compared to OA and they are not in real competition with OA. It also considers that no distortion of competition is imputable to OA as it has lost almost 40 % of its market share since 1998. Greece considers that future relationship of OA with the State has now been rationalised. The Secretary General of Ministry of Economy and Finance has already issued a decision that payments of air tickets in the future will be effected as per market practices (i.e. cash). In this regard, OA also issued an internal document to all OA Departments which prohibits the issuance of tickets to State employees on credit.

- (91) B. The Member State tolerance with the default on or deferred payment of Social Security and Tax obligations by OA; Concerning delayed OA payments of social security contributions for its employees for the period March to December 2000, a settlement with IKA has been concluded in accordance with applicable Greek legislation. Following the signing of the settlement, OA is obliged to pay all new debts in time, if not all outstanding settled amounts will become immediately due again. In their reply of February and October 2001 Concerning the alleged non payment of VAT on fuel by Olympic Aviation, the Greek authorities reassessed, while giving supporting evidence (VAT statements) that OA buys fuel for it and Olympic Aviation, which in returns then pays the VAT to OA. Concerning the non-payment of 8 % VAT on domestic fares (journeys to islands), when OA operates flights between a certain number of Islands, it pays a reduced VAT (the 8 % VAT rate is reduced by 30 % provided OA maintains branches at these locations). The Greek authorities argue that this is a 'insignificant fraction of the total sales volume' that is why they have not explained the VAT situation as regards the flights to the concerned islands, in their reply of 24 October 2001. The Greek authorities acknowledge, however, that such a situation (passengers on these flights seem to be charged an amount up to EUR 3 per flight, which is paid to the State) is not consistent with the applicable legislation, but that it does not constitute State Aid.
- (92) C. The State tolerance with the default on or deferred payment of the different kind of airport charges. Greece

stated that the overdue payments have been organised via offset, in a transparent manner and that there is no discrepancy of data. Concerning the non-payment of rental fees for the use of different facilities (ex-US hangar) at Hellinikon, the Presidential Decree 138/97 imposes on OA to pay airport charges. Such legislation does not provide for any exemption from any rentals or other fees levied for the use of space at Greek airports. In case of delays of payments by OA, the applicable procedures are imposed (e.g imposition of interest). With regards to the allegation of OA's debts to AIA for unpaid charges (ca EUR 30 million), as the Spata airport operates as a private undertaking, no State aid is involved. There has been indeed an accumulation of debts due to the moving to AIA, hence OA has increased its operating expenditure by 1000 %. However, the two companies, AIA and OA, have reached an agreement to settle all OA outstanding debts. Such an agreement will be forwarded to the Commission when signed.

(93) Concerning the delays in paying rent of premises and landing charges to other Greek airports, it is stated that common Greek law applies in full should OA default its payment obligations. The offset of payments between debts of OA to the Hellenic Civil Aviation Authorities (hereinafter referred to as HCAA) and debts of HCAA towards OA (ca. approximately GRD 750 million) are ongoing, Greece promised to provide the Commission with an update within one month, as from 11 April. As regards the non-payment of Spatosimo, the Greek authorities insist that in case of defaults OA pays interests and fines. In the present situation OA has to pay fine and interest for GRD 5,1 billion (EUR 15 million) for a total unpaid Spatosimo of GRD 2,2 billion. Currently, OA has contested the payment of a fine of EUR 15 million, the Administrative Courts have upheld the action and ordered the suspensions of the HCAA decisions and Tax assessment. Finally no outstanding debt exists between Olympic Airlines and Olympic catering, except for normal commercial debt.

(94) In general the Greek authorities contest the allegation that it tolerates absence or default of payments by OA and that it does not impose interests on deferred payments or fines. It considers that its replies of 19 February and 24 October 2001, as well as Annexes 19 to 21 of that memorandum demonstrate that OA is treated as any other Greek Company. OA has requested the payment of delayed State debts in order to improve its cash-flow position during the 2002 winter season, which is always a difficult season, (and all the more

after 11 September). Besides, for the unpaid amounts by OA, Greece has initiated applicable procedures for the recovery of amounts due.

(95) D. The exemptions from taxes, notary or registration fees for OA transactions. The Greek authorities affirm that OA does not enjoy such exemption. Legislation has been enacted to implicitly repeal Articles 3(2), 3(3), 4(2), 4(4) and 6(3) of Law 96/75.

(96) E. The possibility of off-setting debts of the State and of OA, or between airports and OA, including the 'Spatosimo' tax, in a non-transparent way. The Greek authorities consider the off-setting debts system is transparent.

(97) The totality of last years' defaulted payments of OA to the Greek State (including Spatosimo) have been verified as debt to the State in accordance with common Greek law and has been forwarded for payment arrangements (including all corresponding interest and fines due. This is common procedure and is applied also to other airlines. As soon as OA is in default of payment, the applicable procedures for recovery are applied. The outstanding OA claim of GRD 19 billion for compensation for its forced early eviction from Hellinikon is still a pending issue and thus cannot be offset against OA debts to the State by virtue of Greek law, such offsets can be effected only against certified claims towards the State). Finally, as for the argument that airports are deprived from important revenues because of the delayed or non payment by OA (the main contributor) and that this affects competition, the Greek authorities replied that airports in Greece are not autonomous but are funded by the State budget, all income derived goes to State budget, hence there is no distortion of competition.

(98) F. The granting of the operation of the fuelling facility to an OA subsidiary without an open tender and the tariff conditions applied; there was an international tender run by Spata airport in 1997 and not by the Greek government. On the basis of clearly stated assessment criteria OFC was chosen. The entire

development costs amount to approximately GRD 14 billion, while the expenses on a 12-month basis are budgeted by OFC at approximately GRD 600 million.

it is necessary examine the current economical and financial situation.

- (99) The hydrant fee charged by OFC to airlines for the storage and distribution of aviation fuel amounts to 4,36 US cents/Ugallon at the EUR/USD exchange rate of April 2002 and allows, according to Greece, for the recovery of the annual operating expenses, the loan amortisation and a contained return on the investor's equity at an annual rate of well below 15 %. At an estimated projected fuel consumption growth of 2 % per year, the current value of OFC's charges over the 21-year operating period amount to approximately GRD 30 billion according to the Greek authorities, as opposed to the Commission estimation of GRD 100 billion. Finally, Greece stated that OA has decided to join OFC in order to make sure, as it is the biggest user of the airport, that the fee would not rise significantly and that it would not be controlled by petroleum companies and refineries solely.

- (100) G. The granting of a loan of EUR 19,5 million by a public commercial bank (Commercial Bank of Greece) to OA on the basis of an assignment from OA to that bank of its claims against the Greek State for an amount of EUR 22 million for unpaid tickets. The Commercial Bank of Greece ((CBG) is not part of the public sector), 10 % is acquired by Crédit Agricole Caisse Nationale. OA needed such a loan to face likely problems of cash-flow for winter 2002, which is always a very difficult season. The loan was granted by CBG against certified claim of OA towards the State for unpaid air tickets amounting to EUR 22 million. This is not a State Guarantee. Besides, the loan has been granted at worst market condition than if it had been covered by a State guarantee: EURIBOR + 1,25 %.

5. OA's situation as of November 2002

- (101) Before engaging in the assessment of the abusive application of the previous aid and the alleged new aid,

- (102) The Commission would like to emphasise the fact that the examination of OA's present situation has only been possible after two injunctions of information. The replies however not only have they been late, for instance the requested objective analysis on whether the company is going to reach viability as of 2002, was only remitted on 14 November 2002, but Greece never forwarded to the Commission the main information in relation to audited accounts for 2001.

5.1. *Abusive application of the aid granted in 1994 and 1998*

5.1.1. The restructuring plan

- (103) The Commission insists on the fact that the analysis of OA's results and financial situation must be conducted bearing in mind that the reliable audited information only relates at the latest to the year 2000. For more recent figures the Commission relies on the information provided by Greece, which does not consist of audited account for 2001, and on estimations made by the company and subject to a limited review by an independent consultant for 2002.
- (104) All figures reported in the text are rounded to the closest million EUR or billion GRD.
- (105) The table shows key indicators of the 1998 decision accumulated by the Commission on the basis of the information provided by Greece. Some of the figures and ratios corresponding to those of 1998 can not be provided on the basis of the information available today.

Financial Indicators ⁽¹⁾	1998		1999		2000		2001		2002	
	Plan	Actual	Plan	Actual	Plan	Actual	Plan	Estimated	Plan	Projected
Turnover										
Million GRD	324 234	269 519	329 071	273 602	344 829	283 083	359 057	—	380 626	—
Million Euros	951,5	791	965,7	802,9	1 011,9	830,8	1 053,7	761,8	1 117	802,8
Operating result after interest ⁽²⁾										
Million GRD	14 610	- 10 362	21 294	- 16 832	9 622	- 55 651	1 644	—	8 470	—
Million Euros	42,3	- 30,4	62,5	- 49,4	28,2	- 163,3	4,8	- 194,3	24,9	- 41,7
Profit before tax ⁽³⁾										
Million GRD	5 120	1 660	20 914	- 25 980	22 587	- 32 378	2 697	—	6 590	—
Million Euros	15	4,9	61,4	- 76	66,3	- 95	7,9	- 137,3	19,3	18,6
Gearing	2,22	2,01	2,42	3,87	2,76	303	2,57	NS ⁽⁴⁾	2,34	N/A
Total number of aircrafts ⁽⁵⁾	35	33	37	33	40	32	40	32	40	26

⁽¹⁾ Actual figures 1998 to 2000 taken from OA's balance sheets; estimations for 2001 and projections for 2002 from draft figures submitted by the Greek authorities.

⁽²⁾ Or EBT (Earnings Before Taxes — and exceptional items —)

⁽³⁾ And after exceptional items

⁽⁴⁾ Gearing can not be calculated as shareholders equity is negative.

⁽⁵⁾ Figures-other than plan – do not include the aircrafts of the subsidiaries.

1 EUR= 340,75 GRD

(106) It can be seen that serious difficulties arose in the implementation of the plan as early as 1998. In 1997 operating result after interest amounted to a loss of GRD - 28 billion (~EUR - 82 million) against an intended profit of GRD ~1,7 billion (~EUR 5 million). Despite austerity measures undertaken in 1998 to counterbalance this development, the objectives set by the plan for 1998 were not achieved. The operating loss after interest the company experienced in 1998 amounted to GRD - 10,4 billion (EUR - 30,4 million) against an intended profit of GRD 14,6 billion (EUR 42,3 million).

(107) The restructuring plan foresaw over its whole period a significant increase in turnover: in 2002, the turnover should have reached GRD 380 billion (EUR 117 million) compared to GRD 275 billion in 1997 (+ 38 %). Between 1998 and 2002 the turnover remained in fact in the range of GRD 270 to 283 billion (EUR 792 to 831 million) bearing in mind that 2001 itself was an overall difficult year for the air industry.

(108) The operating result was intended to be positive already in 1998. The restructuring plan forecasted a drop to an

almost breakeven level for 2001 before a return to more positive results in 2002. In reality the operating loss (i.e. after all operative expenditures including depreciation of assets and interest cost on financing, but before exceptional items) remained ca. GRD - 10/- 17 billion (EUR - 30/- 49 million) in 1998-1999, it increased to GRD - 55/- 66 billion (EUR - 163/- 194 million) respectively in 2000 and 2001 and is estimated to be EUR - 41 million (GRD - 14 billion) in 2002.

(109) If the 2002 estimated figure of EUR 11 million EBITDA represent an improvement compared with the last two years, which had negative figures, this result can only be confirmed in actual figures when the 2002 accounts will be audited. It is, however, very unlikely that OA will achieve this result, as confirmed by the report commissioned by the Greek authorities from Deloitte ⁽¹¹⁾.

(110) In that respect it must be pointed out that the level of performance to which the Greek authorities refer as

⁽¹¹⁾ See paragraph 75 and followings.

Operating profit in their reply to the Commission of 1 October 2002 cannot be considered as such. It is also not the definition used for the same heading in the Decision of 1998 and in the spreadsheet included and reproduced above. Therefore, the claim that the company has now achieved a positive operating profit is not valid, since such profit actually corresponds to the so-called EBITDA. Indeed, the EBITDA has to cover, not only the normal profitability for the shareholders — which is not even envisaged here — but also two major costs components for all companies:

- the depreciation of fixed assets represents, in the accounting form, the decrease of value, linked to the use, of assets invested in the activity of the company, here mainly the aircrafts and other air-related fixtures, or in other terms their amortisation over their expected lifetime. This heading plays also a key role for the future financing of new assets to replace the existing ones and to ensure the long-term running of the company;
- the interest charge paid by the company to its banks and other financial institutions providing funding to its activity and/or investments.

(111) Therefore, it must be emphasised that such a low level of EBITDA remains unsustainable. On the basis of OA's figures as forwarded to the Commission the depreciation of fixed assets and the interest charge will together amount to an estimated EUR 52 million. Deducting this amount from the EBITDA would bring the operating result or EBT ('Earnings before taxes') ⁽¹²⁾ of 2002 to a loss of more than EUR – 41 million and to a most likely case of EUR – 92 million as per Deloitte review.

(112) However, Greece insists, in their reply of 21 November, that according to the Deloitte & Touche report indications, the application of International Accounting Standards (IAS) instead of the Greek ones, would have significantly improved the EBITDA. It must be underlined, nevertheless, that this only constitutes a classification issue as the use of IAS, i.e. in the present case accounting the leases as economic purchases of the assets, would transfer part of the costs from the financial to the depreciation charge. The Deloitte & Touche report, accordingly, makes clear that it does 'not believe that this change would significantly affect the overall results of OA', i.e. the operating profit on which the analysis of the Commission is based since 1994.

⁽¹²⁾ And also before exceptional items.

(113) According to Greek information an important amount of exceptional gains seems to have been generated since 2000 and would have reduced these losses. Indeed, their amount is very significant (EUR 68 million in 2000, EUR 57 million estimated for 2001 and EUR 60 million forecasted for 2002). For the years 2000 and 2001 they mainly consist of the compensation received from the State for moving from Hellinikon airport to AIA Spata (EUR 51 million in 2000 and EUR 65 million in 2001). In addition there has been the sale of a building (EUR 22 million in 2000). In 2002 exceptional gains are intended to consist of a last instalment of the compensation for moving to AIA Spata of EUR 6 million as well as of gains from the sale of tangible fixed assets — such as aircraft of up to EUR 16 million — and financial fixed assets such as shares in participation of up to EUR 25 million. These gains, which may partially be linked to disposals of non-core assets, may indeed help easing the financial situation of the company. They remain nevertheless a one shot operation, which has no consequences on the cost structure of the company, which remains worrying. It must be emphasised that only operating profit may in the long run allow the survival of an undertaking.

(114) The information provided also refers to an exceptional income for 2002 of EUR 5 million relating to the compensation offered by Greece to all Greek airlines following the events of 11 September 2001 and the closure of airspace. This aid scheme has been registered by the Commission under the number NN 119/2002 and is still under scrutiny by its services under the State aid rules. The present decision will not prejudice the outcome of this examination.

(115) For 2002, the last information provided on 16 October 2002 by OA's management and the Greek authorities would be that in addition to these EUR 60 million exceptional item, an additional EUR 112 million of exceptional income is awaited. No formal evidence on the content of such item was communicated, however, the OA's management broadly explained that it could correspond up to EUR 37 million to the sale of the company's shares in the catering and reservation's systems activities. The remaining and major part (EUR 75 million) is described as sale and lease-back of airplanes. The magnitude of this alleged profit in comparison with the underlying value of these assets in the last balance sheet of the company per 31 December

2000 (Gross book value of EUR ~155 million and Net book value – after depreciation – of EUR ~41 million), as well as the poor level of second-hand aircraft's selling prices at the moment, when many of them are already grounded awaiting a buyer or lessor, can not lead the Commission, until final proof, to consider these figures as reliable.

reaction by the shareholders, which may constitute in an increase in share capital and/or in putting into action severe restructuring measures in relation to the cost structure, which may lead to adapting the company's activities. There has been no such reaction of Greece, neither by increasing the share capital nor by undertaking important adaptations to the restructuring plan in time.

(116) Due to the company continuing making high losses the equity situation, the increasing debts and the gearing status (total payables of the company divided by equity) remain that of a company in difficulty.

— The negative gap of shareholders equity (plan vs. actual) has increased from GRD 32 billion (EUR 93 million) in 1997, to GRD 37 billion (EUR 108 million) in 1998, to GRD 85 billion (EUR 249 million) in 1999 and finally arrives at GRD 132 billion (EUR 387 million) in 2000. For that year own funds were almost nil (GRD 645 million or less than EUR 2 million). Based on the non-audited figures communicated to the Commission for 2001 own funds further decreased to EUR – 136 million.

— Following the various figures for 2002⁽¹³⁾ mentioned above and depending of the level of exceptional income effectively achieved, own funds as of 31 December 2002 may range between EUR – 209 million and EUR – 6 million and with a 'most likely case' as described by Deloitte of EUR – 139 million. Even in the most favourable assessment of the effect of exceptional income on the company's financial situation, the shareholders equity will in any event remain negative during the final period of the restructuring plan.

— This level of shareholders equity is exceptionally uncommon for a company still active. The audited accounts confirm that the red line of 50 % loss of the share capital has been crossed in 1999. Normally such a situation triggers immediate

— In view of this situation the company relies since the end of 2000 only on borrowed money to finance its activities. In 2001 the need for external funds financed by the banks and other third parties, trading partners, suppliers as well as State authorities, through additional loans or by granting delays in payment has increased even more. Indeed these borrowings finance not only the whole assets of the company but also the negative shareholders equity of EUR 136 million.

— The debt has notably increased in 2000 and in 2001. Financial debt increased in 2000 by approx. GRD 15 billion (EUR ~ 44 million) and thus multiplied by 4 compared to 1999. In addition, liabilities towards suppliers also increased by GRD ~ 11 billion (EUR ~ 32 million), whereas liabilities in relation to taxes and social security were GRD ~ 11 billion higher than in 1999. In both cases the 2000 figures doubled the amounts shown for 1999. Such important increases in debt can not be justified by the company's development of activities i.e. turnover, which remained more or less stable, and which could have generated higher costs for purchases, salaries, etc. if it had itself increased significantly. The debt situation relates in fact to OA's overall financial situation and the company's lack of means to meet its current financial obligations in relation to third parties.

— According to OA's audited figures current liabilities⁽¹⁴⁾ in total increased from GRD 39 billion (EUR 116 million) in 1999 to GRD 86 billion (EUR 252 million) in 2000. In 2001 the long-term debt increased by EUR 187 million due to the loan guaranteed by the State financing the relocation costs in connection with the OA's move to AIA Spata.

⁽¹³⁾ See paragraph 78: net result could amount par management estimations to + EUR 18 million and following Deloitte analysis to losses from — EUR 3 million to — EUR 50 million. Possible additional exceptional income of EUR 112 million and charge of EUR 23 million could also arise.

⁽¹⁴⁾ Caption Liabilities C 2 of OA's balance sheet.

— In 2001 current liabilities to third parties increased by another EUR 90 million from EUR 252 million in 2000 to EUR 342 million estimated for 2001. They almost tripled in comparison with 1999. Figures show that OA debts in relation to social security payments rose from EUR 19 million in 1999 to EUR 29 million in 2000 and almost EUR 44 million at the end of 2001. Between the end of 1999 and 2001, OA's debts relating to taxes have been multiplied by 10 (EUR 10 million in 1999, EUR 33 million in 2000 and EUR 99 million in 2001). Once again such an increase may not be justified by changes in the company's activities causing higher debts. In relation to the factual situation of OA on the contrary, current assets, which are normally financed by current liabilities as described above, slightly decreased from EUR 313 million in 2000 to EUR 301 million as of the non-audited 2001 figures, thus normally reducing the need for financing. The acute need for cash to compensate recent losses is the only justification for the described development.

— The gearing is one indicator provided by the 1998 decision intended to monitor the implementation of the restructuring plan. This ratio is to be calculated as the total of all debts owed by the company divided by the shareholders equity⁽¹⁵⁾. Depending on investment and operating results of each year, it was expected to remain between 2.22 and 2.76, in the worse for year 2000. In fact, after a positive start in 1998 (2.01 instead of 2.22), the weight of the debts combined with poor operating results brought the actual figures to 3.87 in 1999. At the end of 2000, when the equity had almost vanished, debts represented 303 times the equity and the gearing arrived at 303.

— Today the ratio can not be calculated any more due to the negative level of the equity. It is a further element proving that OA is a company in financial difficulties far away from any possibility to achieve viability independent from outside intervention. A gearing ratio of 2.76 (highest ration allowed for 2000 by the 1998 restructuring plan) put in relation

to the 2000 and 2001 total debt level⁽¹⁶⁾ requests a net equity of OA representing of at least EUR 200 to 300 million, in case exceptional gains foreseen for 2002 can be realised. The only way to achieve an increase in equity in the company's present financial situation is through an equivalent cash injection in capital by shareholders. To compensate the current negative equity in 2001 the necessary capital injection would rather amount to EUR 340 to 450 million.

— The above figures represent the minimum necessary capital injections supposing that as of 2003 OA will remain at least breakeven. Under the condition that all conditions and obligations laid down by the present restructuring plan authorised by the Commission 1998 are met, OA may still receive a last instalment of EUR 23 million (GRD 7,8 billion) foreseen therein. Not only the conditions and obligations have not been at least partially met, but also the amount of the last instalment of the 1998 restructuring aid of EUR 23 million (GRD 7,8 billion) is far from corresponding to the above-described minimum need for a capital injection meeting paying off the current debts of OA.

(117) *Conclusion:* Greece stated to the Commission its commitment to implement the 1994 and 1998 restructuring plans. Most of the targets requested therein have not been achieved. In addition the conditions and obligations requested by the plans have not or not correctly been implemented. The company continues to be in serious financial difficulties. OA's described financial situation and the serious difficulties identified lead to a lack of viability in the short as well as in the long term.

5.1.2. The implementation of a Management Information System 'MIS'

(118) In relation to the effectiveness of the information system put in place by OA in September 1999 Alan Stratford and Associates, the independent experts investigating it, stated that: 'the consultants are satisfied that management will receive valid and reliable information, but only provided that data is input according to the defined timetables'. The information system should have been put in place at the latest in December 1998, as requested by the Commission's 1998 decision.

⁽¹⁵⁾ Captions B: Provisions for liabilities and charges + C: Creditors + D: Accruals and deferred income on Caption A: Net Equity in the liabilities of OA's balance sheet.

⁽¹⁶⁾ As calculated in the preceding footnote: EUR 575 million at the end of 2000, EUR 825 million at the end of 2001.

According to the consultants the success of the system would depend on 'contracting and efficient implementation of a new Revenue Accounts System' providing data allowing the calculation of revenue and profitability. There were two further potential weaknesses of the system identified by the consultant, which relate to the fact that the MIS is not applied to all subsidiaries of OA (for example; Olympic Aviation) and that certain key management information is not yet included, which seriously reduces the management's ability to obtain a true overview of the whole of their aviation business.

- (119) According to the information submitted on 11 April 2002, Greece argued that the deadline of 31 December 1998 has been unrealistic as it would have meant to implement a MIS within four months. Greece also submitted to the Commission the MIS currently applicable to OA as Annex 39 to the mentioned information, stating that it has been completed in October 2000 and been applied since.
- (120) According to Annex 39 the MIS is not applied to any of the subsidiaries and in particular neither to Olympic Aviation nor to Macedonian Airlines, which both operate air transport services. The Commission is not in possession of any evidence confirming that the system has been successfully implemented and whether it ever became a 'fully operational and adequate management information system' as requested by the Commission decision of 1998. From the information provided (page 4 of Annex 39) it shows that the system has not been made accessible as would be necessary for full implementation. Limited access has been granted as of October 2000. The actual application of the information system is not being proven by any of the information available to the Commission nor are any results thereof reflected in the data transferred to the Commission.
- (121) The most significant evidence that the MIS is not operational is provided by the official auditors of OA (SOL SA – Certified auditors) in the audit reports for the years 1998, 1999 and 2000, and by the enormous delay it took to have the accounts audited.
- (122) It must be reminded that audit reports can generally be broken up into three major categories. The most favourable situation, and by far the most frequent one, relates to reports issued without any remarks, the so called 'clean opinions', showing no restriction in the opinion of the auditors and therefore fully ensuring a true and fair view of the accounts of the company. On the opposite side, there can be a refusal of certification in very severe cases or suspected frauds. In between, one finds the grey zone of the so-called 'qualified opinions' where the auditors accept the accounts under the condition that they also mention their reservations or qualifications in the same report. Hereby it has to be noted that certain qualifications are in some cases unavoidable, for instance, for a first audit year or when big changes in the accounting policy occur. This remains, however, the exception and does not relate to the present case. A qualified opinion, with the exception of the mentioned specific situations, is always a negative occurrence for a company, which the management will always try to avoid by persuading their auditors to lift their reservations. A qualified opinion has always an impact on the company's situation *vis-à-vis* its clients, suppliers and credit institutions.
- (123) OA last audited reports relating to 1998, 1999 and 2000 were all subject to a qualified opinion referring in financial terms to very serious issues, which may be mainly qualified as follows:
- (124) Qualifications made on the basis of the audit process, its scope and restrictions. In relation to year 1998 auditors state that 'Until today (note: 10 September 1999) we have not received a satisfactory number of confirmation letters for liabilities and receivables in concern'. In relation to 1999 it was written that 'the balances of certain receivable and liability accounts have not been fully investigated, for which due to discrepancies, cross checking, lack of data etc., provisions (...) have been set up against the results'. They also refer to 'The delay in completing the closing entries of the Balance Sheet and the events affected significantly in the uniform application of the inventory method among the years '. In 2000 it is stated in relation with the overdue drawing up of the accounts that 'the aforementioned delay restricted our ability of applying basic auditing procedures (physical counts, verification and reconciliation of cash and cash equivalents, inventories and other assets).'
- (125) The Commission understands from the above that the auditors, in order to be able to release a non-negative opinion, had to remind the public to which the report has been addressed that the work and assessment usually required by the rules of the profession could not be fully performed as the relevant evidence was not available. Indeed, an audit assignment never undertakes a 100 % check, it however requests compliance with normal auditing standards required by both national legislation and rules as well as International standards of auditing, to which auditors make reference at the beginning of each report. In OA's case the remarks mentioned in their report are designed to show that

compliance with normal audit standards could not be assured.

organisation in this respect and, especially in terms of time-table.

(126) Qualifications linked to the accounting, management and internal control status. For the year 1998, auditors mentioned the following: 'Generally speaking the system of the book-keeping for the income and the whole accounting system has to be improved in order to ensure the full compliance with Accounting standards and principles'. In 1999, they went one step further by stating that 'The incomplete following up system of the revenue and the presented weaknesses in the accounting organisation along with the inefficiency of internal control, entail immediate measures to be taken in order to eliminate these significant weaknesses'. In relation to 2000, the criticisms in the same field became not only more precise, but also harsher: 'The incomplete application of the revenue Information System that resulted in deficient application and monitoring of the revenue, receivables and payables cycle, as well as the significant deficiencies in the company's accounting infrastructure, combined with the absence of internal control, entail immediate action to be taken in order to eliminate these significant weaknesses'.

(127) It is obvious from the successive reports that the auditors, not only were not satisfied with and confident in the Information System of OA, but moreover had growing concerns over the years. Indeed, where, in 1998, the report mentions the need for improvement of the revenue and accounting system, the 1999 report stresses the need to take measures against weaknesses, on the revenue side, as well as in relation to internal control qualified as deficient. In 2000, the auditors had an even more devastating opinion. Not only the revenue cycle but also the whole key aspects of the relations with third parties (including customers and suppliers) were reported as weak and needing immediate action. As far as the internal control is concerned, the judgement is more than clear: from inefficient in 1999, in 2000 full absence is being reported.

(128) As a consequence, the Commission may not conclude that a Management Information System has been implemented. The auditors, who are mostly involved in its control, have so acutely described its downtrend over the years and thus providing little comfort for the management to monitor their actions and to all third parties to gain confidence in the company's performance. In addition is the recent outsourcing of the Revenue system a further evidence of the poor past performance of the company in this respect. It appears to be linked not only to efforts in relation to cost-reduction but to the complete lack of internal

(129) The delay in producing final accounts confirms the overall negative trend mentioned in the auditors' reports.

(130) The Commission notes that during the restructuring period audited financial accounts of OA have never been presented in time. According to Greek law, in particular Article 43 paragraph 5 of Law 2190/1920, the managing board of a private limited company has to publish the financial statements of the company for the previous financial year at least 20 days before the general meeting of shareholders. Such a meeting has to be convened six months after the end of each financial year. Moreover, Articles 3 and 5 paragraph 6 of Regulation (EEC) No 2407/92 require an air carrier 'to provide its licensing authority every financial year, without undue delay the audited accounts relating to the previous financial year'. Since 1998, however, Olympic Airways has been unable to present final audited accounts in due time:

- the 1998 accounts have been finalised, as shown by the audit's report, on 10 September 1999, more or less eight and a half months after the closure of the financial year. This was already late compared to the legal deadline in Greece, as well as per European common practice, which are six months after the closure of the year;

- for the 1999 accounts, the report was issued on 11 December 2001, almost two full years after the closing and more than five months after the deadline of those for 2000;

- as a consequence, the report on 2000 accounts was issued on 1 August 2002, still 17 months after the closing and again after the deadline for the 2001 accounts;

- as far as the 2001 accounts are concerned no audit accounts were supplied to the Commission and it is therefore more than doubtful that such accounts exist. The best estimate of OA management, given orally in the meeting of 16 October 2002, would be a signature of the accounts early 2003, which would be still one year after the closing of the financial year and at least six months out of schedule.

(131) Once more the problem relating to the production of audited accounts has not decreased but worsened or at least remained at a disturbing level as shown above. The Greek authorities consider that the last reduction in the delays, prove that the situation is improving. In fact the

Commission would like, on the contrary, to emphasise the degradation occurred between 1998 and following years. Should the reduction of delay improve further, one can only hope, but without any certitude, to have 2002 or possibly 2003 accounts on time.

(132) These accumulated delays create further difficulties as the management may not rely on properly audited accounts for their daily business. In addition, neither the shareholder nor third parties ever gain a proper view and security over the company's performance and results. The delays in relation with the qualified opinions raised by the auditors may only lead to greater suspicion regarding the reliability of the accounts and any data related to it. The conclusions drawn up by Deloitte & Touch in their reports to the Commission⁽¹⁷⁾ on 1998 and 1999 going into the same direction prevail. Greece has not informed the Commission of any action able to comfort the situation in the future.

(133) In view of the above relying on non-audited data for 2001, although necessary to obtain a final picture, has to be undertaken with great caution. During recent years significant differences are traceable between the company's last announced figures and those finally showed by annual audited accounts. In their assessment of the 1997 figures, the expert appointed by the Commission, Deloitte & Touche, reported a change from a net profit of GRD 15 billion to a loss of GRD - 7 billion between the last forecast and the final figure.

(134) More recently Greece reported by 11 April 2002⁽¹⁸⁾ a net loss estimated at GRD ~ - 26 billion (EUR ~ - 76,3 million) for the year 2000. This figure, although provided more than 12 months after the closure of the financial year, had then to be changed to a loss of GRD - 32,4 billion (EUR - 95 million) in the audited accounts signed on 1 August 2002. This incident confirms the persistence of the lack of reliability of the non-audited figures presented.

(135) Finally, in relation to the implementation of a reliable management information system applying to the holding OA, the auditors have mentioned in their

reports on 1999 and 2000 that, despite obligation under Greek law and in infringement to the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3)(g) of the Treaty on consolidated accounts⁽¹⁹⁾, lastly amended by Directive 2001/65/CE of the European Parliament and the Council⁽²⁰⁾, the company has not prepared consolidated accounts for its group. In addition to what constitutes a breach of law, such behaviour, in the context of the growing role of the two major subsidiaries, Olympic Aviation and Macedonia Airlines (in the overall network and air transport activities of OA) represents a lack of information for all parties, the management, the shareholder and the engaged third parties, including the Commission, to gain a proper vision of OA's group activity, results and financing flows.

(136) Even the newest piece of information, the report submitted by Greece on 14 November 2002, and very recently prepared by Deloitte & Touche confirmed the absence of reliable data at OA. The consultant stated 'As we have noted in previous reports, Management Information relies on manual systems that are, in some cases, unreliable or inconsistent.'

(137) *Conclusion:* No reliable MIS is in place in relation to OA and its subsidiaries. Apart from confirmation to this respect offered by the Greece no respective prove has been granted to the Commission. OA management is still unable to rely on valid data or to produce reliable figures. Surveying the effects of the restructuring plan authorised by the Commission in 1998 is therefore unachievable.

5.1.3. The specificity of OA status

(138) Greece has informed the Commission that the legislation at stake (Laws 2271/94, 2602/98, 2527/97 and 2414/96) does not contravene Article 1(a) of the 1998 decision (Article 1 commitments (a), (b), (c) and (f) of the 1994 decision), as it has been examined, verified and accepted by the Commission within the proceeding leading to the adoption of the 1998 decision. The Commission acknowledges that such legislation in the contest of the 1998 decision was indeed acceptable.

(139) However, as far as Law 95/76 is concerned, the Greek authorities indicated their readiness to redress the

⁽¹⁷⁾ Pages 55 and 56 of the draft report of 3 July 1998 and page 74 of the report of 21 July 1999.

⁽¹⁸⁾ Appendix 2 of the Greek memorandum forwarded on 11 April 2002.

⁽¹⁹⁾ OJ L 193, 18.7.1983, p. 1.

⁽²⁰⁾ OJ L 283, 27.10.2001, p. 28.

situation created by the provisions of this Law in favour of OA. The Greek authorities do not refute the doubts expressed by the Commission as to its compatibility. Given that the law in question has entered into force before the date of accession of Greece into the Community (1 January 1981), it appears necessary to redress the situation by requiring appropriate measures which would consist in the simple abrogation of the relevant provisions of that law, i.e. Article 3 paragraph 2 and paragraph 3, Article 4 paragraph 2, paragraph 3 and paragraph 4 and Article 6 paragraph 2.

- (140) The Commission takes note of the fact that OA's articles of association have been published.
- (141) Concerning the financial accounts, the Greek authorities argue that there is no link between the delay of publication of the financial audited accounts and the ability of the company to survive. The Commission acknowledges the absence of such a link strictu sensu. However, it observes that by accepting that the audited financial accounts are never produced in time (on the contrary delays increase), Greece accepts that OA clearly infringes Community and national Greek law, it also shows that the MIS has not been implemented as asked in the 1998 Decision.

5.2. The new illegal aids

5.2.1. The granting of EUR 19,5 million loan

- (142) OA has been granted on 8 February 2002 a loan by a public commercial bank (Commercial Bank of Greece) to OA on the basis of an assignment from OA to that bank of its claims against the Greek State for an amount of EUR 22 million for unpaid tickets. The loan has to be repaid within one year. The repayment interest of the loan shall be equal to the Euribor rate + 1,25 %. If there is default for late payment, late payment interest will be due with penalty interest of 2 % above the repayment interest. According to the submission of Greece (Annex 10) since the mutual settlement of debt between the Greek State and OA (and Olympic Aviation) in December 1998, the accrued debt of the Greek State towards OA amounted as of 31 December 2001 to GRD 14 844 375 105 (ca. EUR 43 563 830), out of which GRD 12 711 474 679 (ca. EUR 37 304 401) were overdue amounts of unpaid tickets. This piece of evidence appears to be in line with the amount of EUR 22 million which has been recognised by Greece as debt towards OA and which has been ceded to Commercial Bank of Greece to secure its loan for EUR 19,5 million.

5.2.2. Greece tolerance with the default or deferred payment or any other advantageous treatment under Greek fiscal and commercial law

- (143) The Greek authorities submitted as annex IX of their reply of 1 October 2002 an extract (Article 22) of Greek Law 2731/1999 of 5 July 1999 on cooperation and development regarding non-governmental organisations and other issues. Therein it is referred implicitly to OA. The relevant provision states that where a decision is taken in accordance with Article 2 of Greek Law 2000/91 regarding company privatisation, the provisions of Greek Law on DEKOs (companies that qualify as 'public utility undertakings') 2414/96 regarding the modernisation of public undertakings and organisations and other provisions, will not be applicable except from Articles 9 and 10 of that law. These concern the procedure to be followed in the case of privatisation (Article 9) and the percentage of the capital of the companies' under privatisation, which has to remain always Greek (at least 51 %).
- (144) Hence it appears that OA is no longer a DEKO. This has been confirmed by the Greek authorities in their submission of 1 October 2002 (point 5) stating that OA was not subject to the provisions of Greek Law 2414/96 on DEKOs, as of June 1999, when the Greek State conferred the management of OA to Speedwing.
- (145) Application of Article 2 of Greek Law 2000/1991 requires a decision to privatise a company, which has been until then subject to the provisions of Greek Law 2414/96 regarding DEKOs. In their correspondence of 26 August 1999, the Greek authorities referred to the OA's new managers without however indicating any privatisation procedure. It was only on 13 December 1999 that the Greek State took the decision to privatise OA, a procedure, which was launched on 20 December 2000 and declared unsuccessful in February 2002. However, the Greek authorities never notified the Commission about the actual change of status of the company.
- (146) Taking into account the fact that OA is no longer a DEKO and hence OA is not subject to the provisions of Greek Law 2414/96 since June 1999 (or even December 1999) but only to the general provisions of Greek Law 2190/1920 regarding public limited companies, certain provisions of Greek Laws 2271/94 and 2602/98 should have been adapted accordingly as they do constitute a separate legal frame for the recruitment and staff regulations of OA's employees. The Commission observes that OA, while being a normal public limited company continues, however, to be subject to the DEKO's legislation.

- (147) With regard to the payment of social security obligations, according to the submission of Greece (as communicated in Annex 53 section 15 and 16, as well as Annexes 31 and 32 of the 11 April 2002 reply) amounts have been due to the Greek State by OA in form of social security payments since 1993 until 2001. During this period of eight years when OA has not paid these charges, no actions in the form of fines, auctions etc as foreseen in the applicable Law ⁽²¹⁾ have been undertaken by the Social Security Institution ('IKA'). In April 2001 OA benefited from a settlement with IKA for amounts due up to EUR 32 million. Accrued interest brought outstanding payments to a grand total of EUR 45 million. The amount was payable in 24 monthly instalments plus one bulk advance payment (2 instalments). The monthly rate of the settlement was set at EUR 1 760 821. The monthly rates of contributions for the ongoing monthly due payment vary, but are ca. GRD 2,235 billion, i.e. ca. EUR 6 559 060. The legal basis for that settlement was Greek Law 2676/1999, which allows for such settlement under the condition, that no payment after the date of settlement is unpaid and overdue. Otherwise the entire settlement collapses. Also, according to that law, OA had the possibility to suspend overdue payments for 3 months after a period of six months of payments after the settlements was agreed. However, that should have not affected OA's monthly due payments.
- (148) In order to secure payment of its claim IKA proceeded in July 2001 to an execution on immovables of OA for the amount of EUR 21 218 264. However, there is no evidence of any further action against OA's property to secure this payment. OA appears to have paid effectively after the settlement agreement only until September 2001. For the months of October — December 2001 it benefited from the provision of the above mentioned Law regarding a three-month suspension of payments of the amounts concerned by the settlement. However, OA does not appear to have made any payments to IKA for any social security contributions due during these months.
- (149) Therefore, not only OA has not paid its social security contribution during eight years, without incurring any punitive action, but it has also not observed the late settlement, which should have collapsed upon non-payment of the settlement instalment of one month (October 2001). Against the amount of EUR 45 million, payment has been effected for 6 months in 2001 plus the advance payment. January and February 2002 appear to have been paid. Thus paid amounts are EUR 17 608 210.
- (150) With regard to the non-payment of VAT on fuel and spare parts by Olympic Aviation, after examination of Annexes 28 and 29 to the 11 April Memorandum, there is no evidence that Olympic Aviation has paid the concerned VAT to the fiscal authorities from January to May 2001, and from November to December 2001.
- (151) Concerning the possibility of offsetting debts of the State and of OA, or between Airports and OA, including the 'Spatosimo' tax, in a non-transparent way, the Commission has raised the issue of the vagueness of the Greek Law 2733/1999 as to the calculation of debt mutually owed and settled as per that law. Greece in its submission of 11 April 2002 presented the offset agreement between the Greek State and OA of 24 June 1999, it gives a breakdown of the amounts due and unpaid on each side. The amount offset was GRD 9 862 639 493 (ca. EUR 28,9 million).
- (152) OA's outstanding payments to the Greek State represent airport charges for domestic and international flights for the period November 1994 until December 1998 as well as 'rentals'. The documentation submitted ⁽²²⁾ fully covers the airport charges. There is, however, no details (only a total amount) regarding the 'rentals' that concern the period 1996 to 1998 only. Thus, the amount of GRD 509 192 802 (ca. EUR 1 494 330) are unidentified.
- (153) It should also be noted that the Greek State's outstanding obligations towards OA do not cover a particular period of time. Therefore, it is not possible to verify the validity of the submission. In particular, the offset agreement refers, under point 2 (a) of Annex 15 to the Memorandum of 11 April, that GRD 3 402 729 422 (ca. EUR 9 986 000) represent amounts due for unpaid tickets of officials of the HCAA, maintenance of aircraft used to transport officials by the HCAA, utility costs of buildings of the HCAA. A breakdown of these costs in an annex to that agreement which forms integral part of it indicates that these costs amount only to GRD 2 443 981 910 (ca. EUR 7 172 361). There is no explanation on the difference between the two figures. According to point 2 (b) of the offset agreement the amount of GRD 6 459 910 071 (ca.

⁽²¹⁾ Greek Law 2238/1994, in particular Article 95 and encyclopaedia of IKA No 42/1999 for the settlement of obligations.

⁽²²⁾ In the Annex 15.

EUR 18 957 317) i.e. the rest of the amount offset, represented obligations of various Ministries and public service organisations towards OA. Here too, there is no reference to which period of time these obligations correspond. Also, Greece does not provide any evidence for the amounts presented neither tickets, nor invoices.

Service Obligations revenue to AIA throughout this period and by granting a first rate mortgage on a 737-400 fully-owned aircraft. However, no proof of any payment made in that respect has been communicated meanwhile.

(154) Concerning the period 1998 to 2001 no offset between OA and Greece has been forwarded. Instead, the Commission notices that rentals for different airports for the period 1998 to 2001 are due up to an amount of EUR 2,46 million (EUR 1,6 million for OA and EUR 860 000 for Olympic Aviation). No evidence of payment has been communicated.

(155) Regarding the imposition of the airport development tax 'Spatosimo', according to the submission of 11 April 2002 ⁽²³⁾ it appears that no evidence of payment has been adduced for the total amount of ca. EUR 60 999 156 as Spatosimo tax for the period of December 2000 to February 2002 as well as for the month of March 1999. The complementary documents sent on 14 November 2002, specifies that an outstanding debt of EUR 31 million would be settled in accordance with applicable law and procedure. However, no proof of payment, nor details on the period and the airports concerned are provided.

(156) With regard to the payment of the Airport charges to AIA, Greece in its submission of 11 April 2002 (in particular Annex 44) states that airport charges and any other levies and fees (including rentals and payments for utilities) have been duly made and that there is therefore no issue of state aid. Examination of the material submitted by Greece reveals that according to Annex 44 costs and payments incurred between March 2001 (start of activity at the new airport) until February 2002, are reported at EUR 24 million. OA and AIA had reached an agreement on 23 April 2002 to settle OA outstanding debt. The Commission has received copy of the final agreement dated 23 April 2002 on 14 November 2002. This document assesses the debt to EUR 33,92 million for the period March 2001 to March 2002. Debts should be reimbursed with 12 quarterly instalments for 3 years, beginning in July 2002. The interest rate for the repayment are based on Euribor rate + 2,5 %, which is actually high. OA has secured this three-year settlement by conceding all anticipated Public

(157) The exemptions from taxes, notary or registration fees for OA transactions. These exemptions are linked with Law 95/76 and should be treated in the context of the appropriate measures to be adopted.

(158) With regard to the non-payment of VAT at 8 % collected by OA on domestic fares. Greece in its submission of 11 April 2002 ascertain that the reduced VAT is to be paid by OA and Olympic aviation 'only for flights between the islands of Lesbos, Hios, Samos, Dodekanesse, Cyclades as well as the Aegean islands of Thasos, Samothraki, Northern Sporades and Skyros, provided that it maintains branches at these locations. Through the documentation received, the Commission has been able to verify that the amounts were in fact paid by OA to the State as they are charged on the passenger ticket.'

(159) Concerning the outstanding debt to Olympic Catering, the Commission has been presented with the information that OA has a normal commercial debt of EUR 2,43 million.

(160) As far as the compensation for the early eviction from Hellinikon and the relocation to Spata, the amount set on April 1999 and agreed by the Commission in December 1999 was GRD 33,66 billion (EUR 98,8 million). An additional GRD 8,7 billion (EUR 25,6 million) has been determined by an independent review in February 2002 and is linked to disturbances because of OA's forced early eviction. It brought the compensation due to EUR 124,4 million. As a whole, Deloitte mentions that OA has received EUR 138,7 million in compensation. This amount, when taking into account the inflation and interest impacts, is close to the one established. OA, however, requests up to GRD 19 billion (~ EUR 55 million) to settle all its claims arising from the move from Hellinikon but this amount is not at the time recognised by Greece. Therefore, considering the documents analysed, the Commission can be satisfied that there is no overcompensation of OA for such a move.

⁽²³⁾ In Annexes 41-44.

5.2.3. The granting of the operation of the fuelling facility to an OA subsidiary

(161) The Greek authorities have stated that the granting of the fuelling facility has been undertaken through an international open tender launched by AIA in 1997. The initial cost for the construction and operation of the fuelling facility by OFC was set at GRD 9,6 billion (ca. EUR 28,3 million), and the contract was awarded to OFC for 23 years according to Greece. OA is OFC's largest shareholder with 66 %. According to Annex 24 of their submission of 11 April 2002, the Greek authorities submit as part of a fuelling concession, the agreement of 13 August 1998 between the AIA and Olympic Airways, Avinoil, Motor Oil Hellas, BFSC and Hansaconsult for the construction, commissioning, operation and maintenance of an aviation fuel distribution system at AIA.

(162) They have also communicated an amendment agreement No 2 of 22 May 2001 relating to that fuelling concession agreement between AIA and the OFC SA providing for amendment of the initial agreement to implement the maximum agreed construction cost. The fuelling concession agreement does not contain any reference as to the initial cost of the investment as well as how the throughput fee would be applied given that it clearly states in point 16.4 of that agreement that:

'Subject to the foregoing [the fuelling concessionaire — OFC SA — shall implement a charging policy (including without limitation, in respect of the throughput fee) which is fair, objective, transparent and non-discriminatory between users and which does not discriminate on the grounds of the volume of frequency of aviation fuel supplied or the relationship between the user and the Fuelling Concessionaire or any connected persons with the fuelling concessionaire] the fuelling concessionaire may charge through put fees lower than those calculated in accordance with annex M but in no circumstance shall it charge at a higher level.'

(163) It should be noted that there is no evidence submitted as to the actual fuelling throughput fees charged to OA and its subsidiaries, or to its competitors by OFC SA. The part of the fuelling concession agreement submitted as Annex 24 does not contain any reference to the cost of the facility at the moment of the conclusion of the fuelling concession agreement (Annex C which has not been forwarded). It must be borne in mind that the cost of the construction of the fuelling facility is the basis for the calculation of the base rent and the throughput fee. As per amendment agreement No 2 to the fuelling

concession agreement the cost of the facility increased and reached the amount of GRD 14,030 billion (EUR 41,175 million). Therein it also mentioned that the fuelling concessionaire would need additional financing of an amount of GRD 1 381 476 238 (ca. EUR 4,054 million). It is not explained what the relationship between the initial financing requirements of the facility is, neither how additional finance may be achieved, nor how the additional costs would be amortised through fuelling charges or State subsidy.

6. ASSESSMENT OF THE AID

(164) Under the terms of Article 87(1) of the Treaty and Article 61(2) of the EEA Agreement, any aid granted by a Member State or through State resources in any form whatsoever which distorts competition by favouring certain undertakings or the production of certain goods is incompatible with the common market and with the EEA Agreement. The measures to be assessed are:

(a) The aid granted to OA, initially authorised by the Commission's Decisions of 7 October 1994 and of 14 August 1998, in relation to which the Commission decided to open the procedure provided for in Article 88(2) of the Treaty on 6 March 2002, relating to the non-compliance with the restructuring plan as well as the non-compliance with commitments undertaken by Greece (will be treated in section 6.1).

(b) The alleged non-notified new aid granted to OA in relation to which the Commission also decided on 6 March 2002 to open the procedure provided for in Article 88(2) of the Treaty, relating to the granting of EUR 19,5 million, tolerance with default payment or any other advantageous treatment under Greek fiscal and commercial law as well advantages in relation to the operation of the fuelling facilities (will be treated in Section 6.2).

6.1. Assessment of the aid initially granted in the 1998 Decision, referred above under (a)

6.1.1. Existence of State aid within the meaning of Article 87(1) of the Treaty

(165) With regard to aid initially authorised the Commission already in the previous decisions of 1994 and 1998

stated that it constitutes State aid and that it affects trade between Member States and also distorts competition within the common market. In this respect, the Commission refers to its assessment set out in those decisions.

6.1.2. Legal basis for the assessment of compatibility

(166) The Commission considers that the derogation provided by Article 87(2) of the Treaty and Article 61(2) of the EEA Agreement as well as Article 87(3)(b) of the Treaty and Article 61(3)(b) of the EEA Agreement do not apply in the case at hand. In this respect, the Commission refers to its assessment as set out in the previous two decisions.

(167) Article 87(3)(a) and (c) of the EC Treaty contain derogation in respect of aid intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Greece is a region falling entirely within the scope of Article 87(3)(a).

(168) However, the regional needs in relation to Olympic Airways and aviation services in general, are taken into account thorough public service obligations imposed by Greece to companies offering services between the Greek mainland and the islands as well as between islands. When offering such services Olympic Airways, like all other airlines, is subject to these obligations and benefits, as the case may be, from compensation in relation to non-viable routes. In particular cases, the airlines in question may operate under exclusive rights granted in accordance with Article 4 of Council Regulation (EC) No 2408/1992⁽²⁴⁾. In a liberalised market services necessary to achieve economic and social cohesion as well as regional development may be offered by any operator. In addition, the Commission considers that the objectives of regional aid are normally met more easily through aid schemes, which ensure the supply of such services by a variety of operators.

(169) The aid under examination is a clear-cut restructuring aid granted to a company in financial difficulties since almost 10 years, a situation which has not considerably improved. Not only has the restructuring aid not achieved the envisaged results, but moreover has the authorisation by the Commission for State aid granted

to rectify the financial difficulties of the company been abused. The Commission does not see any justification to consider the aid assessed by this decision as helping to achieve any regional development purposes and therefore regards the aid as not eligible to any exemptions with regional objectives.

(170) With regard to the derogation provided by Article 87(3)(c) of the Treaty in respect of aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Commission also refers to its initial decisions whereby it considered that the restructuring aid of the company was considered compatible with the common market under proviso of respect of the conditions.

6.1.3. Appraisal of the compatibility of the aid granted in the 1994 and 1998 Commission Decisions

(171) In its 1998 decision, Commission considered that the compatibility of the aid with the common market was subject to the full implementation of the restructuring plan aimed at the restoration of the viability of the Company, to the respect by Greece of 24 specific conditions attached to the authorisation of the aid; the avoidance of undue distortions of competition and that the aid was to be limited to the exact minimum. The compatibility of the aid being subject to specific commitments, the Commission by the following has to assess the impact of the breach of certain of these commitments.

6.1.3.1. The full implementation of the plan

(172) As early as 1999, the Commission had informed Greece that it could not authorise the grant of the remaining instalment of GRD 7,8 billion, as the achievement of the expected results in particular as regards costs and productivity ratios had not been achieved. On 26 August 1999, Greece, while stating its commitment to the 1998 restructuring plan, accepted that it would have to be further revised to achieve the targeted results. From mid-1999 onwards, however, the 1998 restructuring plan had been unilaterally changed by OA and Greece for a new restructuring plan, established by Speedwing and mainly focusing on expansion rather than cost containment, and which, as such, could not have been accepted by the Commission. Moreover,

⁽²⁴⁾ OJ L 240, 24.8.1992, p. 8.

Speedwing had initiated its implementation in August 1999, even before the plan was submitted to the Commission on 18 November 1999. During the period August 1999 – Summer 2000 i.e. management period of Speedwing, the restructuring efforts and objectives were suspended. After the departure of Speedwing a new phase of cost containment started with the arrival of a new management. Meanwhile, the company had lost 50 % of its share capital.

(173) The Commission is forced, therefore, to construe that the reduction of costs, which had been identified as a key element of the restructuring plan of 1998 ⁽²⁵⁾ together with the improvement in yields, was not considered as such any longer by OA management and the Greek authorities. Moreover, the continuing losses by the company and the decreasing level of the shareholder equity have kept OA as a firm in difficulty. This should have triggered an immediate reaction by Greece, the sole shareholder, in order to redress the situation, either by increasing the share capital or by undertaking important adaptations to the restructuring plan in time. None was done. Indeed, Greece could have, during the rest of the restructuring period, had presented changes to the restructuring plan and even to the amount of the aid according to the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²⁶⁾. However, it has not done so, although Greece has repeated at several occasions that 'a formalistic attachment' to the restructuring plan could not serve as a reference any longer. The Commission, therefore, can only assess the full implementation of the plan on the basis of the restructuring plan of the 1998 decision.

(174) The Commission accordingly observes that the plan, object of its decision, was not fully implemented any longer. Moreover, the appointment and then departure of Speedwing management, created a stop and go effect between cost reduction phases (1998 – early 1999) and expansion phases (late 1999 – early 2000). Such a situation could only be seen as counterproductive by all layers of the company staff and could create frustration, impression of lack of direction and of support by the State, thus creating an additional difficulty to restore OA situation. It is interesting to note in this respect, that Greece itself in its comments of 21 November 2002 acknowledges that these changes have created a situation of unrest in the company.

(175) The Commission could certainly welcome the move made mid-2000 by the Greek authorities, after the

departure of Speedwing, to try to renew with the application of the plan. However, in addition to the negative effects of this new stop and go movement imposed again to the company, such a move arose one and a half year before the deadline of the restructuring plan, thus giving little time to the company to restart and achieve the plan. In that respect, the Commission considers that the behaviour of OA's various management, as tolerated or even generated by the State, sole shareholder of the company, and as a consequence the Greek State, have not shown a constant, effective and willing attitude to put in place the plan presented for approval to the Commission.

(176) The argument put forward by the Greek authorities that the non payment of the last tranche of the capital injection (EUR 22,9 million) has further aggravated the financial situation of the company and hence weakened its restructuring effort, can hardly be accepted. Greece acknowledged as early as 1998, that the implementation of the 1998 to 2002 Plan would have to be further revised for the Commission to consider positively the granting of the last instalment. Besides, as explained in section 5.1.1 EUR 23 million are far from corresponding to the minimum need of capital injection necessary to restore the equity of OA.

(177) Also, the Commission could hardly verify, not being in possession of the audited accounts for 2001, what the real impact of the 11 of September events have had on OA financial situation. It appears, nevertheless, that irrespective of these implications and irrespective of the compensation already received by OA and currently being examined by the Commission, the non respect of the restructuring plan can be identified as early as 1999 and confirmed in the following years.

(178) The fact that OA has not put in place a MIS has also prevented the company to implement the plan, as it lacked an appropriate monitoring tool and a proper accounting system.

(179) As a consequence, since the plan was not effectively implemented, the objectives initially set have never been met. Indeed, all indicators as reviewed in point 5.1.1. depart significantly from the ones set in the 1998 decision.

(180) Finally, in order for the Commission to fully monitor the progress of the restructuring plan, it needed detailed and regular reports. The Commission opposes the Greek

⁽²⁵⁾ Indeed, seven major actions were described under the heading — reorganisation of the cost structure of the company — in the 1998 decision.

⁽²⁶⁾ OJ C 288, 9.10.1999, p. 2.

statement that reports transmitted in various forms, gave the necessary information that should have been supplied through the March and October 2000 reports. The information received, sporadic and heterogeneous, could have not allowed the Commission to clearly monitor the progress of the restructuring plan, according to the indicators set in the 1998 Decision. This is clearly demonstrated by the fact that the table in point 5.1.1 as per today, cannot be fully completed.

- (181) *Conclusion:* Bearing in mind all abovementioned financial elements, it is the view of the Commission that OA has not implemented the restructuring plan as accepted by the Commission in its 1998 Decision and has been, since 1999, a firm in difficulty according to the definition of the Guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²⁷⁾. This has been acknowledged by the Greek authorities, which in contradiction with their constant statement to respect the restructuring plan admitted in their comments of 21 November 2002 that no Restructuring plan has ever had the chance of being fully implemented. Considering this deviation from the results foreseen in the plan, the lack of a timely reaction by the Greek authorities, which were aware of the situation, can also be seen as a violation of the original decision. The Commission considers that the non respect of the restructuring plan alone would be enough evidence to justify the conclusion that previous aid has not been respected. The Commission will nevertheless also assess the impact of the breach of the other conditions.

The restoration of the viability

- (182) A restructuring plan, the duration of which must be as short as possible, must, according to the Community guidelines on State aid for rescuing and restructuring firms in difficulty, lead to the long term viability of the firm within a reasonable time-scale and on the basis of realistic assumptions as to the future operating conditions.
- (183) As early as 1994, the Commission considered in its decision that OA's recapitalisation and restructuring plan could enable the company to create an operation of lasting viability within three years without receiving further aid. Due, however, to the difficulties met and following the wish of the Greek authorities, an updated plan was submitted and approved by the Commission in 1998. As a consequence, the restructuring period has been extended to 2002.

⁽²⁷⁾ Paragraph (5)(a) of section 2.1 specifies that a firm is in difficulty in the case of a limited company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months.

- (184) However, since the restructuring plan has not been respected, as a consequence the long term viability of the company, primary goal of the Commission decision, has never been achieved, neither for the long term, nor even for the short term. This is clearly demonstrated by the total financial collapse of the company, which has no own funds, only debts. Under any usual commercial practice, OA should have been forced to file for bankruptcy by any associated third parties. Hence, even if the Commission was to assess OA financial situation, irrespective of the full implementation of the 1998 restructuring plan, as repeatedly requested by the Greek authorities, the viability of the company would be very unlikely to be established.

- (185) It must also be reminded that the auditors, in their report for the year 2000, had mentioned that their certification was made 'under the strict assumption that the company continues its activities as a going concern'. This statement is quite unusual in an audit report and shows that the viability of OA was already questionable and that other options, such as liquidation, which would have led to another balance-sheet, could have been considered.

6.1.3.2. The respect of the 24 specific conditions

Article 1(d) of the 1998 decision required OA to put in place a MIS by December 1998

- (186) Greece informed the Commission that such a system is in place as from October 2000. It can therefore be affirmed that a MIS was not put in place in time as required by the decision. However, considering the amount of time necessary to have such a system working effectively, the Commission can accept Greece arguments that 4 months to implement the system were not sufficient.
- (187) However, the Commission considers that today there is no evidence submitted to substantiate the implementation of the requirement of the decision for a fully operational and adequate system to allow OA to monitor the results of the restructuring plan. On the contrary, OA has met huge delays to have its annual accounts approved. All audit reports include qualification that testify the lack of reliable accounts and of internal control, as well as the deficient application and monitoring of the revenue, receivables and payables

cycle. There has been no improvements in this respect over the last three years. In several instances, OA had to contract external experts to assess its financial situation (PriceWaterhouseCooper), since it was unable to monitor the restructuring plan and hence its normal day-to-day activity. Finally, Deloitte & Touche, the consultant appointed by OA, confirmed in 2002 the unreliability of the MIS.

(188) Besides, the MIS should have allowed the Greek authorities to amend the restructuring plan on the basis of monitoring. Such amendment was never done, although the Greek authorities on 16 October 2002 accepted that the restructuring plan was not respected.

(189) *Conclusion:* The Commission concludes that Greece has not respected the condition of Article 1 (d) of the 1998 decision to put in place a fully operational and adequate MIS.

Article 1(a) of the 1998 decision required Greece to fulfil the undertakings referred to in Article 1(a) to (u) of the 1994 decision

(190) According to the 1994 decision⁽²⁸⁾, from a management and status point of view, OA would have the fiscal status of a public limited company comparable to that of Greek undertakings under ordinary law in Greece, except, however, for exonerating OA from any taxes likely to affect the recapitalisation operations envisaged in the undertaking's '1994' recapitalisation and restructuring plan communicated to the Commission. Also Greece would not interfere in accordance with the 1994 decision⁽²⁹⁾, in the management of OA except within the strict limits of its role as a shareholder. Finally in order to respect Article 1 commitment (f) of the 1994 decision, Greece would have adopted immediately the legislation necessary for the effective implementation of the salary, social and financial aspects of the plan.

(191) The Commission takes note that OA's articles of association are published and hence that the obligations of transparency of Law 2190/1920 are respected.

(192) The Commission considers that the clarifications transmitted by the Greek authorities give the insurance that Laws 2271/94, 2602/98, 2527/97 and 2414/96 do

not contravene the above three commitments (c), (b) and (f) in this respect.

(193) As to the commitments for which no breach by Greece was identified (Article 1(d) and (g) to (u)) the information available to the Commission demonstrates that Greece has not failed to comply with these commitments.

(194) As far as Law 95/76 is concerned, the Greek authorities indicated their readiness to redress the situation created by the provisions of this Law in favour of OA. The Greek authorities do not refute the doubts expressed by the Commission as to its compatibility. Given that the law in question has entered into force before the date of accession of Greece into the Community (1 January 1981), the Commission reserves the possibility of proposing appropriate measures in a separate procedure.

(195) However, Greece by tolerating that OA never publishes its audited financial accounts in time and never applies penalties clearly accepts infringement of Greek Law 2190/1920 and Community Law (EC Regulation (EC) No 2407/92). By not imposing the remedies available according to national law or by not withdrawing the air carrier license, Greece clearly demonstrate that it allows to prolong OA's activity after 2000, without further restructuring measures, whereas a company applying normal Commercial activity should have stopped. Article 1(c) of the 1994 decision is not respected.

(196) Article 1(e) of the 1994 decision requires Greece not to grant OA any further aid. This has been clearly infringed, as it will be explained in section 6.2.

6.1.3.3. Conclusion

(197) The Commission has authorised in 1994 to 1998 State Aid under the conditions, which were considered the minimum requirement necessary to accept the aid as not distorting competition contrary to the common interest and therefore compatible with the EC Treaty. The Commission notes that Greece has granted the aid under modified conditions contrary to those under which the aid has been originally authorised in 1994 to 1998 and concludes that the aid no longer complies with the authorisation and can therefore, not be considered compatible with the EC Treaty. It is recalled that the second tranche of EUR 41 million of the restructuring aid authorised in August 1998 by the Commission, was paid in September 1998.

⁽²⁸⁾ Article 1 commitment (c).

⁽²⁹⁾ Article 1 commitment (b).

6.2. Assessment of the alleged new aid, referred above under (b)

6.2.1. Existence of State aid within the meaning of Article 87(1) of the Treaty with regards the alleged new aid

6.2.1.1. Alleged new aid related to the granting of EUR 19,5 million

(198) The Commission has been able to verify that the loan of EUR 19,5 million has been granted according to market conditions, the repayment interest of the loan is equal to the Euribor rate + 1,25 %. There is no advantage granted to OA as the loan has been secured not against a State guarantee, but on the basis of an assignment from OA of its claims against the Greek State for an amount of EUR 22 million for unpaid tickets. The Commission has also been able to examine that this amount is in line with the total amounts declared by Greece as debts towards OA for unpaid tickets (total amount of approx. EUR 37,3 million. The Commission concludes to the non-existence of State aid as far as the EUR 19,5 million loan is concerned.

6.2.1.2. Alleged new aid concerning the tolerance with default payment or any other advantageous treatment under Greek fiscal and commercial law

(199) With regard to the exemption from taxes, notary or registration fees for OA transactions, as it is linked to Law 95/76, the Commission reserves the possibility of proposing appropriate measures in a separate procedure.

(200) Concerning the non-payment of VAT at 8 % collected by OA on domestic fares and the compensation for the early eviction from Hellinikon and the relocation to Spata, the Commission has been able to verify that OA has paid the former and that there is no over-compensation for the latter. The Commission can conclude that there is no State aid involved.

(201) The Commission can also conclude that there is no State aid involved in OA's commercial debt of EUR 2,43 million towards Olympic Catering, which represents a normal commercial liability.

(202) The information received concerning the operation of the fuelling facilities does not allow the Commission to conclude to the existence of State aid.

(203) With regard to OA fiscal and legal status, Greece has decided on its own initiative, without a specific request by the Commission, to modify OA status in order to start its privatisation. Greece has confirmed that as early as June 1999, OA was not subject to Law 2414/96 on DEKOs, which had been accepted by the Commission in the framework of the 1998 decision. However, since then, OA instead of being treated as any other Greek public limited company continues to benefit from specific legislation which is normally only applied to DEKOs and which had been accepted by the Commission in that context. This is an exceptional situation, which does not appear to be foreseen by the Greek law.

(204) The Commission is, therefore, unable to verify that such a framework, which only applies to OA, does not entail possible State intervention and hence possible distortion of competition. Moreover, the fact that OA is imposed specific cumbersome legislation on the recruitment of staff cannot exclude the infringement of one of the 24 conditions attached to the granting of the restructuring aid (Article 1(b) of the 1994 decision and Article 1(a) of the 1998 decision), where Greece would not interfere in the management of OA except within the strict limits of its role as a shareholder. Hence the situation seems to stem from an infringement of the Greek law, a misuse of the previous aid by the non-respect of the conditions attached in the 1998 decision and the existence of distortion of competition.

(205) Concerning the payment of social security obligations, before the conclusion of the settlement with the Organisation for Social Security (IKA), which Greece has not provided the Commission with yet, OA has not paid its contributions from 1993 to 2001 (EUR 32 millions) without incurring any fines or penalty. Since the signature for an amount of EUR 45 million of that settlement (accrued interest brought the outstanding payments to that total) OA appears not to have paid October to December 2001, thus being in breach with the settlement. A private creditor, considering the financial situation of OA, would have immediately used all legal means of action, including, if needed, legal means of execution to obtain the payment of the due amounts as laid down in the settlement. The fact that IKA has not undertaken such action constitutes State aid. Therefore, the amount of EUR 27 391 790 as part of the (collapsed) settlement is overdue and immediately payable. To that amount default interest should be accrued.

(206) With regard to the non-payment of VAT on fuel and spare parts by Olympic Aviation, no evidence of payments from January to May and November to December 2001, have been provided. As the Commission has not received this information, it cannot exclude that it constitutes State aid. No proof of payment for the rentals for different airports for the

period 1998 to 2001 to an amount of EUR 2,46 million has been given. A normal creditor, informed of OA financial difficulties, would have used, as a minimum from 1999, all legal means of action, including, if needed, legal means of execution to obtain the settlement of the due payments. The absence of such action may lead the Commission to conclude to the existence of State aid.

(207) No evidence of payment has been forwarded either to the Commission for the irport charges to AIA following the adoption of a settlement agreement between OA and AIA for an amount of EUR 33,92 million. The Commission takes note of such an agreement. However, having not received any proof of payment as from today and taking into account that the first payment should have occurred in July, it cannot exclude that the agreement has not been respected. In accordance with the terms of the agreement, a normal creditor should have claimed the total unpaid amount of instalments bearing default interests and would in that respect have used all legal means of action, including, if needed, legal means of execution to obtain this settlement. The Commission has not received any information of this nature, it cannot exclude the existence of State aid.

(208) No proof of payment has been adduced for the Spatosimo tax for the period of December 2000 to February 2002, as well as the month of March 1999 for an amount of ca. EUR 60 999 156. As the Commission has not received the information that the tax has been paid, the tolerance of a persistent non-payment of the due amount constitutes State aid.

(209) Finally the offsetting of debts of the State and OA, or between Airports and OA for an amount of ca. EUR 28,9 million, does not include details as the reference period for the State's outstanding obligations toward OA. As the Law forming the basis for the offset lacks precision, the actual agreement itself reproduces such vagueness, coupled with a lack of evidences. Therefore, the validity of these amounts cannot be verified and they cannot be invoked to demonstrate the absence of aid under the form of tolerance of a persistent non-payment of airport charges.'

(210) In relation to all measures considered as new aid herein, it needs first to be determined whether those measures are imputable to the State. According to the judgement of the Court dated 16 May 2002 in case C-482/99

(*French Republic v. Commission*) ⁽³⁰⁾, the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In the present case, there are no doubts that it is the State itself, which tolerates the constant deferral, non-payment of different charges, taxes due by OA, as well as the infringement of Community and Greek law. In some other cases, the measures are imputable to airports or to IKA. As far as airports are concerned, the Greek authorities have stated that all airports run by the HCAA are funded by the State budget and all income derived from their activities goes to the State budget. Airports in Greece are not autonomous financially, nor is the HCAA. As for IKA, it is a public body established by the Greek Law ⁽³¹⁾, which has been made responsible, under State supervision for managing the social security system, and collecting mandatory employers' and workers' social security contribution. The measure is, therefore, clearly imputable to the State.

(211) Secondly, it needs to be examined whether the new illegal aids involve any transfer of State resources. This is the case by accepting that OA does not pay in time (eight years delay for IKA, for instance) its different financial obligations. It must be reminded to the Greek authorities that deny the existence of State aid in this case, as they consider that there is no pecuniary advantage involved, that the concept of aid 'is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking' ⁽³²⁾.

(212) Thirdly, it needs to be determined whether the new illegal aid distorts competition. The conduct of the State gives OA a significant commercial advantage over its competitors by mitigating for OA the burden associated with normal application of the social security system, of levies and airport charges. It gives OA the opportunity to regularly escape its financial obligations, in contradiction with normal commercial practices ⁽³³⁾ and artificially maintains the Hellenic flag carrier alive. Even, if OA would pay the all amount of interests and penalties due, as stated by the Greek authorities, in

⁽³⁰⁾ The so-called Stardust Marine case. See in particular paragraph 55.

⁽³¹⁾ Greek development Law 1846/1951, Article 11.

⁽³²⁾ Case C-387/92 Banco Exterior de Espana V. Ayuntamiento de Valencia (1994) ECR I-877, paragraph 13.

⁽³³⁾ Case C-256/97 D.M. Transports.

return for the generous payment facilities ⁽³⁴⁾, these amounts cannot wholly undue the advantage gained by OA. IKA, as well as the fiscal authorities and airports by constantly accepting at their discretion the deferral of payments ⁽³⁵⁾, must be held to have acted, *vis-à-vis* OA, as a public creditor which, like a private creditor, is seeking to obtain payment of sums owed to it by a debtor in financial difficulties ⁽³⁶⁾. Considering the magnitude of the facilities obtained by OA by different public bodies and their relative frequency, and taking into account the fact that OA is in financial dire straits, OA would have been manifestly unable to obtain comparable facilities from a private creditor in the same situation. Besides, such a creditor would not have allowed a situation where the debts continue to increase while the assets that might be used to satisfy these debts are disappearing ⁽³⁷⁾. On the contrary, a private creditor would have asked by all legal means the payment of the arrears or the execution of its guarantees. There is accordingly a distortion of competition by favoring OA within the internal market, over the other Community air-carriers. Indeed, aviation is a liberalised sector since the implementation of the third package in 1992.

remains to be seen, whether, currently, the Greek State is paying for the purchase of tickets from OA or any of its subsidiaries.

- (215) On this basis the Commission considers that this new non-notified measure constitutes State Aid within the meaning of Article 87(1) of the EC Treaty.

6.2.2 Legal basis for the assessment with regard to the alleged new aids concerning the tolerance with default payment or any other advantageous treatment and the advantages in relation to the operation of the fuelling facilities

- (213) Fourthly, the examined measures do affect trade between Member States, since OA carries a transport activity, which by nature is a cross-border activity and covers the whole internal market.

- (216) To safeguard the functioning of the common market, and in view of the principles enshrined in Article 3(g) of the Treaty, derogations from the principles enshrined in Article 87(1) and set out in Article 87(3) must be strictly interpreted when a system of aid or any individual aid measure is under examination.

- (214) The Greek authorities cannot prevail themselves with the internal weaknesses of their own administration to allow the granting of further aid to OA, neither that because other companies do not fulfil their financial and fiscal obligations, OA could be allowed to be in contravention with the 1994 and 1998 Decisions, *nemo auditur propriam turpitudinem allegans*. Finally, the Greek authorities assures the Commission that future relationship with OA have been rationalized, as tickets for civil servants will have to be purchased as per normal practices. Such a statement only reinforces the Commission conviction that OA has never been allowed to operate as any other commercial entity. The fact that the State tries to change such a situation as per now, does not modify the fact that the Greek authorities have not complied with their obligations derived from the 1998 Decision not to grant further aid. Furthermore, the letter of the Secretary General of Ministry of Economy requiring that officials of the Greek State pay according to market practices as of 1 May 2002, is of no legally binding nature to its addressees. Therefore, it

- (217) Article 87(2) of the Treaty, which provides for aid having a social character, aid making good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany is not applicable in the present case.

- (218) Article 87(3)(a) and (c) of the EC Treaty contain derogation in respect of aid intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Greece is a region falling entirely within the scope of Article 87(3)(a). Therefore the aid may have to be assessed under regional aspects. The Commission does not consider this aid to meet any regional objectives as it has demonstrated in section 6.1.2.

⁽³⁴⁾ It must be reminded that for the social security the period covers eight years.

⁽³⁵⁾ According to Law 2676/1999 IKA has the right (not the obligation) to reach a settlement agreement for late payments or debts.

⁽³⁶⁾ Case C-256/97 D.M. Transports, point 24.

⁽³⁷⁾ Opinion of the Advocate-general Mischo, Case C-480/98, Magefesa, points 32 to 43, Rep I-8717.

- (219) Article 87(3)(b) of the EC Treaty, which provides for aid to promote the execution of an important project of common European interest or to remedy a serious

disturbance in the economy of a Member State, and article 87(3)(d) of the EC Treaty, which provides for aid to promote cultural and heritage conservation, are not applicable to aid to aviation transport.

mentioned guidelines, indicate that today, OA, while not respecting the ongoing restructuring plan, has still no alternative restructuring plan that can allow the Commission to conclude to a return to viability of the company in the medium and long term.

- (220) Under Article 87(3)(c) of the EC Treaty, aid to facilitate the development of certain economic activities or of certain areas may be considered compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. In the case at stake, the Commission considers Article 87(3)(c) of the EC Treaty as the legal instrument, which could provide an exemption. In this respect it also considers that aid for restructuring may contribute to the development of economic activities without adversely affecting trade if the conditions set out in both Community Guidelines of 10 December 1994 on the application of Articles 87 and 88 of the Treaty to state aids in the aviation sector⁽³⁸⁾ and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty are met.

- (224) It results from the above that the new aids granted do not fulfil the conditions for a derogation laid down in article 87(3)(c). The Commission finds that Greece has unlawfully granted non-notified new aid relating to the tolerance with default payment or any other advantageous treatment under Greek fiscal and commercial law, as well advantages in relation to the operation of the fuelling facilities in breach of Article 88(3) of the Treaty.

6.3. Conclusion

6.2.3 Appraisal of the compatibility of the alleged new aids

- (221) The new non-notified aids are clearly an infringement of the past commitment not to grant any further aid (Article 1(e) of the 1994 Decision) and contravene also the Community guidelines on State aid for rescuing and restructuring firms in difficulty (paragraph 42). There is no legal or economic justification to accept these new aids.
- (222) More importantly, the grant of the new identified unlawful aid, has been examined against the background that OA has already received aid in the past, so that the current situation indicates a clear breach of the 'one-time-last-time' principle contained in both Community Guidelines of 10 December 1994 on the application of Articles 87 and 88 of the Treaty to state aids in the aviation sector, and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty.
- (223) Irrespective of the breach of the above principle, the examination of the other conditions that should accompany a restructuring aid according to the above

- (225) The doubts prompting the Commission to initiate the procedure have been allayed as far as the commitments (b) and (f) of Article 1 of the 1994 decision (Article 1(a) of the 1998 decision) are concerned, as well as concerning the granting of EUR 19,5 million loan, the compensation for the early eviction from Hellinikon to Spata, the debt of EUR 2,43 million towards Olympic Catering, the operation of the fuelling facilities and the payment of VAT at 8 % collected by OA on domestic fares.
- (226) The Commission takes the view that the abusive application of the 1994 and 1998 aid and the new aid, except for the elements stated above, are incompatible with the common market as referred to in Article 87(1) of the Treaty because they do not meet any of the necessary requirements for the application of the derogation provided for in Article 87(2) and (3).

6.4 Recuperation

- (227) In the light of the above, the Commission is of the view that the State aid granted by Greece to OA pursuant to Decision 94/696/EC and Decision 1999/332/EC, is incompatible with the common market and needs to be recovered.
- (228) However, as far as the period of recovery is concerned, a distinction has to be made between the period 1994 to 1998, and 1998 to 2002. In accordance with Article

⁽³⁸⁾ OJ C 350, 10.12.1994, p. 5.

14(1) of Regulation (EC) 659/1999, 'The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. The Commission has taken into account in some occasions ⁽³⁹⁾ that provision in order not to request recovery in the light of the specific circumstances of those cases.

HAS ADOPTED THIS DECISION:

Article 1

The restructuring aid granted by Greece to Olympic Airways in the form of:

(229) The Commission adopted in 1994 the decision 94/696/EC authorising State aid with conditions. However, the Commission noticed that several of those conditions had not been observed and, therefore, it was decided to re-open the procedure. Subsequently, on 14 August 1998 the Commission took a new positive decision with conditions. In that decision, in particular paragraphs 66(c), 68, 76, 83 and 91, the Commission considered that all the commitments set out in Decision 94/696/EC were fully complied with by Greece. Moreover, although the Commission concluded to the existence of illegal and incompatible new aid, it nevertheless decided in paragraph 93(b) of that decision, not to recuperate that aid, which was fundamentally equivalent to the aid authorised in the decision of 1994. In order to ask for the recovery now, it can not be excluded that the positive decision of the Commission in 1998 has created some kind of expectations that the aid package of 1994 was unproblematic. Consequently, in the light of the very specific circumstances of this case, no recovery is necessary for the aid granted before 14 August 1998.

- (a) loan guarantees extended to the company until 7 October 1994 pursuant to Article 6 of Greek Law 96/75 of 26 June 1975;
- (b) new loan guarantees totalling USD 378 million for loans to be contracted before 31 March 2001 for the purchase of new aircraft and for investment necessary for the relocation of Olympic Airways to the new airport in Spata;
- (c) easing of the undertaking's debt burden by GRD 427 billion;
- (d) conversion of GRD 64 billion of the undertaking's debt to equity;
- (e) a capital injection of GRD 54 billion reduced to GRD 40,8 billion in three instalments of respectively GRD 19, 14 and 7,8 billion in 1995, 1998 and 1999 respectively,

is considered to be incompatible with the common market within the meaning of Article 87(1) of the Treaty, as the following conditions, under which the initial authorisation of the aid has been granted, are no longer met:

(230) The same cannot be said for the period 1998 to 2002. First of all, it is recalled that the second tranche of EUR 41 million of the restructuring aid was paid in September 1998, namely one month after the second decision of the Commission. Moreover, as far as new illegal aids are concerned, there is no decision whatsoever from the Commission that could create any expectation that the aid would not be recovered. Secondly, the timing of this Commission's decision is within normal practice. Finally, the core of the aid granted in that period is the new illegal aid for which the Commission has received two complaints (see point 39 above). That new illegal aid has been examined in depth following the opening of the procedure launched in March 2002, and where the Commission has found that there is State aid involved incompatible with the common market, there is no reason for not asking its full recovery.

- (a) the full implementation of the restructuring plan aimed at the achievement of the long-term viability of the company;
- (b) the observance of 24 specific undertakings attached to the authorisation of the aid and;
- (c) the regular monitoring of the implementation of the restructuring aid.

Article 2

The State aid which Greece has implemented in the form of tolerance of a persistent non-payment of social security obligations, of VAT on fuel and spare parts by Olympic Aviation, of rentals for different airports, of airports charges to Athens International Airport and other airports, of Spatosimo tax is incompatible with the common market.

⁽³⁹⁾ See *inter-alia* Case C 68/99 Italy, Mesures urgentes pour l'administration extraordinaire des grandes entreprises en difficulté, approved on 16 May 2000, points 70 to 73; Case C 57/97 Spain, Spanish corporate tax laws, approved on 31 October 2000, points 24 to 28; Case C 61/2000 France, Provisions pour les implantations d'entreprises à l'étranger en franchise d'impôt, approved on 21 November 2001, points 32 and 33.

Article 3

1. Greece shall take the necessary measures to recover from the beneficiary the aid of GRD 14 billion (EUR 41 million) referred to in Article 1 which is not compatible with the Treaty and the aid referred to in Article 2 and unlawfully made available to the beneficiary.

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

Article 4

Greece shall inform the Commission within a period of two months from the date of notification of the present Decision of the measures to be taken to comply with it.

Article 5

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 11 December 2002.

For the Commission

Loyola DE PALACIO

Vice-President of the Commission
