II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 31 January 1996

concerning the recapitalization of the Iberia company

(Only the Spanish text is authentic)

(Text with EEA relevance)

(96/278/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

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

Having, in accordance with the provisions of the above-mentioned Articles, given notice to the parties concerned to submit their comments and having regard to those comments,

Whereas:

THE FACTS

I

The company Iberia Líneas Aéreas Españolas (Iberia LAE, hereinafter referred to as 'Iberia'), which carried 13,6 million passengers in 1993, is by far the largest airline in Spain. It is controlled by the State holding-company Teneo which owns 99,85 % of the company's shares. In addition to Iberia itself, there are the subsidiary airlines Aviaco, Viva and Binter which specialize in charter flights or operate on particular routes. At the end of 1993 Iberia employed 24 500 people and the four companies of Iberia, Aviaco, Viva and Binter owned a fleet of 177 aircraft (120 for Iberia alone).

With a turnover of US$ 3,316 billion in 1993, Iberia occupies a mid-way position among European national airlines. The company network covers Spain and Europe, the Middle and Far East, North America and, above all, Latin America. Since the end of the 1980s Iberia has also acquired sizeable holdings in South American airlines: Viasa (45 %), Ladeco (35 %) and above all Aerolíneas Argentinas (hereinafter referred to as 'Arsa') and its subsidiary Austral. Iberia holds 30 % of the shares of Arsa and all the capital of the Argentine holding-company Interinvest, which in turn owns 53,35 % of the shares of Arsa. On a par with Air France and Lufthansa, it also holds 29,2 % of the capital of the Amadeus computerized reservation system.

In 1992 the Iberia group benefited from a State aid measure in the form of an injection of capital of Pta 120 billion, accompanied by a complete programme of restructuring and investment entitled 'Strategic plan of the Iberia Group 1992-96' (hereinafter referred to as 'the strategic plan'). The strategic plan was ambitious in terms of the growth and development of Iberia. It was based on a good general upturn in traffic after the dramatic drop in activity witnessed in 1991 as a result of the Gulf War. In addition to increasing the market share held by Iberia it provided principally for the renewal of and increase in the company's fleet and facilities; a reduction in personnel and better productivity; and the development of company activities, in particular towards Latin America, where Iberia had invested heavily between 1989 and 1991. The injection of capital was also designed to reestablish the ratio of debt to equity which had deteriorated appreciably. The return to profit was anticipated as from 1992.

This injection of capital of Pta 120 billion and the corresponding strategic plan were notified to the Commission in February 1992. By Decision of 22 July, as submited to the Spanish authorities on 5 August 1992, the Commission accepted the aid subject to compliance with the following several conditions, which referred to the commitments made in this context by the Spanish Government. One of the conditions was that the aid should be the last during the strategic plan: *'la ayuda será la última inyección de capital en forma de ayuda (aumento del capital o cualquier otra forma de ayuda) procedente de fondos públicos para la duración del programa (1989-96)'.*

In actual fact, the 1992 strategic plan was hard hit by the crisis in the air transport sector which started with the Gulf War and continued in 1992 and 1993 as a result of the economic recession. While the strategic plan provided for an increase in turnover of 19 % in 1992 and 13 % in 1993 at current prices, the actual increase was 10,6 % and 4 % respectively. This shortfall was due to an overestimation of the growth of traffic, which had to be corrected by a reduction in seat-kilometre supply, low seat-occupancy levels (66,5 % in 1992 and 1993 as against the anticipated 67,3 % and 69,1 % respectively) and above all a substantial drop in receipts per passenger-kilometre, which fell in 1992 and 1993 by 9,3 % compared with 1991.

Faced with the crisis of 1992 and 1993, Iberia reduced its seat supply and investments against the forecast levels and lowered its costs by more than had been provided for, whilst improving its productivity in line with the strategic plan. Here, in addition to lowering the number of employees, efforts centred on ground-handling services and aircraft maintenance, company organization, improving customer services, renovating the fleet and switching freight transport to aircraft which do not carry solely cargo. In terms of inputs, the Iberia Group attained the productivity objectives it had set itself with, in 1993, a ratio of almost 1,5 million seat-kilometres supplied per employee, or an increase of 24 % on 1991. However, Iberia's productivity measured in terms of seat-kilometres supplied per employee or in passenger-kilometres carried per employee remained somewhat lower than that of its main European competitors in 1993.

In terms of personnel, the Group had 5 000 fewer on 31 December 1993 than in 1991, representing a reduction in staff of 2 066 more than had been planned. Iberia also reduced its supply in terms of seat-kilometres, which increased by only 3,6 % against the average increase for European carriers of 21,4 %. Together with low seat-occupation levels, these figures reflect a significant reduction of market shares for the company. Iberia also revised its fleet forecasts downwards, abandoning the target of maintaining at 120 the number of aircraft in operation up to 1996, making increasing use of leasing, and cancelling several orders in 1994. Altogether, investment expenditure amounted to Pta 40 and 22,3 million respectively in 1993 and 1994 instead of the Pta 70,5 and 100,5 billion initially envisaged.

Despite these efforts, and because of the drop in receipts per passenger-kilometre and the associated inadequacy of the cost-cutting exercise, the company's operating result (before financing costs and exceptional losses) remained heavily negative in 1992 and 1993, the acumulated operating deficit reaching Pta 28,9 billion over those two years, i.e. 3,3 % of turnover. Thanks to the efforts made over the past two years and the improvement in general and sectoral business activity, the operating results nonetheless showed a surplus of Pta 6 billion in 1994.

Iberia's net results over that same period were more negative than their operating results, with figures of Pta -35 billion, -70 billion and -41,5 billion respectively in 1992, 1993 and 1994 due to the scale of financing costs (of the order of Pta 20 billion annually) and, above all, the exceptional losses resulting from its holdings in Latin America. In 1992 and 1993, for example, these accumulated losses alone, which resulted essentially from problems encountered in the process of privatizing Aerolíneas Argentinas, amounted to Pta 54,2 billion.

The cumulative losses have led to a marked worsening of the company's balance-sheet structure despite the Pta 120 billion capital injection it received in 1992. The ratio of debt to equity was thus 4,99 at the end of 1993 and 14,72 at the end of 1994. Without a fresh injection of capital Iberia's equity have probably become negative in 1995. The worsening structure of the liabilities side of Iberia's balance sheet, characterized by excessive indebtedness, is reflected by a sharp increase in financing costs: the financial result (plus interest accrued, minus interest paid) was negative to the tune of some Pta 24 billion in 1994, or 5,51 % of turnover.

To sum up, Iberia was in a very delicate position at the end of 1994. The company urgently needed fresh capital to meet the repayment of debt deadlines and to restore an acceptable balance-sheet structure, although this would be pointless if it were not accompanied by substantial restructuring of its activities. In this respect, apart from the losses on investments in Latin America, the size of the operating losses in 1992 and 1993 was worrying even if the positive result in 1994 bore witness to an undeniable recovery.

It is against this backcloth that the Spanish authorities have submitted to the Commission a new recovery plan for Iberia, accompanied by a fresh increase in capital.

II

By letter of 23 December 1994 the Spanish authorities notified to the Commission, pursuant to Article 93 (3) of the EC Treaty, a programme of measures designed to adapt Iberia to the new comeptitive environment ('Programma de Medidas de Adaptación de Iberia al Nuevo Entorno Competitivo', herinafter referred to as 'the adaptation programme'). The programme is accompanied by a Pta 130 billion capital injection. This will not come direct from the Spanish State but from the State holding-company Teneo, the majority shareholder in Iberia. Notification was recorded at the Commission Secretariat-General on 23 December 1994, under No N 774/94.

On 3 January 1995 the Spanish authorities supplemented their notification by sending the Commission Iberia's accounts for 1992 and 1993, a note from the Spanish Minister of Transport on the liberalization of air transport in Spain and a declaration to the effect that the nationality clause previously contained in Article 5 of Iberia's articles of association had been deleted. The Spanish authorities also indicated that they would shortly be sending the Commission a slightly amended version of the programme notified on 23 December 1994.

On 20 January 1995 the Spanish Government duly transmitted to the Commission the final version of the programme, which was registered on 26 January. This new version contains only minor changes to the previous one. It also provides for an increase in capital of Pta 130 billion.

The programme notified by Iberia to the Commission, which was drawn up with the help of a reputable international firm of consultants, involves solely Iberia LAE and not the whole Group. The aim is to adapt the company to the new competitive context of lower receipts per passenger-kilometre and to guarantee its viability in the short term. It runs over two years, through to 1996, is accompanied by financial projections through to 1997, and includes a management and a financial plan.

The management component of the programme is based on an analysis of the markets in which Iberia will remain operative by consolidating its positions — that is to say, mainly the domestic Spanish market, routes between Spain and Europe and routes between Europe and Latin America. In its programme notified at the end of 1994 and at the beginning of 1995 Iberia takes the view that the outlook is now good on the market between Europe and Latin America and it thus plans to keep its entire Latin American strategy, which has meant a certain amount of extra investment, especially, in 1994, an increase in its holding in Aerolíneas Argentinas from 30 % to 83,35 % following the reduction in the participation of the Argentine State. It will also continue to operate flights to and from North America and the Far East. Only a number of loss-making routes in Europe will be closed down.

Iberia's turnover has been calculated on an annual basis up to 1996, taking account of the growth prospects for each market based on data from the IATA (Intenational Air Transport Association) and the AEA (Association of European Airlines), Iberia's likely market shares (which are forecast to decline overall over the period), its seat-occupancy factor (forecast to rise slightly) and its receipts per passenger-kilometre (forecast to fall). Thus, Iberia's total supply measured in seat-kilometres should, after the drop already recorded in 1993, fall from 36,790 billion in 1993 to 33,709 billion in 1994 before rising to 33,858 billion in 1996. Similar estimates have been made for receipts from freight (forecast to rise), ground-handling services (forecast to fall in real terms) and maintenance (forecast to fall).

The programme is based on a more prudent and less expansionist strategy than the 1992 strategic plan. Whereas the plan had anticipated satisfactory growth in traffic, especially towards Latin America, and receipts exceeding the increase in costs, the programme notified at the beginning of 1995 is built principally, to guarantee the viability of the company, on a drop in costs and only slightly greater business activity. Since receipts are expected to rise slightly, the programme provides above all for three major series of cost-reducing measures aimed at restoring a clearly positive operating result. The company will first of all trim its personnel costs, with a reduction in staff of 3 500 employees between 1994 and 1997 though early retirement and voluntary redundancies. This reduction, which represents 14 % of the company's total staff as at the end of 1993, will give rise to exceptional costs to Pta 32,2 billion, but will reduce operating costs by Pta 20,2 billion annually. In addition, the following wage measures are envisaged:

— a reduction in wages on 1 January 1995 amounting to 8,3 % of the total wage bill, varying between 3 % and 15 % according to staff categories (expected savings: Pta 9,7 billion),

— a payment to staff in January 1995 and 1996 of two sums of Pta 5,3 billion to compensate for the wage freeze in 1993 and 1994,

— a wage freeze for 1995 and 1996,

— a review, producing Pta 2,5 billion in annual savings, of several non-wage staff benefits.

Iberia will then reduce its 'negotiable costs', currently Pta 165,9 billion a year (or 38 % of the total operating costs of the company), by Pta 15,4 billion. A programme specifically aimed at reducing these costs, called 'Prega' (Programa de Reducción de Gastos), has been set up to save Pta 4,9 and 10,5 billion respectively in 1994 and 1995. 'Negotiable' costs are controllable costs resulting from negotiations with third parties, mainly for the supply of goods and services. They include fuel purchases and, as regards services, accomodation for flight personnel, aircraft cleaning, maintenance, etc. The Prega programme had a significant impact in 1994, with Pta 350 million more saved than had been anticipated.

On top of these efforts to reduce costs, steps will be taken to improve the management of the Iberia fleet by making greater use of leasing, which will increase the flexibility of the costs structure, and above all by reducing the number of the company's own aircraft through the cancellation or postponement of orders. Iberia's total fleet will thus fall from 120 in 1993 to 99 in 1995 and then increase to 104 in 1997.

Alongside cost reduction, the programme sets out to maximize Iberia's receipts by the following means:

— the introduction of computerized systems of network and timetable management, which will enable expected receipts to be optimized at the level of the group and its subsidiaries. These systems take constant account of fares, the seats available on each aircraft, timetables, the configuration of networks, and so on, and adapt them accordingly,

— an improvement of the effectiveness of the sales force of Iberia's commercial agencies by improving information and motivation and increasing the responsibilities and qualifications of the staff of each of these agencies.

Taking all of the above into account, the programme notified to the Commission sets out to improve Iberia's operating results substantially with the aim of making it positive by Pta 16,6 billion in 1995, rising to Pta 28,8 billion in 1997. Because of the persistence of exceptional losses, the company's net result would be only very slightly positive in 1996 (+Pta 0,19 billion), reaching Pta + 7,9 billion in 1997.

As regards the programme's financial component, the main measure envisaged is a Pta 130 billion capital injection by the holding-company Teneo in 1995, at a time when the cost-cutting measures will in fact have been implemented. According to the Spanish authorities, this capital injection is necessary because it will not be possible for the company to reestablish a sound financial structure solely by improving its operating results. Moreover, since Iberia sold those of its assets least connected with air transport as part of the 1991 plan, the company cannot sell any more assets without damaging its core business. Thus, the Spanish authorities argue that external finance is the only solution. The Pta 130 billion capital injection will enable the management-related measures outlined above to be implemented and the financial health of the company to be restored. It will thus allow private capital to be invested in the company at the end of the programme, and Iberia will then be in a position to distribute dividends. From 1995 Iberia's employees will in part become shareholders.

The sum of Pta 130 billion has been calculated to meet two objectives:

— to fund the staff-reduction programme (Pta 32,2 billion, see above),

— as far as the remaining Pta 97,8 billion is concerned, to improve the company's financial structure. This injection will enable the debt-to-equity ratio to be reduced to 1,48 in 1996 and to 1,17 in 1997. At the same time, the reduction of debt will also bring financing costs down to reasonable proportions, with the ratio of financing costs to turnover falling from 7,4 % in 1994 to 3,6 % in 1996.

The Spanish Government has put forward several arguments in favour of the Iberia adjustment programme. Above all, it points out that the company has implemented all of the measures contained in the 1992 strategic plan. The Spanish Government stresses that the various conditions attached to the Commission's acceptance of the aid have also been met. The Spanish authorities further point out that Iberia's results were affected in 1992 and 1993 by the following exceptional circumstances, which were unforeseeable and outside the control of the company and its management:

— the economic recession, which accentuated the effects of the Gulf War in the air transport sector, leading more particularly to a reduction in fares, and which proved to be particularly severe in Spain,

— the crisis in the European monetary system, which has led to a sharp depreciation of the Spanish peseta since the summer of 1992,

— the anticipated liberalization of air transport on the Spanish domestic market, and

— difficulties encountered in privatizing Iberia's South American subsidiaries (especially Aerolíneas Argentinas).

Finally, the Spanish authorities claim that the programme presented to the Commission, which has received the approval of management and trade unions alike, does not involve any element of aid within the meaning of Article 92 (1) of the Treaty, in that:

— it is based solely on management criteria which rapidly guarantee the company's economic and financial liability, and

— the accompanying capital injection does not constitute a contribution of public money because it is to be carried out by Teneo, an entity independent of the State budget. These various arguments were further explained in a memorandum sent to the Commission by the Spanish authorities on 16 February 1995. The Spanish authorities stress in particular the structural crisis in air transport and the political and legal aspects of the case. They add that the operation is in any case compatible with the common market, given the restoration of the company's viability, the reduction in capacity provided for by the programme and the necessity of the capital injection in question.

Looking at all the information accompanying the notification of aid, the Commission decided, on 1 March 1995, to open the procedure provided for by Article 93 (2) of the Treaty in respect of the fresh capital injection of Pta 130 billion into Iberia. The procedure was commenced on account of the nature of the capital injection by the holding-company Teneo, which can be regarded as State resources within the meaning of Article 92 (1) of the Treaty, and because of serious doubts on the part of the Commission as to:

— the existence of aid, given the unlikelihood of repaying the financial outlay made by Teneo to any satisfactory degree,

— the possibility of allowing the aid — if such it was — to enjoy one of the exemptions under Article 92 (2) and (3) of the Treaty; in this regard the Commission has serious reservations as to possible unforeseeable, exceptional circumstances outside the control of the company which could jeopardize the condition set out in its decision of 22 July 1992, according to which there was to be no new aid before completion of the strategic plan in 1996. The Commission also noted that it did not in any event have sufficient information to conclude that the conditions subject to which it generally accepts restructuring aid were met.

In its decision to open the procedure, the Commission also explicitly indicated that it would obtain the views of consultants in order to collect the information to enable it to make a final assessment of several of the points on which it had raised doubts and on the general framework of this case.

By letter of 9 March 1995 the Commission brought its decision to open the procedure to the knowledge of the Spanish Government and asked it to submit its comments. This letter was published in the *Official Journal of the European Communities* [1], and the other Member States and other interested parties were also asked to submit their comments in accordance with the provisions of Article 93 (2) of the Treaty.

III

By letter of 10 April 1995 the Spanish authorities presented their comments in reply to the Commission's letter of 9 March 1995 informing them of its decision to open the procedure. These comments deal with the presentation of the facts as they are set out in the letter in question, the existence of aid factors, the possibility of receiving a second tranche of aid and, finally, compatibility with the common market of the intended capital injection.

As regards first of all the submission made by the Commission in its letter of 9 March 1995, the Spanish authorities pointed out that Iberia's receipts are not much below the average of the receipts of its European competitors. They also claim that Iberia's operating loss has only really emerged over the last three years and that between 1986 and 1994 Iberia's operating results had shown a positive balance overall, of Pta 12,4 billion.

The Spanish Government also criticized the presentation of the plan, in so far as it did not show that Iberia would in fact be reducing its supply in the coming years, it did not lay sufficient emphasis on 'controllable' cost-reduction and productivity efforts and it did not have enough regard to reductions in personnel costs. On this last point, the Spanish authorities pointed out that money wages at Iberia in 1996 would be 8,3 % lower than what they had been in 1992 for each category of staff. Finally, the Spanish authorities felt that Iberia's productivity in 1993 was comparable to that of its main European rivals.

Secondly, on the question of aid factors, the Spanish Government further developed the two arguments it had already put forward in its notification to rebut the existence of State aid within the meaning of Article 92 (1) of the Treaty:

— it claims, on the one hand, that the funds from Teneo cannot be regarded as aid, in that Teneo is a wholly private limited company which manages the companies in its group on a purely economic basis. According to the Spanish Government, therefore, Teneo has received no funds from the State to carry out the operation in question and it alone took the decision to invest,

[1] OJ No C 114, 6. 5. 1995, p. 7.

— it states, on the other, that the operation in question forms part of the global strategy of Teneo which operates as a holding company in a competitive situation, managing the group as best it can and taking account of the synergies — the increase in capital being accompanied by a coherent, realistic and viable restructuring plan.

Thirdly, regarding the possibility of receiving a second tranche of aid, the Spanish authorities argued first of all that the Commission cannot validly point to the possible absence of unforeseeable, exceptional circumstances outside the control of the company to refuse a second tranche of aid. In fact the Commission Decision of 22 July 1992 on the injection of capital of Pta 120 billion was based on criteria established by the 1984 memorandum — the basis on which the Spanish Government undertook in 1992 not to grant any further aid to Iberia throughout the duration of the programme. The Spanish authorities further claim, therefore, that the Commission could not suddenly introduce new criteria, namely, the absence of exceptional, unforeseeable and outside circumstances, without ignoring the fundamental principles of legal certainty, equality, non-retroactivity and legitimate expectation. The Spanish authorities concluded that the Commission must continue to base itself on the criteria of the 1984 memorandum and it cannot apply retroactively the guidelines drawn up in 1994, which are inapplicable to this case. They also stressed that it was for the Commission to exercise its powers in full and to look at the whole of the new programme without dwelling on prior examination of the existence or otherwise of unforeseeable, exceptional circumstances outside the control of the company.

The Spanish Government further claims that the four circumstances it has put forward meet the triple condition in question in any case. In its view the criterion of exceptional, unforeseeable and external circumstances cannot be confused with the conditions of compatibility provided for by point (b) of Article 92 (2) of the Treaty ('damage caused by natural disasters or exceptional occurrences') and amounts to a lesser degree of requirement. The Spanish Government also sets out why it feels that the economic crisis in 1992 and 1993, the devaluation of the peseta over those years, the problems encountered in the privatization of Arsa and the liberalization of the Spanish market were, in its opinion, exceptional, unforeseeable and external to Iberia. Finally, the Spanish Government argues that even if none of these four circumstances were of an exceptional, external or unforeseeable nature, their cumulative effect would make them such.

Turning, lastly, to the compatibility of any aid with the common market, the Spanish authorities take the view that the programme submitted to the Commission contains everything that is needed to illustrate that all the conditions laid down by the Commission for exemption under point (c) of Article 92 (3) of the Treaty are met.

IV

Following the opening of the procedure, the British, Danish, Dutch, Norwegian and Swedish Governments, several of Iberia's rival airlines, in particular Air UK, American Airlines, British Airways and Euralair, plus other interested parties such as Teneo, the Snecma, the Sepla union of the staff of Viva Air, and the Association of Airlines of the European Community (ACE), submitted comments on the matter. A total of 17 different parties, including eight airlines, submitted comments. All these parties, except Teneo and Snecma, approved the Commission's decision to open the procedure provided for by Article 93 (2) of the Treaty and raised several issues bearing on the doubts expressed in that decision. Only the holding-company Teneo said that the injection of capital did not amount to aid, putting forward in particular its group strategy and its own financial and management independence from the Spanish State. It also contested the criterion of exceptional, unforeseeable and external circumstances as specific to the sector of civil aviation and contrary to the principles of non-retroactivity and legal certainty. Snecma, which is a supplier to the big manufacturers of aircraft used by European airlines, stated that the economic cycle between 1991 and 1994 had indeed been exceptional and unforeseeable, owing principally to the slow recovery.

The countries submitting comments said that the rules of the Treaty regarding State aid had to be applied strictly in the civil aviation sector following the entry into force of the provisions of the third liberalization package (Council Regulations (EEC) No 2407/92, (EEC) No 2408/92 and (EEC) No 2409/92 [1]) on 1 January 1993. The Netherlands, in particular, stressed that the aid penalized companies which had restructured on their own initiative without receiving any State aid. Generally speaking, the five countries approve the opening of the procedure in this case, share the doubts expressed by the Commission, and draw attention to:

[1] OJ No L 240, 24. 8. 92, pp. 1, 8 and 15.

— the existence of State aid within the meaning of Article 92 (1) of the Treaty in that, on the one hand, Teneo is a public company controlled by the State and, and on the other, the test of rational investor in a market economy is not satisfied in this case,

— the absence of exceptional and unforeseeable circumstances external to Iberia as the reason for its present difficulties. In this respect, the United Kingdom states that the recession in 1992 and 1993 was part of a normal cycle, that the effects of devaluation of the peseta on the accounts of Iberia are in no way demonstrated and that headging techniques exist, that the liberalization of air transport had been a continuous and forseeable process since the 1980s and that, finally, Iberia's investments in Latin America were, from the outset, part of a high-risk strategy,

— the fact that under these circumstances the positive decision taken by the Commission in 1992 on a one-off provision of aid of Pta 120 billion militates against the granting of any further aid.

The United Kingdom and Denmark add that some of the aid granted for social reasons is also likely to distort competition. Furthermore, as far as the United Kingdom is concerned, the operation was likely to alter the conditions of trade within the Community in a manner contrary to the common interest, particularly on the very important charter market to Spain. Finally, the Netherlands take the view that the aid could only be accepted if it were accompanied by strict conditions governing the sale of assets, recductions in carrying capacity, and a ban on investing in other airlines.

These different issues also merge in the comments provided by the airlines, the Sepla section of Viva Air staff and the ACE. British Airways, in particular, produced a study carried out by the Avmark consultancy agency showing the absence of exeptional, unforeseeable circumstances external to Iberia as the reason for its difficulties. These interested parties also make extra points in asking the Commission to oppose any capital injection in Iberia. Pan Air, the Sepla section of Viva Air staff and ACE, for example, fear that Iberia might use the monies received as aid to spark off a fares war. British Midland, British Airways, Euralair, American Airlines, SAS and the Sepla section of Viva Air staff claim than the adaptation programme is not credible and not sufficient to guarantee Iberia's viability in the long term. They stress its high production costs, the dangers of its Latin American strategy, and the economic nonsense of Iberia's taking over regular services successfully operated by Viva Air. The Sepla section of Viva Air staff also say that Iberia is not managed along market economy lines. British Air and Euralair also çlaim that the aid is not indispensable to achieving the objectives of the programme, since Iberia can sell off assets or further reduce operating costs. ACE, like Air UK and Britannia, further underlines that Iberia already enjoys the benefit of privileged treatment in Spanish airports because of its ground-handling monopoly, the price of which is high compared with the quality of the services provided. They add that the arrival of Viva Air on the charter market, as provided for by the programme and as a consequence of the capital injection, could seriously distort competition in this very competitive market, in particular between the United Kingdom and Spain. Finally, Euralair asked the Commission to reopen the dossier concerning the aid of Pta 120 billion accepted in 1992 because of the failure to comply with the plan accompanying it.

All the comments expressed by the Member States and interested third parties were forwarded by the Commission to the Spanish Government on 15 June 1995. By letter of 29 June 1995 the Spanish authorities replied in turn to these comments. They contest, point by point, all the arguments advanced by the Member States and interested third parties except Teneo and Snecma, especially those put forward by British Airways and Euralair, referring to the points already set out in their aforesaid letter of 10 April 1995. They produced a report drawn up by the consultant NatWest Markets showing that the programme in question would significantly improve the competitiveness of Iberia by eliminating by and large the cost and competitiveness variations between Iberia and its main European competitors. They also produced a report from Airbus Industrie which, on the one hand, stressed the significance of Iberia's orders and its presence in Latin America for the prosperity of the European aeronautical industry and, on the other, underlined the exceptional and unforeseeable nature of the economic difficulties that arose in 1992 and 1993. The Spanish Government added, among other things, that the criterion of exceptional, unforeseeable and external circumstances should not be confused with *force majeure,* that the total impact of the exceptional and unforeseeable nature of the recession in Spain on Iberia's receipts amounted to Pta 59 billion, that Iberia would soon be as competitive as Viva Air and that Viva Air has a place on the charter market, that the Commission could not legally demand of Iberia the sale of its assets and that there was no other alternative to the injection of capital since Iberia no longer has non-essential assets.

V

As had been announced in its letter opening the procedure addressed to the Spanish authorities on 9 March 1995, the Commission engaged an internationally renowned independent consultant (Deloitte & Touche) in

April 1995 to collect information on several of the matters on which it had expressed doubts. The consultant's first task was thus to apply to the operation in question the test of a rational investor in a market economy. Should be consultant conclude on this first point that the proposed capital injection of Pta 130 billion was alien to a rational investor, he was then also ask to:

— identify the reasons for the failure of the 1992 strategic plan,

— provide the criteria for assessing the exceptional, unforseeable and external nature of the four factors (recession, devaluation, advanced internal liberalization, and holdings in Latin America) put forward by the Spanish authorities to explain the difficulties of Iberia,

— assess the viability of the adjustment programme, and determine whether the sum of Pta 130 billion was sufficient to meet the aims of the programme,

— look, where appropriate, at alternative solutions to remedying the situation at Iberia.

The consultant appointed by the Commission was able to do his job in cooperation with representatives of the Spanish State, Teneo and Iberia, from whom he received all the information necessary. Meetings held in Madrid on 26 and 27 July 1995 between the consultant, the Commission representatives and the directors of the Iberia Group focused in particular on the situation regarding the various subsidiaries of Iberia and the main elements of its group strategy.

On 10 August 1995 the consultant submitted a draft final report which was forwarded to the Spanish authorities for their comments. The consultant took account of the comments as far as possible and submitted his final report to the Commission on 20 September 1995. What emerges first and foremost from that report is that a rational investor, acting in accordance with the rules of a market economy, would not have made a similar, single capital injection of Pta 130 billion into Iberia for at least two reasons: first, in a comparable situation a rational investor would try to minimize his initial input and make further instalments as and when the objectives of the recovery plan were met; secondly, the operation is too much of a financial risk because of the uncertainities which still surround the future of the group, in particular in Latin America.

Turning then to the failure of the 1992 strategic plan, the consultant attributes is both to the excessive costs of Latin American investments and the undue ambition of the plan in terms of expected growth and acquisition of market shares, in curcumstances whereby Iberia's cost structure and insufficient productivity made it unable to cope with the unforeseen drop in receipts per passenger-kilometre. The consultant also takes the view that of the four corroborating factors put forward by the Spanish Government only the particularly serious nature of the economic recession in 1992 and 1993, and not the recession as such, could be regarded as an exceptional and unforeseeable circumstance external to Iberia. That part of the recession describable in those terms could only have caused the company a loss of around Pta 14 billion. The consultant also says, however, that:

— the devaluation of the peseta proved in the event to be favourable to Iberia,

— the advance liberalization of the domestic Spanish market had only a slight impact before 1994 and was in any case predictable,

— the problems encountered with holdings in Latin America were neither unforeseeable, exceptional, nor outside the control of Iberia since from the outset they were a major commercial risk and the losses suffered derive principally from committments made by Iberia even before the 1992 strategic plan.

As regards the measures provided for by the adaptation programme notified for the period from 1994 to 1996 (better productivity, lower costs, etc.), the consultant feels that these measures point in the right direction, and that their actual implementation is a prerequisite for the survival of Iberia and its viability. However, they are not enough to guarantee this viability in the long term. It cannot be said at this stage what the real chances of Iberia's survival in the long term are, since efforts will have to continue after 1996, in particular regarding cost reduction, in the face of increased competition. The consultant added that if a rapid injection of capital was really necessary, the immediate needs of the company are, none-the-less, well below Pta 130 billion.

Finally, the consultant proposes a solution in his final report which combines the sale of Iberia's Latin America assets, assumption of the staff-reduction costs by the Spanish State and making future injections of capital subject to the attainment of performance indices. In addition, the company's maintenance and ground-handling services might be sold off.

VI

As part of the opening of the procedure and in parallel with the work carried out by the consultant appointed by the Commission, several meetings took place in June, July, August and September 1995 between the Commission and the Spanish Government, Teneo and Iberia. As a result of these meetings and the comments submitted by the Member States and the other interested parties and the conclusions of the consultant's report set out above, the Spanish Government informed the Commission in the summer of 1995 of its willingness to adapt the financial part of the programme notified on 23 December 1994 and 20 January 1995. It would no longer consist of a capital injection of Pta 130 billion, but would comprise two separate operations: the transfer by Iberia of certain Latin American assets to a new company provisionally called 'Newco', with a buy-back option; and an injection of capital from Teneo into Iberia. Teneo would hold some of the capital of 'Newco' but the majority of 'Newco's' shares would be held by private investors. Arsa would be part of the assets sold to Newco.

In September 1995 the Commission asked the consultant to provided it with the information needed to reach a conclusion, based on the principle of the investor in a market economy, on various aspects of this change in the recapitalization of Iberia. The consultant was asked in particular to check the following four points:

— do the various transactions concerning 'Newco' reduce the risks inherent in Iberia's commitments *vi-à-vis* Arsa?

— are the various transactions concerning 'Newco' operated on a commercial basis?

— on what conditions might Iberia exercise its option to buy back the assets sold to 'Newco'?

— as regards the increase in capital, is the test of the investor in a market economy satisfied, and under what conditions following the various operations concerning 'Newco'?

After obtaining all the requisite information from Teneo and the Spanish authorities, the consultant answered the four questions in the draft final report submitted in the second half of November 1995. According to the consultant the transactions concerning 'Newco' do in fact eliminate practically all the risks to which Iberia had been exposed thus far through its committment in Arsa. These operations also appear to follow normal commercial rules. The consultant further proposed that Iberia's buy-back option should be subject to conditions which guarantee that the company's financial situation is not jeopardized.

As regards the increase in capital, the consultant also feels that the Iberia group is potentially viable and recapitalizable. Nonetheless, he takes the view that the risks inherent in this group are still high despite the offloading of some of its Latin American holdings. He is of the opinion that a capital injection of Pta 48 billion would be enough to guarantee the survival of the company in the short and medium term (minimum cash requirement). Additional increases in capital could be made in the future, as results emerge showing satisfactory continued recovery of the group, in order to improve the structure of liabilities. The consultant further states that the immediate injection of capital should also offer prospects of profitabiltiy of at least 30 to 40 % by 1999, which he regards as the minimum annual rate of return (hurdle rate) that market economy investor would demand under the same circumstances. In this respect, the consultant defined a range of amounts of capital injection which satisfy the principle of market-economy investor and vary as a function of the respective hypothesis. The other main parameters determining this amount are the average growth rate in Iberia's cash flow after 1999 and the amount Iberia finally obtains from the sale of Austral.

The consultant's final report confirms all these conclusions.

In parallel with the work carried out by the consultant, numerous meetings took place between Iberia, Teneo and the Spanish Government, on the one hand, and the Commission and its consultant, on the other, in September, October and November 1995, and in particular in Madrid on 6 and 7 November 1995. These provided the Commission with details of the planned operations of withdrawal of investment and recapitalization. These contacts were continued, in particular at a meeting held in Madrid on 23 and 24 November 1995, after the consultant had drawn his conclusions, set out above. The Commission thus obtained a clear picture of the relevance of the various parameters used to measure the commercial nature of the different operations envisaged.

On 18 December 1995 the Spanish Government officially transmitted to the Commission a document setting out the various changes to the financial part of the adaptation programme ('Actualización del plan financiero del programa de adaptación de Iberia al nuevo torno competitivo'). This document, of which certain points were made by the Spanish authorities in four letters addressed to the Commission on 21 December 1995, and 5, 19 and 26 January 1996, refers to three amendments to the programme as initially notified.

First of all, the cost of the staff-reduction programme at Iberia has been revised upwards because of underestimation in the initial forecasts of the length of service acquired by people likely to benefit from early retirements and voluntary redundancies. This now comes to Pta 36,685 billion as against the initial projection of Pta 32,2 billion. This sum will be tansferred by Teneo to Iberia in the form of a capital injection (see below) once the Commission has adopted a positive decision on the matter. Iberia will then transfer Pta 29 billion, to finance the early retirements, to an insurance group with which it has reached an agreement to manage the entire early retirement programme. Of the eight billion or so set aside for financing early retirement measures, half will be paid immediately and the remainder spread out over 1996.

Secondly, Iberia will transfer to Andes Holding BV (ex 'Newco') the following of its holdings in South American companies: 13 % of the capital of the Chilean company Ladeco, 100 % of the capital in the Argentinian company Interinvest SA and 10 % of the capital of Arsa. Andes Holding B.V. is a limited company under Dutch law set up for the purpose of purchasing these holdings from Iberia and, eventually, reselling them. Of its capital of US$ 10 million, 42 % is held by Teneo and 58 % by [...](*) top-ranking American merchant banks, [...]. Andes Holding BV will take decisions by a simple majority, except for fundamental decisions mainly affecting its status, purpose, winding-up and capital structure. Any decisions to sell its assets require only the consent of the [...] shareholder banks. In addition to its capital, Andes Holding BV's resources include primarily a postponement of payment of the purchasing price of Austral (see below) and two loans floated among its shareholders. The first of these loans for well in excess of the capital of Andes Holding BV is subscribed to the amount of 70 % by the private shareholders of Andes Holding BV and 30 % by Teneo. Taken out for a period of [...] years, it bears interest at a rate [...]% higher than the dollar three-month Libor, as calculated three-monthly on an annual base of 360 days. The debts relating to this first loan (senior debts) are doubly 'privileged' in that the loan is secured on the assets acquired by Andes Holding BV and its repayment takes priority over that of the second loan (junior debts). This second loan for the same amount as the first, which is thus subordinated to the first loan, is subscribed up to 30 % by the private shareholders of Andes Holding BV and 70/ % by Teneo. It is also for [...] years. Its rate is [...]% above the dollar three-month Libor, as calculated three monthly on an annual basis of 360 days. The difference in rate with the first loan is explained by the subordinated nature and hence greater risk.

Prior to selling its holding in Interinvest to Andes Holding BV, Iberia plans to increase the latter's capital by three operations: the transfer to Interinvest of loans that Iberia has taken out on Arsa; an injection of additional funds; and transfer to Interinvest of some of the Arsa shares directly held by Iberia amounting to 10 % of the capital of Arsa. The additional funds will be injected with the help of funds from a loan taken out by Iberia with Andes Holding BV, or on the finance market. With this injection of capital Interinvest will buy back for an identical amount the debts of Arsa held by third parties, including those guaranteed by Iberia. Interinvest will then make an 'irrevocable contribution' to Arsa, thereby wiping out some of the latter's debts. These prior operations were demanded by the shareholders of Andes Holding BV, so that it could buy from Iberia a company with reorganized capital.

The sales price of the holdings sold to Andes Holding BV was determined on the basis of a report drawn up by the American bank [...]. The difference between the book value of the assets sold and the actual transfer price means for Iberia an exceptional loss of around US$ 100 million. The proceeds of sale break down as follows: a first part to repay the loan of the same amount previously contracted by Iberia; a second part to be paid, as a second payment, to Iberia after a period of due diligence accompanied by an avoidance clause, of a maximum of four months; and a third and final part, amounting to the value of Austral, to be paid to Iberia only after disposal of Austral, to be paid to Iberia only after disposal of Austral by Andes Holding BV. The period of due diligence is to allow Andes Holding BV to check the correctness of the information with which it has been provided and to ensure that recapitalization operations prior to the sale have indeed been carried out. The deferral of payment of the part corresponding to the value of Austral is explained, according to the Spanish authorities, by the problems encountered by Andes Holding BV in obtaining the requisite financing. However, Andes Holding BV needs to be in possession of Austral in order to facilitate the sale of Arsa to a potential buyer.

Following the transfer of 10 % of the capital of Arsa to Andes Holding BV, the increase in capital of Interinvest, the irrevocable contribution made by Interinvest in Arsa and the transfer of Interinvest to Andes Holding BV, the capital of Arsa will break down as follows: 80,33 % to Interinvest; 5,73 % to Andes Holding BV; 5,73 % to Iberia and 8,21 % to third parties. As regards Iberia's residual holding in Arsa (5,73 %), Iberia will give Andes Holding BV a mandate to sell that holding to third parties at the same time as it sells its own holdings.

(*) In the published version of the Decision, some business information has hereinafter been omitted.

The transfer to Andes Holding BV of Iberia's abovementioned Latin American assets, and then their resale by Andes Holding BV, consists of two successive phases. The first begins with the establishment of Andes Holding BV, the floating of two loans and the purchase of assets from Iberia. This will be for a maximum of two years, during which time Iberia has a buy-back option on the assets transferred to Andes Holding BV. This buy-back option may be exercised for all or only some of these assets. The repurchase price, as determined on transfer of the assets, is calculated in such a way as to permit the repayment of the two loans contracted by Andes Holding BV with the attendant interest plus the reimbursement to Andes Holding BV shareholders of the capital of Andes Holding BV, plus return on capital set at [...] % over the dollar Libor.

The second phase of a maximum of one year will only come into being should Iberia not exercise its buy-back option during the first phase. During this second phase Iberia will no longer have a buy-back option and Andes Holding BV's Latin American assets will be sold on the market at the best price, with no floor price. Andes Holding BV will give an irrevocable assignment to [...] to negotiate and complete this final transaction. To make for rapid transfer of Andes Holding BV's assets during this second phase Andes Holding BV could, during the first phase, despite Iberia's buy-back option, take up any useful contact with third parties.

During these two phases Iberia will continue to take charge of the operational management of Arsa.

Andes Holding BV will be wound up once the Latin American assets it has acquired from Iberia are sold, either to Iberia or to third parties and probably no later than three years after being set up. After reimbursement of the loans in order of priority Andes Holding BV's capital will be divided between shareholders according to their holdings.

The Spanish authorities claim that all the transactions relating to Andes Holding BV are in accordance with the wishes of the Member States and interested third parties who, in their comments, asked Iberia to sell off assets and reduce the risks connected with its Latin American holdings. They also remove one of the main obstacles put forward by the Commission's consultant regarding the possibility of a capital injection in line with the principle of the market-economy investor.

Finally, the Spanish authorities say they have provided the Commission with all the contracts and agreements relating to this transfer operation of certain Latin American assets of Iberia.

Thirdly, the injection of capital that Teneo will make in favour of Iberia has been reduced to Pta 87 billion instead of the Pta 130 billion initially notified and the Pta 138 billion envisaged at one stage. According to the Spanish authorities this new amount is based on:

— the progressive results of Iberia up to and including October 1995. In the first ten months of 1995 Iberia managed a positive operating result of Pta 31,700 billion, more than Pta 16,800 billion up on the predictions made by the adaptation programme. This improvement, which bears witness to the seriousness of the forecasts on which the programme is based, derives principally from greatly restricted expenditure and better organization of supply despite the fact that the staff-reduction measures anticipated have not yet been completed,

— the objectives of the adaptation programme as notified in December 1994, namely, to reestablish in the short term the economic and financial profitability of the company, to adapt its financial structure to its activities, to enable shareholders to obtain a satisfactory return on investment, to attract private capital and to open up the prospects of partial privatization. The Spanish authorities stress that the content of the notified adaptation programme (measures to reduce operating costs, financing expenses, etc.) remains unchanged. That said, the financial projections have been updated as a function of the three changes described above. Furthermore, they have been extended by two years, to 1999,

— the need to finance staff reductions for which the costs amount to some Pta 37 billion (see above),

— the need to undertake minimum recapitalization of the company and to reduce debts by around Pta 50 billion (writing-off of debts of Pta 26 billion in the short term and mortgage debts of Pta 24 billion). The anticipated injection of capital is the minimum amount needed to guarantee the success of the adaptation programme and to prevent the burden of financing expenses from jeopardizing the future of the company. It is not, however, enough to reestablish a balance sheet structure (debts to equity ratio) comparable to other companies in the sector, since Iberia's equity was negative at the end of 1995, before any increase in capital,

— the impact of selling Iberia's holdings in Arsa, Austral and Ladeco.

The Spanish authorities add that the sale of Latin American assets to a company with a majority holding of private capital and the injection of capital far lower than the initially notified sum are consistent with the principle of the investor in a market economy. They justify the rational nature of this injection of capital by putting forward Iberia's good results in 1995 and above all the disappearance of risks connected with South American

holdings, on the one hand, and financial analyses showing the return on this investment to be much higher than the minimum required by an investor, on the other. They point out that Teneo is a holding company independent of the State, and also draw attention to Iberia's positive results since the beginning of the programme some two years ago, thanks to cost-reduction efforts and to the refocusing of the company's activities on its three main markets (domestic Spanish, European and Latin American). Drawing in particular on the work carried out by their consultant, NatWest Markets, the Spanish authorities also contest the conclusions of the consultant appointed by the Commission that Iberia's short-term need for fresh funds comes to only Pta 48 billion.

The Spanish authorities also point out that the injection of capital in question of Pta 87 billion is only the first step in a plan to recapitalize Iberia for a total amount of Pta 155 billion. Thus, Teneo should make a fresh injection of capital of Pta 20 billion in the first quarter of 1997 in order to improve the liabilities structure still further. An injection of Pta 25 billion, likely to be made by private investors at some stage in the future, should also help to cover some of the extra requirements.

As regards the increase in capital of Pta 20 billion in the first quarter of 1997, the Spanish authorities say that this operation will also be consistent with the principle of the market-economy investor. Indeed, the injection will not be made until Iberia has met the following criteria and objectives which will adequately demonstrate, according to the Spanish authorities, the economic and financial profitability of the company:

— operating result of not less than Pta +16,626 and Pta +27,322 billion in 1995 and 1996 respectively,

— cash flow generated by operations of not less than Pta +43,471 and Pta +60,872 billion in 1995 and in 1996 respectively,

— net result after tax of not less than Pta −47 and Pta +1,5 billion in 1995 and 1996 respectively,

— operating results to employee ratio of not less than Pta +0,72 and Pta +1,22 million per employee equivalent in 1995 and 1996 respectively,

— ratio of operating result to tonne-kilometres provided of not less than Pta +4,41 and Pta +6,80 per TKP in 1995 and 1996 respectively,

— reduction in operating costs of Pta 15,443 billion in 1994 and 1995, in line with the Prega programme,

— reduction in staff of 2 699 employees by 31 December 1996,

— tonne-kilometres provided to employee ration (excluding handling staff) not less than +0,24 and +0,26 million per TKP per employee equivalent in 1995 and 1996 respectively.

To enable the Commission to check that these criteria are met, the Spanish Government adds that it will send the Commission Iberia's accounts for 1995 and 1996, as audited in accordance with Spanish law.

Finally, in its letter of 18 December 1995 the Spanish Government stresses that the operations in question (transfer of certain Latin American assets to Andes Holding BV and an injection in capital of Pta 87 billion) are accompanied by the following conditions:

— should Iberia be able to exercise its option to buy back the Latin American holdings sold to Andes Holding BV during the first two years following their sale, and even during the period of due diligence, the company undertakes only to do so if (a) the market value of the shareholders' equity of the entire group is not less than 30 % of the group's enterprise value ('group's enterprise value' being taken to mean the value of the capacity of all the assets of the group to generate profits) and if (b) a private investor plays a significant part, either directly or indirectly, in the operation. The same dual condition will apply during the third year following the sale where Iberia presents the most attractive bid. It will not apply, however, if Iberia exercises its buy-back option in order to resell the assets in question immediately to third parties,

— Teneo will have a share in Andes Holding BV with the same rights and obligations as the other shareholders and financiers of Andes Holding BV and in accordance with business principles. Decisions concerning Andes Holding BV will be taken by a majority of its shareholders, in accordance with the agreements concluded between the parties in accordance with Dutch and British law, as applicable. Where, in future, for commercial reasons affecting Andes Holding BV, Teneo is forced to hold some of the assets of Andes Holding BV the Spanish Government undertakes to oblige Teneo to sell those assets subsequently to a third party. Apart from the cases resulting from its rights and obligations as set out in the agreements relating to Andes Holding BV, Teneo will not acquire any of the assets of Andes Holding BV,

— no Spanish public entity or enterprise other than Iberia and Teneo will be involved in transactions concerning Andes Holding BV or acquire assets from Andes Holding BV,

— the injection of capital authorized will be used only (a) to cover staff-reduction costs or (b) to reduce debts. A report will be drawn up for the Commission on the implementation of the debt-reduction plan. This report will give a detailed account through to 1999 inclusive of the loans to be reimbursed and of the use of funds made available through the reduction in financial expenses. The funds from the injection of capital may in no circumstances be used to hamper Iberia's cost-reduction programme or make for a significant change in its global strategy as to tariffs and fleet capacity,

— the funds needed to pay staff-reduction costs (Pta 36,685 billion) will be transferred to Iberia immediately after this Decision. The remainder of the capital injection will not be paid to Iberia, on the other hand, until after the second payment of the proceeds of the sale to Andes Holding BV of Interinvest and Ladeco (see above),

— Iberia and Teneo agree that cost reduction is a fundamental objective of the adaptation programme and continued efforts to reduce costs beyond 1996 are essential,

— where the objectives of the adaptation programme are not achieved and where, consequently, Iberia needs additional capital, Teneo and Iberia will meet that need through greater cost reduction, disinvestment or injections of capital primarily from private investors.

With all the facts set out above, the Commission can make a final assessment of this case.

LEGAL ASSESSMENT

VII

Article 92 (1) of the Treaty and Article 61 (1) of the Agreement on the European Economic Area (hereinafter referred to as 'Agreement') provide that any aid granted by a Member State or through State resources in any from whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

The Treaty and the Agreement set up the principle of neutrality with regard to the system of property ownership in the Member States and the principle of equality between public and private undertakings (Article 222 of the Treaty and Article 125 of the Agreement). In accordance with those principles, the Commission's action must not prejudice or favour public undertakings, in particular when examining an operation in the light of Article 92 of the Treaty and Article 61 of the Agreement. It must be established, therefore, in each individual case whether a transaction between a Member State and a public undertaking is a normal commercial transaction or whether it contains, totally or in part, aspects of aid. To determine whether State aid is involved the Commission must base its judgment on the principle of the investor in a market economy. In this principle there is no State aid where a fresh injection of capital is made under conditions which would be acceptable to a private investor operating under normal market economy conditions [1]. The Court has stated, in its Judgment of 21 March 1991 in Case C-305/89 (*Italy* v. *Commission*), that 'although the conduct of a private investor, with which the intervention of the public investor, pursuing economic policy aims must be compared, need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy, whether general or sectoral, and guided by prospects of profitability in the longer term' [2].

In the case in question the two operations relating to the capitalization of Iberia must be examined in the light of this principle, these being all the transactions relating to Andes Holding BV, on the one hand, and the injection of capital of Pta 87 billion by Teneo, on the other. This final examination ties in perfectly with the procedure opened by the Commission on 1 March 1995 in that the changes made by the Spanish authorities to the financial part of the notified programme take account of the comments submitted by the Member States and interested third parties following the opening of the procedure. The changes involve the sale of assets, a cutback in the risks arising out of Iberia's commitments in Latin America and a reduction in the amount of proposed capital injection — all points raised by the Member States and interested third parties in their comments summarized in Part IV above.

[1] Commission communication on the application of Articles 92 and 93 of the Treaty to public authorities' holdings; *Bull. EC*, 9-1984: Judgment of the Court of Justice of 13 March 1985 in Joined Cases 296/82 and 318/82, *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV* v. *Commission*, ECR [1985] 809, paragraph 17.

[2] ECR [1991] I-1603, paragraph 20.

As regards, first of all, the establishment of Andes Holding BV and all the transactions relating to that company, the information the Commission has, and in particular the report by the consultant appointed by the Commission, indicates that Teneo and the Spanish Government have adopted an attitude in this instance which is comparable to the conduct of a private investor acting on a purely commercial basis.

First of all, the financial structure of Andes Holding BV, which is based on low equity compared with resources from debts, would seem to be similar to the general kind of structure in this type of operation. Since it has been set up solely to buy and then sell specific financial holdings, Andes Holding BV is a company with a lifespan limited to three years maximum in which a high investment in capital is not justified. Secondly, private investors have effective control of the company and play a major role in each of the three parts of the financial structure of Andes holdings BV, namely, 60 %, 30 % and 70 % respectively in equity, junior debts and senior debts. It should be noted in this respect that the Commission takes the view that an operation involving public funds does not amount to aid where private investors also take a sizeable holding in this operation under comparable conditions (1). Thirdly, the interest rates on the different sources of financing of Andes Holding BV, namely the Libor plus 7 %, 2,5 % and 0,5 % respectively for equity, junior debts and senior debts, do not exceed the limits found for similar operations. Furthermore, the participation of American merchant banks in these various operations guarantee that the rates do reflect market prices.

The same goes, fourthly, for the prices paid by Andes Holding BV to purchase financial holdings in Arsa, Interinvest, Austral and Ladeco. Financial holdings in Arsa and Interinvest in particular were based on the merchant bank's [...] evaluation of Arsa. To do this the bank used an essentially comparative method. The value of Austral was also estimated by an internationally well-known auditing firm. The transfer price of Iberia's 13 % holding in Ladeco reflects the price of the latest transactions concerning that company.

The fact that Iberia has a buy-back option also demonstrates the rational conduct on the part of Teneo, in that it may facilitate the conclusion of an agreement. The Commission has taken note of the Spanish Government's willingness to subject Iberia's buy-back option of the various holdings sold to Andes holding BV, even during the period of due diligence, to the dual condition that after any repurchase of this kind the market value of the share capital of the whole of the group is at least 30 % of the group's enterprise value and that a private investor also has a sizeable share, directly or indirectly, in the operation in question, yet without Iberia's exercising its buy-back option so as immediately to resell the assets in question to third parties. The same dual condition applies during the third year following transfer where Iberia presents the most attractive bid. This shows that all the transactions concerning Andes Holding BV are designed to offload the Latin American holdings in question and are not an underhand method of facilitating an injection of capital without making any real changes to the composition of the group. The same applies to the commitments undertaken by the Spanish authorities whereby:

— Teneo will be part of Andes Holding BV with the same rights and obligations as the other shareholders and financiers of Andes Holding BV on the basis of commercial principles. Decisions concerning Andes Holding BV will be taken by a majority of its shareholders, in accordance with agreements concluded between the parties under Dutch and British law as applicable. Where, in future, for commercial reasons affecting Andes Holding BV, Teneo has to hold some of the assets of Andes Holding BV the Spanish Government undertakes that Teneo will subsequently sell those assets to a third party. Apart from the cases resulting from its rights and obligations as set out in the agreements relating to Andes Holding BV, Teneo will not acquire any of the assets of Andes Holding BV,

— no Spanish public entity or undertaking other than Iberia and Teneo will be involved in transactions concerning Andes holding BV or acquire assets from Andes holding BV.

Finally, the various transactions concerning Andes Holding BV, if immediately reflected by a net injection of fresh capital of only Pta 16 billion, will nonetheless make for a substantial reduction in the risks borne until then through Iberia's involvement in Arsa. They thus eliminate one of the principal risk factors inherent in Iberia's position, as seen by a market economy investor. The risks stemmed not only from Iberia's sizeable holding in Arsa (83,35 %), but also from the loans and loan guarantees it granted to Arsa. As a result of these transactions, Iberia will henceforth have only a minority direct holding of 5,73 % in the capital of Arsa. The guarantees provided by

(1) Commission communication on the application of Articles 92 and 93 to public authorites' holdings; Bull. EC 9-1984.

Iberia regarding loans taken out by Arsa have also disappeared, with the exception of guarantees on a loan of US$ 75 million secured, however, on two Boeing 747s, the market value of which matches that amount. It should be noted, however, that the deferred payment on the sale of Austral is a risk for Iberia in that the actual payment to be made will be the same as any resale to third parties. The same goes for the period of due diligence for a maximum of four months, during which the sale of Latin American assets can be called into question. On this point, however, it must also be remembered that, according to the Spanish authorities, only Pta 36,685 billion of the notified capital injection of Pta 87 billion will be paid by Teneo to Iberia immediately after adoption of this Decision. The remainder, Pta 50,315 billion, will not be transferred until after the second payment of the proceeds of the sale to Andes Holding BV of Interinvest and Ladeco, after expiry of the period of due diligence.

As regards the injection of capital of Pta 87 billion, the method normally used to measure the rational nature of an investment is to compare the amount of the investment with the return it will generate. The fact that this injection of capital will be used in part to finance the social objective of staff reductions, at a cost of Pta 36,685 billion, is of no consequence to the Commission's assessment.

Comparing the initial investment of Pta 87 billion with the return expected on that investment by applying the rule of the rational investor in a market economy means in this instance determining the value of the Iberia group in the medium term and assessing the minimum rate of return that an investor might normally expect before investing. The return generated by the injection of capital comes largely from the added value the company will gain in the next few years since it does not have to pay dividends before 1999. This added value is the difference between the group's medium-term value and its present value, which, according to the financial analysts consulted, is zero. Thus, any assessment of the rational nature of investment in this instance means comparing the amount of the investment with the probable value of the company in the medium term with the minimum rate of return an investor would expect.

The usual way of calculating the value of a company in this type of operation is to multiply the cash flow in a typical year by a coefficient updating all future cash flows. The value of the asset determined in this way must then be reduced by the amount of debt to arrive at the value of equity. The multiplier coefficient applied to profit in a typical year is a function of both the average rate of cash flow growth for all future years and the updating rate used, the latter being the weighted average cost of capital for the company in question, which takes account of the cost of debt and the cost of equity. While the cost of debt is fairly easy to assess, since reference need only be made to the interest rate on loans granted to the company, the cost of equity is not. This is estimated using the capital asset pricing model (CAPM). In this model the cost of equity is the risk-free market rate plus the risk premium for that market multiplied by a beta coefficient. The beta coefficient (equity beta) is the return required by the market in a given sector, directly measured by comparing the results of the companies in the sector with their market values and corrected by the financing structure (gearing) of the company in question. The weighted average cost of capital defined in this way does not otherwise take account of the particular risk inherent in each company.

The Commission has used this approach in the present case. The time scale for estimating the probable value of the Iberia group in the medium term is 1999 in that the company has financing projections up till then and 1999 is long enough off to allow the injection of capital in question to have its full effect as part of the process of recovery and is also soon enough to reduce any uncertainty as to the reliability of the projections. These are based on cautious growth hypotheses since, according to these projections, Iberia's operating income is only due to increase by 4,6 % per year at the current prices between 1994 and 1999, and to reach Pta 539,1 billion in 1999. These hypotheses assume that Iberia will lose market shares over that period. By way of information, the annual growth rate of world air transport, as expressed in passenger-kilometres, has risen by some 4,0 % and 5,4 % over the past five and ten years respectively, and analysts are predicting average growth of 6,0 % per year for the next four years. Still in 1999, Iberia's operating result should be Pta + 55,5 billion and its net result before tax Pta + 46,9 billion. These results assume satisfactory continuation of the process of recovery as a result of reduced operating costs.

The results projected for 1999, as adapted and corrected in certain areas, show a profit by that date, followed by a cash flow for a typical year. However, since there is no stock market quotation for Iberia shares it was not possible to determine the value of the company's beta coefficient directly. The coefficient used of 1,39 (equity beta) is therefore derived from an analysis including some 20 airlines in Europe and the world, which also takes account of the financial structure of Iberia in 1999 and the consequences of that structure on the sale of assets to Andes Holding BV. On this point the Commission takes the view that Iberia will receive all the proceeds from the sale of Austral after it has been sold by Andes Holding BV. In contrast, the injection of capital of Pta 20 billion which Teneo plans to make in 1997 has not been taken into account. The Spanish market rate without risk and the risk premium for that market have been set respectively at 10,7 % and 7 %. Taking these as a basis, the cost of equity will be 20,4 % and the weighted average cost of capital of Iberia will be 14,42 % in 1999. In addition, the average cash flow growth rate of Iberia assumed by the Commission beyond 1999 varies between 4 % and 4,5 % at current prices. This is a reasonable hypothesis since, with an average inflation rate estimated at 3 %, it means real growth of slightly more than 1 % per year. All these factors have been used to calculate the equity value of the Iberia group in 1999, namely Pta 246 or Pta 267 billion depending on whether the growth rate applied is 4 % or 4,5 %.

The Commission also takes the view that the annual minimum rate of return (hurdle rate) that an investor acting on market principles would require before injecting the capital in question is at least 30 %, given the amounts involved and in particular the risks. This rate of at least 30 %, which is apparently very high and far higher than market rates, reflects the distinct possibility that the programme will not go as planned and the real return at the end of the day will be lower. In fact, the rate has to be higher than the cost of equity since the latter does not take account of all the risks connected with the company. Despite the virtual disappearance of the risks inherent in its involvement with Arsa and the substantial improvements in its operating result in 1994 and the first six months of 1995, Iberia is still a company with a very high specific risk. The following uncertainties militate against the continued recovery of the company, its long-term profitability and the financial projections through to 1999 taken as a basis to calculate the value of the company by then:

— the adaptation programme has not been completed; in particular, the staff reductions envisaged have not yet begun,

— the company has recently had a certain amount of industrial unrest, this being reflected in particular by frequent strikes by pilots. Apart from the direct cost to Iberia this damages the image of the company and could make it difficult to achieve the productivity gains envisaged by the programme,

— in its present from the programme finishes at the end of 1996, by which time Iberia will not yet have achieved the level of productivity and efficiency of its main Community competitors. A new cost-reduction plan will thus have to be drawn up and negotiated with the two sides of industry. The outcome of these negotiations cannot be predicted at the present time,

— doubts concerning the existence and modes of intervention of future external partners still to be chosen,

— the effects on the long-term profitability of Iberia of the liberalization of air transport and handling activities in Europe cannot yet be fully evaluated.

The consultant appointed by the Commission also feels that the annual minimum rate of return, as defined above, that an investor would expect in this case is at least 30 %, and proposes a bracket of 30 % to 40 %. The Commission if of the opinion that a rate of more than 30 % might be expected by an investor working in the short or medium term in a purely financial framework. However, in line with the abovementioned rulings by the Court of Justice, the Commission must take account of the fact that the holding-company Teneo is not trying to make a profit on its capital in the short or medium term, but rather it is pursuing a strategy and objectives of long-term economic policy *vis-à-vis* a company whose strong points and potential it plans to maximize in a constantly expanding sector, in particular through an alliance with an outside partner. In the main these strong points are: technical and commercial know-how; a tradename known throughout the world; a network centring on Europe and Latin America; and a firm footing in Spain, which is the country generating the most tourist traffic in Europe. The constant improvement in Iberia's operating result for two years now also bears out the effectiveness and seriousness of the adaptation programme pursued, which is based primarily on reducing operating costs. Particularly significant in this instance is the Spanish Government's claim

that cost reduction is a fundamental objective of the adaptation programme as far as Iberia and Teneo are concerned, who also see continued efforts to reduce costs beyond 1996 as essential. Indeed, the information held by the Commission shows that by 1998 the productivity and cost-reduction efforts made by Iberia will enable it to make up much of the present leeway on the average taken over the following companies: British Airways, KLM, Lufthansa and Air France. The undertaking by the Spanish authorities that, if the objectives of the adaptation programme are not met, Teneo and Iberia will meet any need for additional capital by a greater reduction of costs, by disinvestment and by the involvement of private investors, is a further factor of risk reduction.

In the final analysis, the investment of Pta 87 billion is in the lower bracket of the value of Iberia's equity in 1999, as based on the method set out above and updated over a period of four years by an annual rate of return of 30 %. The test of the investor in a market economy must therefore be regarded as satisfied by the injection of capital in question.

In addition, and to complete its analysis, the Commission has also looked at Iberia's equity needs and has found, from the information in its possession, that Iberia must deal in the coming months with the cost of the staff-reduction programme and with several loan repayments. Despite the constant improvement in cash flow generated by operating, the company's financial situation will not allow it to meet all these obligations and Iberia's need for an injection of fresh funds in the short term is at least Pta 48 billion. The company's debt-to-equity ratio is also far higher than that of other European countries, as stated at the end of point I above. While Iberia's sale of some of its assets and holdings to Andes Holding BV has made for a net intake of fresh capital it has brought no significant change to the company's liability structure since these sales have, on the contrary, brought about a net book loss. But Iberia's insolvency and its lack of equity demand a healthier financial structure with increased equity for at least three reasons. First of all, there is a need to reassure the company's current and future debtors, in particular the banks whose financing is vital to the survival of the company and who might be tempted to pull out or demand prohibitive interest rates due to the lack of equity. The Commission would point out at this stage that it would regard any guarantee of payment explicitly or implicitly made to Iberia's creditors by Teneo or by any other public entity as illegal State aid, not having been notified [1]. Secondly, Iberia's liabilities must be improved in order to attract private partners in the short or medium term on conditions which are satisfactory to the company and to its shareholder, Teneo. Finally, an injection of capital of more than short-term financial needs is a clear indication, especially to staff made uneasy by several years of difficulties, of Teneo's confidence in the future of Iberia. Under these circumstances, given that the Spanish Government has explicitly stated that the capital injected will be used solely to cover the cost of staff reduction or to reduce debts on a commercial basis, the amount of Pta 87 billion, which definitely covers Iberia's short-term needs, ties in with Teneo's long-term strategy regarding its subsidiary.

It should also be added that despite the increase in capital of Pta 87 billion the financial expenses-to-turnover ratio of Iberia will be far higher than the average of British Airways, KLM and Lufthansa through to 1998. Similarly, Iberia's gearing, defined as the ratio between the sum of bank debts and leasing, on the one hand, and total equity, on the other, will remain considerably higher for the same period than the average of these three competitors.

It follows from all the above points that the various transactions concerning the company Andes Holding BV and the injection of capital of Pta 87 billion by the holding-company Teneo into Iberia do not amount to State aid within the meaning of Article 92 (1) of the Treaty or Article 61 (1) of the Agreement. Consequently, no objections should be raised to these operations and the procedure should be closed. This Decision takes account, in particular, of the Spanish Government's undertaking regarding the following conditions:

— should Iberia be able to exercise its opinion to buy back the Latin American holdings sold to Andes Holding BV, during the first two years following their sale, including the period of due diligence, the company undertakes only to do so if (a) the market value of the shareholders' equity of the entire group is not less than 30 % of the group's enterprise value ('group enterprise value' being taken to mean the value of the capacity of all the assets of the group to

[1] See letter from the Commission to the Member States of 5 April 1989 (Ref. SG(89) D/4328).

generate profits) and if (b) a private investor plays a significant part, either directly or indirectly, in the operation. The same dual condition will apply during the third year following the sale, should Iberia present the most attractive bid. It will not apply, however, if Iberia exercises its buy-back option in order to resell the assets in question immediately to third parties,

— Teneo will have a share in Andes Holding BV with the same rights and obligations as the other shareholders and financiers of Andes Holding BV and in accordance with business principles. Decisions concerning Andes Holding BV will be taken by a majority of its shareholders, in accordance with the agreements concluded between the parties in accordance with Dutch or British law, as applicable. Where in future, for commercial reasons affecting Andes Holding BV, Teneo is forced to hold some of the assets of Andes Holding BV the Spanish Government undertakes to oblige Teneo to sell these assets subsequently to a third party. Apart from the cases resulting from its rights and obligations as set out in the agreements relating to Andes Holding BV, Teneo will not acquire any of the assets of Andes Holding BV,

— no Spanish public entity or enterprise other than Iberia and Teneo will be involved in transactions concerning Andes Holding BV or acquire assets from Andes Holding BV,

— the injection of capital authorized will be used only (a) to cover staff-reduction costs or (b) to reduce debts. A report will be drawn up for the Commission on the implementation of the debt reduction plan. This report will give a detailed account through to 1999 inclusive of the loans to be reimbursed and of the use of funds made available through the reduction in financial expenses. The funds from the injection of capital may under no circumstances be used to hamper Iberia's cost-reduction programme or make for a significant change in its global strategy of tariffs and fleet capacity,

— the funds needed to pay staff reduction costs (Pta 36,685 billion) will be transferred to Iberia immediately after this Commission decision. The remainder of the capital injection will not be paid to Iberia, on the other hand, until after the second payment of the proceeds of the sale to Andes Holding BV of Interinvest and Ladeco (see above).

— Iberia and Teneo agree that cost reduction is a fundamental objective of the adaptation programme and that continued efforts to reduce costs beyond 1996 are essential,

— where the objectives of the adaptation programme are not achieved and where, consequently, Iberia needs additional capital, Teneo and Iberia will meet that need through greater cost reduction, disinvestment or injections of capital primarily from private investors.

Finally, the Commission has also taken note of the willingness of the Spanish authorities to make an extra capital injection of Pta 20 billion during the first quarter of 1997, but not to make it until the eight criteria and objectives set out in point VI above have been met. Meeting these objectives and criteria will be checked on the basis of the Iberia's accounts for 1995 and 1996, as audited in accordance with Spanish law. The extra injection of capital will be notified to the Commission. The Commission, in turn, will examine it in terms of the rule of the market-economy investor and will check above all that the aforesaid objectives and criteria have been met. The Commission will also take account of any other factors, especially as regards financial projections for the period from 1997 to 2001, the situation of Iberia and the group *vis-à-vis* its main competitors, and other essential risk factors.

GENERAL REMARKS

As a general rule, the Commission points out that under Article 93 (3) of the Treaty it must be informed in advance of any operation likely to involve State aid. The Commission also stresses that should it receive a notification in future concerning an aid project it will have to take account of all the relevant facts and in particular the fact that the company has already benefited from State aid. In such an event the Commission could not authorize the granting of additional aid otherwise than in exceptional and unforeseeable circumstances beyond the control of the company [1],

[1] Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, Chapters I.3 and V.2: OJ No C 350, 10. 12. 1994, p. 5.

HAS ADOPTED THIS DECISION:

Article 1

The various transactions relating to the company Andes Holding BV and the injection of capital of Pta 87 billion made by the company Teneo on behalf of the company Iberia do not amount to State aid within the meaning of Article 92 (1) of the Treaty establishing the European Community or Article 61 (1) of the Agreement establishing the European Economic Area, particularly in view of the Spanish Government's undertakings set out at the end of the ante-penultimate paragraph of point VII above.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 31 January 1996.

For the Commission

Neil KINNOCK

Member of the Commission