EUROPEAN COMMISSION

Brussels, 14/09/2005
C (2006) 2706 final

In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].		PUBLIC VERSION This document is made available for information purposes only.

COMMISSION DECISION

of

State aid C 11/04 (ex NN 4/03) - Olympic Airways -
Restructuring and privatisation

(Only the Greek version is authentic)
(Text with EEA relevance)

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] OJ C 192, 2.7.2004, p. 2.

(1) In a letter dated 3 March 2003 (TREN A/26534, 25 July 2003) the Hellenic authorities underlined their commitment to and the steps already taken to privatise the state-owned airline Olympic Airways.

(2) In the absence of a formal notification, the Commission adopted on 8 September 2003 an information injunction decision (C (2002) 3266), which was notified to the Greek authorities on 9 September 2003 requesting that all necessary information be provided to allow for the examination of the compatibility of the measures for the restructuring and privatisation of Olympic Airways with Article 87 of the Treaty

(3) On the same day, by letter (TREN D/15287) the Commission insisted to the Hellenic authorities that the latter should notify the law to the Commission (adopted 9 September 2003) providing for the privatisation of Olympic Airways. In a letter dated 17 September 2003 (TREN A/30881), the Hellenic authorities stated that they intended to submit this information when it was opportune.

(4) On 25 September 2003 the Commission received an official complaint (TREN A/30589) about the privatisation of Olympic Airways from a competitor, Aegean Airlines.

(5) The privatisation law as well as the reply to the information injunction were sent to the Commission by letter dated 29 September 2003 (TREN A/30866), However a certain number of elements were still missing and the Commission advised the Hellenic authorities of this by letter dated 31 October 2003 (TREN D/17821), a copy of which was also subsequently faxed to the Hellenic Permanent representation on 4 December 2003.

(6) On 12 December 2003 a new company called Olympic Airlines came into existence before the Commission had completed its examination of the compatibility of the measures for the restructuring and privatisation of Olympic Airways with Article 87 of the Treaty. Consequently, the information injunction procedure adopted by the Commission on 8 September 2003 was recorded in the State aid register as NN 4/2003.

(7) On 15 December 2003 (TREN D/22742), the Commission reiterated its request for information on the privatisation and by letters dated 18 and 19 December 2003 (respectively TREN A/38288 &t TREN A/38258), the Hellenic authorities provided the requested information.

(8) On 15 January 2004, a new request for additional information was sent to the Hellenic authorities (TREN D/160), who replied in two letters dated 16 January 2004 (respectively TREN A/11076 & A/11077)

(9) On 16 January 2004 the Commission wrote to the Hellenic authorities regarding Athens International Airport (Spata) and its ongoing relationship with Olympic Airways/Airlines. The Hellenic authorities replied by letter dated 23 February 2004. A further request for information on this subject was sent to Greece on 15 June 2004 and replies were received to this letter on 4 August 2004.

(10) By decision of 16 March 2004, notified to the Hellenic Republic by letter dated 16 March 2004 (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 11/2004.

(11) The Commission decision to initiate the formal investigation procedure was also published in the *Official Journal of the European Communities*[2]. The Commission invited interested parties to submit their comments on the subject. The Hellenic Republic forwarded comments to the Commission by letter dated 11 June 2004.

(12) Within the timeframe provided for in the published opening of procedure, the Commission received two comments from interested parties. These comments were then submitted to the Hellenic authorities for their observations and the observations of the Hellenic Republic were received on 3 November 2004

(13) On 11 October 2004 the Commission sent a letter giving Greece formal notice of its intention to adopt a suspension injunction if within ten days of receipt of the letter if it did not receive satisfactory information demonstrating that Greece was no longer making aid payments to the beneficiaries. Greece was also invited to submit their comments on the matter. On 28 October 2004 the Greek authorities replied to this letter of formal notice. The Hellenic Republic opined that taking an injunction at this stage would seriously jeopardise the current intensive effort of the Hellenic Republic to find a solution and would be disproportionate and unjustified.

(14) Subsequent to the submission of their observations the representatives of the Hellenic authorities have kept the Commission services appraised at regular intervals of developments (in meetings dated 17 December 2004, 19 December 2004, 3 February 2005, 7 February 2005 and 28 April 2005 and by letters dated 22 February 2005 and 19 April 2005) and in the ongoing restructuring and privatisation of Olympic Airlines and of Olympic Airways Services.

(15) They also provided the Commission services with information on the following issues

- Law 3259/2004 providing Olympic Airways with temporary immunity with regard to enforcement action taken by creditors (by e-mail dated 22 December 2004)

- Law 3282/2004 whereby the state replaced Olympic Airways in terms of the latter's obligations towards financial institutions in respect of the financing and lease arrangements of Olympic Airlines' Airbus A340-300 aircraft. (by e-mails dated 22 December 2004 and 4 April 2005)

In as much as these additional clarifications shed light on and relate to questions raised by the Commission in the opening of procedure they will be taken into consideration in the present decision.

2. THE FACTS

2.1 Past Commission decisions regarding Olympic Airways and its subsidiaries

The 1994 Decision

(16) On 7 October 1994 the Commission adopted decision 94/696/EC[3] (hereafter "the 1994 decision") according to which aid granted or to be granted by Greece to Olympic

[2] OJ C 192, 2.7.2004, p. 2

[3] OJ L 273, 25.10.1994, p. 22

Airways was declared compatible with the common market provided that Greece met a series of commitments listed therein.

The 1998 Decision

(17) However, due to the fact that several of the conditions attached to the 1994 decision were not observed, the Commission decided on 30 April 1996[4] to re-open the procedure provided for by Article 88(2) of the Treaty, and to initiate proceedings with regard to new and non-notified aid of which it had been informed.

(18) On 14 August 1998, the Commission adopted decision 1999/332/EC[5] (hereafter "the 1998 decision") according to which certain aid granted or to be granted by Greece to Olympic Airways was held to be compatible with the common market in the context of a restructuring plan covering the period 1998-2002. The aid was also authorised subject to a number of conditions.

The 2000 Decision

(19) In July 2000 the Hellenic Republic notified the Commission its intention to use the remaining authorised aid to put in place a series of loan guarantees for the purchase of new aircraft and for investment necessary for the relocation of Olympic Airways to Athens International Airport (hereafter AIA) at Spata to be contracted before the end of 2000. By letter of 10 November 2000 (SG(2000)D/108307), the Commission informed the Greek authorities of its decision to amend part of the 1998 decision with regard to the aid measure concerning the loan guarantees.

The 2002 Decision

(20) On 6 March 2002 the Commission decided to open the formal investigation procedure laid down in article 88(2) of the Treaty. It expressed concern in respect of abusive application of aid granted in the 1994 and 1998 Commission Decisions non implementation of the company's restructuring plan and concerns it had in respect of new illegal state aid.

(21) On 9 August 2002 the Commission sent the Hellenic authorities a further injunction to provide the information previously requested; requiring in particular the production of accounts and figures relating to the payment of operating costs by the state, the replies furnished by the Hellenic Republic were insufficient.

(22) On 11 December 2002 the Commission adopted a final negative decision 2003/372/CE[6] (hereafter "the 2002 Decision") concerning aid granted by the Hellenic Republic to Olympic Airways. The Commission concluded that aid previously granted by the State and authorised by the Commission was incompatible with the Treaty on account of the failure to comply with the relevant conditions notably the failure to correctly implement the restructuring plan. In addition the Commission found that Olympic had received new aid that was illegal and incompatible with the common market in that the Greek state had tolerated the non-payment or deferment of payment dates of certain social security payments, value

4 OJ C 176, 19.6.1996, p. 5.
5 OJ L 128, 21.5.1999, p. 1
6 OJ L 132 28.5.2003, p. 1.

added tax on fuel and spare parts, rents payable to airports, airport charges and a tax imposed on passengers departing from Greek airports called 'spatosimo'.

(23) In accordance with this decision Greece was obliged without delay to take all necessary steps, in accordance with the applicable national laws, provided that these allowed for the immediate and effective execution of the decision, to recover from the beneficiary the State aid of GRD 14 billion (EUR41 million) referred to in Article 1 of the decision as well as new aid referred in Article 2 of the decision. The aid (including interest) to be recovered should also include interest from the date on which the aid was at the disposal of the beneficiary until the date of recovery.

(24) Greece was also enjoined to inform the Commission within a period of two months from the date of notification of the decision of the measures that it was taking to comply with the decision. The decision was notified to the Hellenic authorities by letter dated 13 December 2002 (SG(02) D/233148) and published in the *Official Journal of the European Union* on 28 May 2003.

(25) On 11 February 2003 following on from the 2002 Decision, the Greek Government informed the Commission that it had received independent advice that Olympic Airways had not received preferential treatment and that therefore the Government would not implement the requirements of the Decision to recover the amount that the Commission had judged incompatible.

Follow up of the 2002 Decision

(26) On 24 February 2003 Olympic Airways lodged an appeal against the Commission decision before the Court of First Instance (Case T-68/03). It was not joined in this appeal by the Hellenic Republic and the Greek authorities did not appeal the Commission decision to the European Court of Justice.

(27) On 6 March 2003 the Commission informed the Greek Government that it was required to comply with the 2002 Decision. On 26 June 2003 the Greek Government responded stating that it was examining the legal effects of the 2002 Decision and of the procedure the Commission had followed in adopting it. It also assured the Commission that it intended to carry out recovery. It did not do so, nor did it furnish the Commission with a timetable for this recovery. Accordingly the Commission was obliged to take an action for non-implementation before the European Court of Justice on 3 October 2003 (Case C–415/03).

(28) On 12 May 2005 the European Court of Justice ruled in the Case C-415/03[7] and found in favour of the Commission. The Court (Second Chamber) declared that by failing within the prescribed period to take all necessary measures to recover the aid found to be unlawful and incompatible with the common market - except for those sums relating to the social security contributions – that the Hellenic Republic had failed to fulfil its obligations.

(29) On 23 May 2005 the European Commission sent the Hellenic authorities a letter concerning what measures would be taken by the Hellenic Republic to ensure compliance with the Decision of the European Court of Justice (ECJ) of 12 May 2005 in case C 415/03.

[7] Decision not yet published in the ECR

(30) By letter dated 2 June 2005 the Hellenic Republic replied reiterating its willingness to co-operate fully with the Commission in this matter. In as much as this reply relates to the matters which were raised in the opening of procedure it will be summarised here below.

(31) As of today the recovery of the aid found to be incompatible in the Commission decision of 11 December 2002 has still not been carried out. An action under Article 228 of the EC Treaty for non-execution of this judgement may be introduced by the Commission.

(32) The present decision however concerns only those decisions taken or measures put in place by the Hellenic authorities in favour of Olympic Airways and its successors after the adoption of the 2002 Decision.

3. THE OPENING OF PROCEDURE

The decision of the Commission to open the procedure provided for under Article 88(2) was based on a number of issues.

3.1 The continuing non payment of the company of tax and social security liabilities.

(33) Olympic Airways' (hereafter "OA") results year-on-year since 2002 have been negative, the company continues to demonstrate a negative profitability ratio, the core activity of the company rather than generating income is actually reducing the overall value of the company year on year and as such it is difficult if not impossible to believe that it is not continuing its activities only by non payment of its liabilities to the state which in the 2002 Decision had been found to amount to the receipt of illegal state aid.

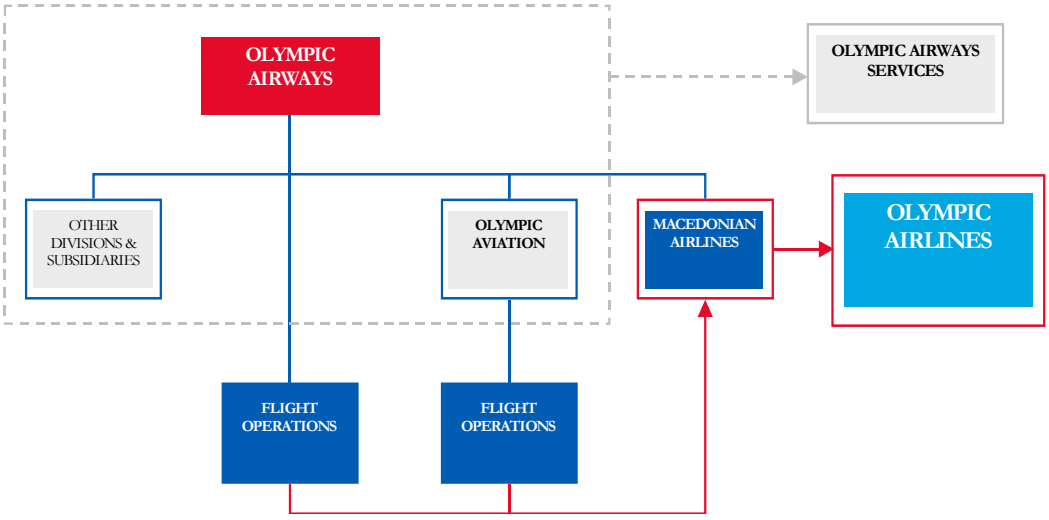
(34) The conclusion that was reached is that the State is de facto if not de jure the principal creditor of OA and if it was not for continued State intervention the company would have long since ceased operations.

3.2 The structural reorganisation of the company

(35) The Commission at the time of opening of procedure was aware of the existence of Law 3185/2003 which provided for the hiving off of the flight divisions of the various companies within the Olympic Airways Group (hereafter "OAG") namely, OA, Olympic Aviation (hereafter "OAv") and Macedonian Airlines (hereafter "MA") and their regrouping into a single entity (the former MA) which was renamed Olympic Airlines (hereafter "NOA"). The non flight divisions were to stay within OA which would be renamed Olympic Air services SA (hereafter "OAS") and Law 3185/2003 provided that an identical procedure could be undertaken in respect of the ground-handling and the maintenance and engineering divisions although to date this has not yet been done.

(36) In the opening of procedure the Commission reached the conclusion that the Hellenic Republic having failed to privatise the OAG as a whole, had decided to divide up the group into separate entities with view to making these units more attractive to potential investors and to separate them from OA's liabilities.

(37) In effect what appears to have happened after the restructuring of the OAG is that after December 2003 all flight activities are now concentrated in NOA and all other



activities principally ground handling and maintenance and engineering remain with the rump company now called OAS. OAS also retains ownership of a number of majority shareholdings in other aviation related companies in Greece such as catering, information technology and fuel services.

(38) The privatisation law specifies that the transfer of the assets, other transferred rights and of the liabilities to the new company is exempt from any tax, levy and right towards the State, public law legal entities or any public-law entity and are exempt from any charge, debt, claim of third natural or legal persons, except for the obligations which are expressly mentioned in the restructuring assessment. Additionally, Article 27 of Law 3185/2003 stipulates that the new company is exempted of the application of Articles 479 and 939 of the Civil Code[8] and of Articles 537 and following of the Commercial Code concerning the debts that OA contracted before the 'scission' of the flight division. Consequently, following this measure, creditors will only be able to take action in respect of those debts which are transferred to NOA, but will not be able to go against the new company in respect of debts remaining with OA. Subsequently (15 October 2004) the Greek state enacted Law 3259/2004 providing OA with temporary immunity with regard to enforcement action taken by creditors

(39) In application of Law 3185/2003, the Greek state engaged a consultant (Deloitte & Touche) to determine the value of the 'flight' divisions of OAG. They were also charged with the preparation of a transformation plan and a report on the state of OA and OAv to determine the number and type of employees to be transferred to NOA. Deloitte & Touche indicated that they had not carried out an audit and that they were working solely on information provided by OA and OAv management. Additionally Deloitte & Touche did not include in their evaluation the aircraft owned by OA and OAv, the value of the latter was calculated by another external consultant (Airclaims Ltd.) at a market price of EUR 120 million.

(40) Public service obligations (hereafter "PSOs") were transferred from OAv to NOA without a public tender. It also appears that OAv had secured its obligations to AIA airport in the sum of EUR10 million on the earnings from these PSOs and that this loan remained with OAv notwithstanding the fact that these PSOs were to be carried out by NOA.

8 Both articles refer to the rights of creditors to protection in the context of transfers of assets

(41) Presidential Decree 178/2002, which transposes EC Directive 98/50 into Greek law, stipulates that in the case of a transfer whatever the method of an activity of a company towards another, employees connected with this activity will be transferred to this new company with the same status and rights. It was the intention however to change the status of the employees. In order for this to take place however a negotiated procedure foreseen by Presidential Decree 178/2002 would have to take place.

(42) With respect to the OA staff, at the time of scission almost 300 specific laws, collective agreements or other provisions applied to the staff as a whole. The Greek authorities considered it therefore important to modify the legislative framework and to re-negotiate the collective agreements, more especially as the group employed 6171 persons in June 2003 (approximately 1850 staff moved to NOA) and personnel costs represented 38% of the total income while the average in the sector is around 22-26%. Consequently, Article 27 of Law 3185/2003 envisaged a number of changes. Law 2190/1994 which concerns the administrative recruitment procedure for companies in the public sector will not apply to NOA. All the employees who, under the terms of the applicable collective agreements, have the right to leave on retirement during 2003 or 2004 would however have their rights respected.

(43) In contrast to OA which had financed its operations exclusively from debt it was intended that NOA would use its own funds. NOA began operations with little or no debt and this was due in no small part to the choice of what was transferred to the new entity. In the liabilities of NOA at its entry into operations the new company inherited no financial debt from the parent company which was indebted at that stage in the sum of EUR207 Million.

(44) According to the applicable provisions of Greek bankruptcy law (Law 2190/1920) when it comes to the detachment of a division, sector or service and its absorption by an operational company the shares of this company remain with the original company. What this means in this case is that the shares in NOA should remain in the ownership of OA. However, Article 27 of Law 3185/2003 stipulates that within the framework of the privatisation procedure that all the shares resulting from the detachment of the various divisions of OA will be given to the Greek State. Moreover, any monies resulting from the subsequent sales of these divisions will be used to discharge OA's debts and obligations. The Greek State specified that by this procedure, the financial assets are transferred to the State and their value cannot be called into question, insofar as it is the product of an evaluation carried out by auditors. Moreover, the State considers that these assets when they are sold by the State will generate a higher price than if the shareholding had not been transferred to it.

3.2 The “prepayment” of EUR130,312,450 to OA

(45) By means of Ministerial decree 2/71992/A0024 of 22/12/2003 and pursuant to Article 27 of Law 3185/2003 the Greek State established a special account at the Bank of Greece entitled "Greek State – Denationalisation Account of the Olympic Airways Group". The account will be credited with any proceeds of sale, within the framework of the privatisation procedure, from companies within the OAG (the first being NOA), the shares of which have been transferred to the Greek State. Nevertheless, to cope with necessary expenditure, until the privatisation of the companies within the group took place this account was credited by the State with a sum described as an “advance” or “pre-payment”. This “advance” is equal to the nominal share capital value NOA (EUR130,312,450).

(46) Those parts of OA's liabilities which were not to be transferred to the new entity NOA, and specifically expenditure connected with the early retirement of certain personnel would be financed by the special account as well as from income generated by the supply of services to NOA and to other third parties.

3.3 Spatosimo and payments to AIA

(47) By letter of 19 January 2004 a complainant (Aegean Airlines) forwarded to the Commission a copy of a letter from the Hellenic Civil Aviation Administration (doc. DII/A/28751/11626/22-07-2003), addressed to the Auditor General of the State and sent to the “Athens International Airport Company”. It appeared from this letter that in relation to the “tax for the modernisation and development of airports” also known as ‘spatosimo’ levied by air carriers and forwarded by them to the State, OA owed the sum of EUR 26,001,473.33.

(48) It also appeared from this letter that the Hellenic Civil Aviation Administration (HCAA) was looking for the repayment of this EUR26 million owed. It therefore appeared that OA, the main user of Greek airports did not pay the ‘spatosimo’ and thereby obliged the State to find means to aid AIA, newly created and dependant on the spatosimo. Although OA did have an obligation to repay the due sums in the future, the Commission suspected that in the meantime it benefited from the forbearance of the State which not only did not punish it for the late payment but put in place mechanisms whereby the other Greek airports have to contribute for the losses occasioned by the late or non payment of OA of its ‘spatosimo’ debts.

4. COMMENTS RECEIVED DURING THE PROCEDURE

4.1 Initial comments of the Greek authorities

(49) On 11 June 2004 Greece submitted its response to the opening of procedure. It began by explaining that in its opinion the most appropriate solution for OA was the privatisation of the various businesses and activities of the group. The privatisation would take place as quickly as practicable and in full compliance with all applicable rules and requirements of Greek and EC law; the Commission would be kept fully informed of developments. Greece explained that privatisation was the most economically beneficial solution for the authorities as it would generate more money that could be expected if the company was liquidated. While acknowledging that the privatisation option would also have social and other non-economic benefits the

Hellenic Authorities emphasised that the economic analysis was he only criterion for deciding on the most appropriate strategy.

(50) Greece referred to the progress that had already been made in advancing the privatisation process which had previously been communicated to the Commission. Greece confirmed that the flight activities of OA and OAv had been spun off along with a number of intangible assets such as slots, rights under bilateral agreements, the brand name and logo and the goodwill of OA into an existing company MA. MA changed its name and became NOA. Ownership of NOA shares (following a capital increase to accommodate the contribution in kind of the flight business) was transferred directly to the Greek State taking NOA out of the OAG. The new company began operations on 12 December 2003 having been granted all necessary licenses.

(51) It further explained that the strategic model for NOA was the creation of a viable scheduled air carrier operating with average industry labour costs and able to take advantage of a number of factors including OA's strong brand image, Greece's position as one of the world's 15 favourite tourist destinations and the 2004 Olympic Games in Athens. New management had been appointed to NOA and a thorough review of the business plan was underway.

(52) Following NOA's commencement of operations OA ceased to be an EU licensed air carrier and was renamed OAS. OAv also ceased flight operations with the exception of limited general aviation and helicopter services which were expected to be transferred to the new company.

(53) With respect to the non flight activities (ground-handling, maintenance and engineering and aviation training) now regrouped within OAS Greece indicated that it was their intention to privatise these activities also. This was also provided for by Law 3185/2003. It was also intended to sell any participation on other companies such as Olympic Catering and Galileo Hellas. OA also participated in three Athens International Airport related fuel companies, namely Athens Airport Pipeline Co, Olympic Fuel Co and Olympic IntoPlane Co and it was anticipated that these shareholdings would be sold off in a timely and orderly manner. Sale of these latter companies would be relatively easy as they had 'clean balance sheets' and their private shareholders had the right of first refusal to buy them.

(54) The Greek authorities wanted to clarify a number of restructuring related issues raised in the opening of procedure.

(55) With respect to the agreements between OA and NOA Greece asserted that all services are provided at market rates and are in accordance with OA's generally applicable commercial policy. The Authorities also undertook to transmit these agreements to the Commission.

(56) With respect to aircraft leases Greece stressed that only fully-owned aircraft of OA were transferred to Olympic Airlines. Aircraft leased by OA were subleased to NOA at market rates as the termination of leases before the expiry of their terms would have led to OA making payments for losses suffered by the lessors. Operating leases would be assigned directly to NOA thus taking OA out of the lease.

(57) With regard to the lease of 4 Airbus A340/300 aircraft partially covered by state guarantees (up to 45% of the financing value) these leases would not be assigned to the new company. NOA would operate these aircraft on a sub-lease basis paying

market rates to OA. In this way the Greek authorities contended that no state benefit would pass to NOA.

(58) In relation to the state guarantees for these aircraft it was the contention of Greece that although the 2002 Decision declared that restructuring aid granted to OA in several forms (including state guarantees) was incompatible, the Commission had only ordered the recovery of the last tranche (EUR41 million) of the restructuring aid granted to OA (as well as the recovery of unauthorised new aid) on the grounds of legitimate expectation. Greece contends that as the 2002 Decision does not specifically provide for the recovery (or cancellation) of state guarantees it provided for their continuation.

(59) With regard to the transfer of PSOs, Greece argued that this took place lawfully as the operation of these routes formed an integral part of the flight activities of OAv and the routes continued to be operated with the same aircraft and same personnel as for he rest of the network.

(60) Regarding the alleged new aid to OA the Greek authorities expressed some confusion as to what was meant by 'tax obligations'. The Greek authorities said that the Commission had failed to make a case that the Greek authorities had 'assisted' OA by tolerating non-payment of certain obligations (not only tax). They further stated that in making such an allegation it was for the Commission to discharge the burden of proof which it had failed to do. Greece reiterated that OA is subject to the generally applicable Greek law and procedures applicable to all Greek companies in this regard.

(61) Concerning the alleged non payment of 'spatosimo' the Greek government submitted that a distinction need to be made between the relationship between the air carriers collecting the spatosimo and then forwarding this to the Hellenic Civil Aviation Administration (HCAA) and the relationship between the HCAA and the airports in Greece (including AIA) who receive amounts of the spatosimo calculated on the number of passengers flown. With regard to the collection mechanism air carriers levy this on their passengers and it is then forwarded by the carriers to the State. Spatosimo that has been thus levied and not paid to the state is a debt to the state and is subject to the general provision of the 'Code for the Collection of Debts to the State (KEDE). This was the situation with the amount of EUR 26,001,473.33 that OA had not paid on time but which was subsequently paid off in instalments with all applicable default interest and penalties.

(62) The collection mechanism is separate from the disbursement mechanism whereby the Greek state (through the HCAA) pays sums to the airports. Although the two mechanisms are intended to operate back-to-back (one financing the other) the Greek authorities argued that the obligation of the Greek State to pay the airports is not dependant on its ability to collect the sums due from the air carriers. As a result there had been situations where the State had been obliged to grant sums that had not yet been collected. They further argued that while this was unsatisfactory for the State it did not amount to state aid as the air carriers were not relieved from their obligation to pay (including default interest and penalties). In the particular case referred to in the opening of procedure the Greek State had been obliged because of cash flow constraints to alter the percentage of allocation of 'spatosimo' as between airports granting more to AIA (resulting in a short term reduction in the due payments to other airports). It was explained that this was essential as AIA's financial situation is

monitored by the European Investment Bank and commercial lenders and was irrelevant to the issue of whether OA paid its dues.

(63) The Greek state said that the non payment of 'spatosimo' had been raised by the Commission as the only evidence of the non-payment by OA of its obligations to the state.

(64) With regard to the special account provided for by Law 3185/2003, the Hellenic authorities submitted that the prepayment to OA of the amount of EUR130,312.450 was a measure of a temporary nature and was something that any prudent market investor would do. At the moment of the sale of NOA any pre-paid amounts will be repaid to the special account. Greece further explained that the shares in NOA no longer belong to OAG but to the State. It added however that as OA was deprived of the value of its flight division provision for a certain prepayment to OA which does not exceed the value of its 'lost' property was a proportionate and adequate measure for the purposes of restructuring and privatisation.

(65) In the event that the sale of NOA does not repay the prepaid amount of EUR130,312,450 then the Greek government submitted that the shortfall will be made up from the sale of non flight activities. Law 3185/2003 provides that the proceeds of sale of these divisions will be paid into the special account. In the event that the financial obligations of OA exceed the nominal value of the share capital of the companies to be sold then Greek insolvency law will apply and creditors can make their respective claims accordingly.

(66) Any sums from the sale proceeds which exceed the nominal value of the share capital of the companies sold remains with state and cannot be used by OA. OA will only have access to the account to meet its severance and retirement obligations and to cover the financial obligations of OA and OAv during the course of the transformation and liquidation process.

(67) The Greek State submitted that Law 3185/2003 was an attempt to maximise shareholder value so as to maximise recovery (of State aid) and the return on investment. Creditor protection would not be any better in the event of a bankruptcy.

(68) In the alternative, if the Commission considers that the "pre-payment" was not consistent with what a (private) market economy investor would do to maximise recovery and return on investment than the Hellenic authorities would ask the Commission to consider examining the prepayment in the light of the 'Rescue and Restructuring Guidelines' as a rescue aid compatible with the common market under Article 87(3)(c). The Greek authorities would then submit that the conditions for the grant of rescue aid were met from December 2003 onwards and this would be substantiated by business plans etc.

(69) On the question of possible aid to the future purchasers of any of the Olympic companies the Hellenic authorities wanted to reassure the Commission of their intention to sell NOA and any other activities/businesses at market prices and this would be done in accordance with applicable Greek and Community law.

(70) The Hellenic Authorities disagreed with the conclusion that the Greek state wanted to protect NOA from the enforcement of the December 2002 decision since it prohibits any OA creditors to go against NOA. They contend that this was not the intention which was rather to maximise recovery of investment. They explained that the

operation of the special account is such as to ensure that amounts up the nominal value of the shareholding of NOA is available to OA and its creditors assuring an adequate level of creditor protection. Greece emphasized that it is entitled to decide upon the most appropriate means of restructuring and privatisation and introducing a safeguard to ensure that OA's creditors have at least the same level of protection as they would otherwise have was a legitimate exercise of Greece. This protection of creditors should not be confused with the recovery obligation following the December 2002 decision

(71) Greece also disagreed with the Commission conclusion that the creation of NOA is not a solution as its viability is not guaranteed; Greece stated that it was confident that NOA would be a success story.

(72) With respect to the proposed long implementation period for the overall restructuring and privatisation, Greece said that it noted the Commission's concerns and would try to accelerate the process where practicable. It was the intention of Greece to provide the Commission with a new timetable for the implementation of the restructuring/privatisation plan and the subsequent liquidation of OA.

(73) On the question of other laws providing OA with special exemptions or immunities, Greece reiterated that the provisions of Law 96/1975 granting special privileges (in the areas of payment of duties on transactions, exemption from payment of stamp and traffic duties and in the area of state guarantees) to OA had been abolished and that OA is subject to all generally applicable taxes and duties and operates in the context of a free market economy.

4.2 Third party comments

(74) Following the publication of the letter addressed to the Greek authorities in the *Official Journal of the European Union* comments were received from two interested within the time allowed.

4.2.1 Aegean Airlines

(75) The first Comment was received from a Greek air carrier called Aegean Airlines (hereafter "Aegean"). It made the following observations.

Preferential terms of payment between OA and AIA

(76) Aegean alleges that during its first year of operations at AIA OA had paid less than 30% of its obligations to AIA, agreements have alleged been reached between AIA and OA (AIA's largest individual customer – 35%) and two preferred mortgages have been registered on three OA aircraft in favour of AIA to secure payment of sums in excess of EUR29 million plus interest and expenses. The overdue liability of OA to AIA was estimated by Aegean to be in the order of EUR70-80 million. Aegean alleged that OA and NOA have been allowed to incur substantial liabilities by the 55% state controlled AIA and that these are not available to other airlines. Aegean estimates that if the same facilities were afforded to it would have been provided with working capital of EUR40-50 million.

The financial performance of companies within the Olympic Group

(77) In relation to OAv, Aegean state that this company recorded losses of EUR32.2 million (on revenues of EUR83 million 39%) despite having received

EUR8.2 million compensation from the Greek State for "early relocation" of its activities from Ellinikon Airport to AIA. The further point out that the Debt of OAv to OA has grown from EUR68 million in 2000 to EUR127 million at the end of 2002. OA did not consolidate OAv accounts in 2001 and 2002and Aegean opines that the reason for this was to make the mother company's books look better.

(78) Aegean also advances some indications on the profitability of OA in 2003. According to publicly available traffic information OA's traffic declined by 8% in 2003 while its load factor declined by 5%. The decline was most pronounced on its European network with a 14.4% decrease while the number of business passengers declines by 26%. In the opinion of Aegean this decline in passenger number together with an increasingly difficult market (fuel price increases, increased competition from low cost carriers) means that the OAG financial position has deteriorated through 2003.

Possible subsidisation of NOA through non payment of OAS

(79) Aegean voices their suspicion that the new company is not paying (or is not paying enough) for the services that it receives from OAS.

(80) According to Aegean the pre-payment of EUR 130,312,450 million lodged to the special account has been depleted after 8 months.

(81) A new law has been adopted (Law 3259/2004) protecting OAS and OAv from having execution procedures taken against them. According to the law no procedure of execution or of interim relief shall be initiated inside or outside Greece against the assets (movable or immovable) of OAS and or OAv until 28 February 2005. This law seems to have been adopted because certain creditors had seized one Airbus 300-600 aircraft and were threatening to sell it in settlement of their debt.

(82) Aegean complains that the Greek state had automatically awarded OAv's PSO routes to NOA without availing of a public tender. In addition all of OA's traffic rights to Non-EEA states have been taken over by the new company without any reassessment of the criteria for designation although other airlines including Aegean had expressed an interest in being designated.

(83) Aegean are of the opinion that the transfer of assets to NOA without the corresponding liabilities may be incompatible with both the Treaty and the Greek constitution.

(84) According to press article MA prior to being transformed into NOA had accumulated tax liabilities of GRD 3.5 billion, Aegean alleges that Greece is not made any claim against NOA in respect of this sum.

4.2.2 Ryanair

(85) Comments were also received from the Irish low-cost airline Ryanair. Ryanair made a number of general comments regarding the application of EC State aid rules in member states other than Greece and in relation to airlines other than Olympic. With regard to the case in hand Ryanair initially noted that they were unable to comment on the latter sent to the Greek government as no English translation of the latter had been made available.

(86) In the case of Olympic Ryanair continued stating that "in the original investigation against OA the amount of state aid found to have been received by OA was over

EUR1 billion and yet they were only required to repay EUR200 million to the Greek government". Ryanair went on to assert that other airlines have been forced to subsidise the failing national carrier through higher airport charges because OA has been granted a 'holiday' from these charges. In their opinion the continued illegal support of this failed national airline seriously undermines the potential for new and more efficient operators to enter the market. They described the creation of a debt free new airline as unacceptable and wondered if the current procedures had been followed with respect to Article 4 of Council Regulation 2407/92 of 23 July 1992 on licensing air carriers[9] in applying for a new Air Operators Certificate for the new company. In concluding Ryanair state that the Greece should not be permitted to again circumvent the rules and continue to prop up its failed national airline.

4.3 Greece's Reply to Third Party Comments

(87) In the opinion of Greece the information contained the comments submitted by third parties is inaccurate and contributed nothing new to the investigation. The Greek authorities reminded the Commission that the previous privatisation process for the airline had been terminated on 6 October 2004 and that a new group of advisers had been appointed for both the privatisation of NOA and of the other businesses/divisions. The new group of advisers had already commenced work and progress was being made on the 'proposal phase' an indicative timetable for the privatisation was also furnished.

(88) In relation to the specific comments made by the third parties Greece made the following replies

4.3.1 Aegean Airlines' observations

(89) Alleged preferential treatment of OA at AIA, the Greek authorities said that this issue had been addressed before in the context of the present state aid investigation, before the ECJ (Case C-415/03) and in other State aid investigations (NN27/1996 Construction and Exploitation of Athens International Airport). Although AIA is 55% state-owned it is operated as a private business independent from control by the government in its day to day business. As such AIA is exclusively responsible for the collection of airport charges and settlement arrangement for late payment. Of the nine directors of AIA 4 are appointed by the State, 4 by the developers and the remaining one being an independent appointee. Greece reiterated that it had already clarified the issues relating to late payment of spatosimo.

Possible subsidisation of NOA thorough non payment of OAS

(90) Greece stated that all services provided by OAS to NOA are done so at market terms and conditions. The Greek authorities provided some documentary evidence of payments made by NOA to OA.

(91) More generally Greece provided documents in support of its assertion that NOA has no outstanding payments with any state entity. In this regard evidence was furnished regarding up-to-date payments to the Tax Authorities in respect of Salaried Persons Tax (FMY), VAT, airport charges (including at AIA), spatosimo and social security (IKA).

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9 OJ L 240, 24.8.1992, p.1

(92) With regard to the special account, Greece stated that the sums in the account were being used in accordance with the provisions of Law 3185/2003. The pre-payment into the account was described as an "ephemeral measure that any prudent market investor would adopt in the circumstances." The pre-payment had been used primarily for salaries in both OA and OAv aircraft lease costs and early retirement of OA and OAv staff.

(93) The Greek state also indicated that NOA has received no funds from the special account either directly or indirectly. The allegation that NOA had not received any liabilities on its creation was also strenuously denied.

(94) The amount of EUR 130,312,450 was granted in instalments between 24 December 2003 and 13 May 2004 (less than 6 months). It had been so paid out so that if the Commission were to decide that it constituted State aid within the meaning of Article 87(1) of the Treaty then all the conditions for it to qualify as rescue aid would have been met. In support of the contention that the cash advance could constitute rescue aid Greece pointed out that :

– Olympic Airways was a company in difficulty within the meaning of the guidelines,

– the prepayment to Olympic Airways consisted of liquidity support,

– the liquidity support was expected to be reimbursed over a period of not more than 12 months after disbursement of the last instalment to OA; the last instalment was paid in May 2004 and the reimbursement was intended to be carried out after privatisation of NOA in May 2005,

– the grant of rescue aid avoided serious and severe social difficulties throughout Greece,

– OA ceased to be an air carrier and only operate non-flight services, the spill over effects into other member states are therefore limited,

– the amount granted was necessary to keep the company in business for the limited period it as granted; the amount is proportionate and comparable to other amounts of rescue aid authorised by the Commission for undertakings of similar size or undertakings operating in the same field.

(95) With regard to the new law (Law 3259/2004) protecting OAS and OAv from the execution of procedures against them, Greece said that in its opinion this measure was necessary to ensure the privatisation process. This temporary measure did not deprive creditors of their rights but suspended for a limited period the execution of procedures. This temporary protection from creditors does not apply against the Greek state or other public/state bodies; it applied only to OA and OAv. The temporary measure did not qualify as state aid as it implied no transfer of state resources. (Under Law 3185/2003 following the scission creditors can only take action against NOA in respect of those debts transferred to NOA).

PSOs and designations under bilateral agreements

(96) In the opinion of Greece the transfer of PSOs and bilateral designation rights to NOA took place by virtue of succession rights in accordance with Greek corporate law.

These routes were operated either by OA or by OAv and these companies' flight divisions had gone to make up NOA.

(97) With respect to the alleged GRD3.5 billion outstanding tax bill for MA Greece explained that an outstanding tax bill relating to the period 1993-1997 was the subject of litigation before the courts in Greece. The amount on question (including charges and penalties) is EUR9,106,481.75 and the case is still ongoing. The company makes appropriate provision in its accounts for this liability pending the outcome of proceedings.

4.3.2 Ryanair observations

(98) Greece dismisses Ryanair's observations completely, noting that Ryanair is not active on the Greek market, does not compete with Olympic Airlines and is using the procedure to advance arguments relating to its own ongoing debate with the Commission.

4.4 Comments made by the Greece following receipt of letter of formal notice regarding suspension injunction

(99) On 11 October 2004 the Commission sent a letter of formal notice informing Greece of its intention to adopt a decision requiring Greece to suspend any unlawful aid until the a decision on its compatibility could be taken. The letter informed Greece that if within ten days of receipt of the letter the Commission did not receive satisfactory information demonstrating that Greece was no longer making aid payments to OA such an injunction would be adopted. Greece was also invited to submit their comments on the matter.

(100) On 28 October 2004 the Greek authorities replied to this letter of formal notice. Greece opined that taking an injunction at this stage would be disproportionate and unjustified and would seriously jeopardise the current intensive effort of Greece to find a solution to the problem of the companies. They also stated in relation to substantive issues raised in the Commissions letter of formal notice that concerning 'spatosimo' payments that as OA was no longer an air-carrier it no longer collected this tax and in relation to the 'special account' and payment there from of EUR 130,312,450 to NOA that this was the act of a prudent investor or possibly a payment of rescue aid. The Greek authorities stated that they could not see the need for such an injunction at this stage of the investigative procedure and did not perceive a significant change of circumstances since the opening of procedure or see evidence of substantial and irreparable damage to warrant the adoption of such an injunction.

4.5 Comments made by Greece following the judgement in Case C-415/03

(101) As previously referred to, following the Judgement of the ECJ on 23 May 2005 in Case C-415/03 the Commission addressed the Hellenic authorities requesting information on the measures to be taken by Greece to ensure compliance with the judgement.

(102) The Hellenic authorities replied by letter dated 2 June 2005 and although the letter primarily deal with the issue of recovery following the 2002 Decision in as much as it touched issues relating to the restructuring and proposed privatisation which form the substance of the current investigative procedure it will be examined in the context of the current procedure.

(103) The Greek authorities firstly wanted to raise certain issues relating to the recovery from OA. Greece wished to point out that although the judgement of the ECJ in point 33 mentions that *"the operation in issue transferred all the assets of the company Olympic Airways […] to the new company Olympic Airlines"*, that this was not correct, and that several important assets remain in OA and it continues to be active in several markets.

(104) Greece pointed out that the companies within OAG were in the process of being privatised and that details of this privatisation has already been communicated to the Commission services. It was the intention of the Greek authorities to fully comply with recovery and once the assets of NOA had been sold the sales proceeds would go directly to the Greek state. If this wasn't enough to satisfy recovery then the sales proceeds from OA as lodged into the special account in the name of the government, would be used. Once all these avenues had been exhausted it was the intention of the Hellenic authorities to liquidate OA.

(105) Greece further committed itself that in the event that the sales from NOA did not fully satisfy recovery it would guarantee that no general or special provision of Greek law will protect the "*successor companies"* (explicitly including NOA) from the obligation of reimbursement of the aids that the Commission decision of December 2002 imposes. More specifically, regarding the special provision of Law 3185/2003 which grants protection from creditors to NOA in respect of debts of OA made before the restructuring, the letter continues "not even the Greek State can go after Olympic Airlines for debts of Olympic Airways" and that the superior character of Community law means that in respect of recovery this provision cannot be used to frustrate the effect of the Commission decision and the Community rules on State aids.

(106) The Hellenic authorities clarified that the purpose of this provision was to protect NOA during the restructuring rather than protect it from a possible obligation of recovery of the aids according to the December 2002 decision. In the opinion of Greece a future possible liability for recovery for NOA, if recovery had not been fully effectuated at the level of OAG, would not be possible in the event that the successor company is sold at a reasonable market price under the scope of the Commission Guidelines for the privatisation procedures.

5 RESULTS OF THE EXPERT STUDY REQUESTED BY THE COMMISSION

(107) Before the Commission can engage in an assessment of the points raised in the opening of procedure and of the information furnished by the Hellenic Authorities and the third parties, it was necessary to examine the current economic and financial situation of OA (OAS) and NOA and the progress which had been made on the restructuring and privatisation.

(108) To this end the Commission engaged the services of an independent expert (Moore Stephens) to carry out a study of the restructuring, operations and privatisation to date of the various Olympic companies and to determine what has happened since the restructuring.

(109) Moore Stephens (hereinafter 'the experts') carried out their study in Athens between 9 and 26 May 2005. In carrying out this study they were facilitated by the Hellenic authorities and their advisers and also by the fact that a data room had been

prepared by the authorities and their privatisation advisers so that potential purchasers involved in the privatisation process could do their own research.

5.1 Expert conclusions relative to the restructuring

(110) The Commission's experts examined the restructuring operation and the way in which the assets and liabilities to be transferred to NOA and to be left in OA were evaluated and has indicated that certain entries are not in accordance with either Greek or international Generally Accepted Accounting Principles (GAAP). They indicate that an amount of EUR30 million termed goodwill was recognised on the balance sheet of OA prior to the restructuring. This amount was a valuation, by management, of the Olympic brand name, the Olympic logo, the NOA trademark, and slots and bilateral agreements. They point out that neither Greek GAAP nor International GAAP allows internally generated intangible fixed assets or goodwill to be recognised on the balance sheet.

(111) Another possible point of concern related to the valuation of aircraft. The experts pointed out that at the time of the scission owned aircraft and aircraft engines in OA and OAv were re-valued at current market value. This exercise was carried out at 1 October 2003 by an international airline consultant, Airclaims Ltd., and resulted in an increase of approximately EUR43.2 million over the existing written down value.

(112) The experts point out that the opening balance sheet for NOA contained no allowance for doubtful debts against trade receivables. Whilst NOA management is confident that all the balances transferred would have been collected, the experts feel that it is unrealistic to assume zero bad debts. A further amount of EUR 825,020 labelled "doubtful accounts receivable" was included in the transformation balance sheet of MA. The experts are of the opinion that it appears imprudent to include this as an asset.

(113) It was also pointed out by the expert that the opening balance sheet of NOA contained an asset of EUR 7.9 million from OA, estimated by management, which had been previously a debt owed in MA. The corresponding liability was not transferred to NOA because of the provisions of Law 3185/2003 allowing liabilities to be retained by OA.

(114) The experts indicated that a sundry debtor of EUR 24.4 million was included in the opening balance sheet which related to an amount due from OA in respect of the expected net proceeds from the sale of two A300-600 aircraft owned and remaining in the balance sheet of OA and leased to NOA. It is not in accordance with Greek or International GAAP to anticipate a debtor which relates to the sale that has not yet occurred of a fixed asset not owned by the company. As NOA appears to have enjoyed the costs and benefits of ownership of these aircraft, the aircraft might have been transferred to NOA with the other owned aircraft for its book value of EUR19.2 million.

(115) It has also been confirmed by the experts that the NOA balance sheet excludes most of the flight operations liabilities that existed in OA and OAv. The experts point out that under Greek company law, all assets and liabilities relating to activities being hived off in a company restructuring must be transferred. Whilst there is an inevitable degree of subjectivity in such an exercise, the legislation does not give management the option to be selective in the assets and liabilities transferred. Law 3185/2003,

however, contains provisions that permitted OAG management to override the normal requirements of the legislation and selectively exclude liabilities from the spin-off. In taking advantage of Law 3185/2003 management decided to exclude from the spin-off all liabilities over one month old.

(116) The experts have carried out a comparison of the liabilities transferred to those left behind by comparing balance sheet extracts from the opening balance sheet of NOA at 11.12.03 with the year end balance sheets of OA and OAv at 31.12.03 (OA and OAv did not prepare balance sheets at 11.12.03).

BALANCE SHEET EXTRACTS	Olympic Airlines	Olympic Airways	Olympic Aviation	
	11-Dec-03	**31-Dec-03**	**31-Dec-03**	
Provision for termination				
Provision for retirement benefits	33,922,469	82,035,663	10,534,535	**Note 1**
Other	7,616	89,230,530	709,865	**Note 1**
	33,930,085	**171,266,193**	**11,244,400**	
Long term debt				
Bank loans	-	148,036,005	-	**Note 2 / Note 1**
Other long term debt	-	1,018,427	-	**Note 1**
	-	**149,054,432**	**-**	
Short-term liabilities				
Suppliers	31,019,022	89,067,738	148,671,366	**Note 1**
Banks short terms liabilities	-	14,504,809	-	**Note 3 / Note 1**
Customers advances	824,482	-	392,413	**Note 1**
Taxes and duties payable (inc airport duties)	4,045,699	373,549,262	719,901	**Note 1**
Social security and contributions payable	2,495,142	147,554,360	-	**Note 1**
Current portion of long term debt	-	22,986,786	-	**Note 2 / Note 1**
Dividends payable	514,739	-	-	
Amounts owed to affiliated undertakings	-	4,745,844	-	**Note 1**
Other creditors	7,009,156	65,838,943	617,392	**Note 1**
Prepaid tickets	32,288,005	-	-	
	78,196,245	**718,247,742**	**150,401,072**	
Accruals and deferred income				
Accrued expenses	-	49,642,845	751,674	**Note 1**
Sundry accruals and deferred income	-	57,328,943	17,664,167	**Note 1**
	-	**106,971,788**	**18,415,841**	
TOTAL LIABILITIES	**112,126,330**	**1,145,540,155**	**180,061,313**	

Note 1 *Retained liabilities in accordance with Law 3185/2003*

Note 2 *ABN Amro loan*

Note 3 *Emporiki Bank loan settled with proceeds from EUR 130M in Feb. 2004*

(117) The experts have demonstrated thereby that no long term liabilities and less than 10% of the short term liabilities were transferred to NOA. The total liabilities transferred to NOA (EUR 145 million) are just 9.9% of the total liabilities of all three companies (EUR 1,471 million). The short term liabilities transferred to NOA (10% of total short term liabilities) are those under one month old.

(118) The largest liabilities left behind in OAG are tax and social security liabilities to the State amounting to EUR521 million. The experts report that NOA management's stated intention in leaving behind most of the liabilities in OAG was to enable the airline, its new guise as NOA, to continue trading and proceed to privatisation. They conclude therefore that if OAG management had transferred the full liabilities of the flight divisions to NOA the new company would have faced the same liquidity crisis that existed in OAG, which would almost certainly have led to insolvency and closure of the airline. Put another way, there would have been no purpose to carrying out the restructuring exercise if the full liabilities of the flight divisions of OAG had been spun-off with the assets.

(119) In relation to MA a tax provision relating to the findings of a tax audit covering the years 1992-1997, amounting to EUR9.1 million, was excluded from the balance sheet. The experts found that there had been no tax provision for MA relating to the years 1998 - 2003. A tax department audit has not yet been carried out. Management have not made a provision because they believe there will be no profit tax liability for the period. MA made a profit in 2001, 2002 and 2003.

(120) The experts come to the conclusion that there was an overvaluation made of the assets that were transferred to NOA, The experts have themselves carried out another valuation of the assets transferred and have reached the conclusion that the valuation made by the management of OAG (EUR130,312,459) and which was not validated by an independent auditor was significantly over-valued, in their opinion by more than EUR90 million. The Commission's experts using accounting techniques recognised under Greek and International GAAP have restated NOA's balance sheet to reflect the above issues to the extent that they can be quantified and the result is that the value of the net assets transferred to NOA is reduced from EUR 130 million to EUR 38 million. They state in this regard that even allowing for a certain level of subjectivity in the valuation it is difficult to explain the discrepancy arrived at between the two amounts and conclude that NOA was overvalued10.

10 *The Experts note that*t *this exercise was is not an audit of the opening balance sheet and that the adjustments carried out do not necessarily include all those that would be required if an audit were carried out.*

Item	Opening B/S (EUR)	Adjustment (EUR)	Adjusted B/S (EUR)	Explanation
1. Goodwill	30,000,000	(30,000,000)	-	Remove internally generated goodwill
2. Owned aircraft	124,599,144	(43,200,000)	81,399,144	State aircraft at written down value
3.Trade receivables	51,336,137	Mgt estimate	Mgt estimate	Remove doubtful trade receivables
4. Amt due from OA	7,904,245	(2,904,245)	5,000,000	Restate OA debtor at actual amount
5.Receivables (MA)	825,020	(825.020)	-	Remove doubtful receivables (MA)
6a. Sundry debtor	24,674,196	(24,674,196)	-	Remove debtor relating to future disposal of aircraft
6b. Owned aircraft	-	19,175,961	19,175,961	Include aircraft to be sold at book value
7. Payables > 1 month	-	Mgt assessment	Mgt assessment	Include payables > 1 month
8.Tax provision 92-97	-	(9,106,482)	(9,106,482)	Include tax provision (MA) 1992-1997
9.Tax provision 98-03	-	Mgt estimate	Mgt estimate	Include tax provision (MA) 1998-2003
Total		**(91,533,982)**		

(121) The experts report that NOA's opening balance sheet and component transformation balance sheets were compiled by the company's accountants, Deloitte and Touche, from information provided by management but were not audited or otherwise independently assessed. Under normal Greek company law independent auditors would have to provide an opinion with words to the effect that the figures in the transformation balance sheets were properly extracted from the company's underlying accounting records. However, Law 3185/2003 allowed NOA to forego this exercise and required only that the auditors prepare the balance sheets, without having to provide an opinion on them.

(122) The experts cannot conclude whether Deloitte and Touche did prepare the balance sheets or whether they were prepared by management. Deloitte and Touche's report on their work is a descriptive report explaining the make-up of the balance sheets in which they emphasize that "no audit or other independent examination was carried out by ourselves" and that the transformation balance sheets remain "the full, absolute and exclusive responsibility" of management.

(123) Therefore, the experts conclude that in addition to the questions of proper accounting treatment set out in the previous finding, there exists an overall lack of assurance over the opening balance sheet figures because of the absence of an audit or other independent control over the exercise. In support of this conclusion, the experts also refer to the auditor's report on the financial statements of NOA for the year-ending 31 December 2003 two and a half weeks after the opening balance sheet in that the auditor expressed reservations in respect of the opening balances of the company. The auditors state that in respect of goodwill, fixed assets at valuation and

the debtors and creditors transferred from the component companies to NOA, they are not in a position to confirm the value of these items and therefore do not express an opinion on them.

(124) Law 3185/2003 provides for a cash advance from the Greek State to cover the financial obligations of OA and OAv in the course of the transformation and liquidation procedure, this sum is based on the nominal value of the shares of NOA. The experts conclude that it was in the interests of OAG […]+to maximise NOA's opening share capital by maximising the value of transferred assets and minimising the value of transferred liabilities. The value of the net assets transferred and, in turn, the nominal value of the share capital of NOA was EUR 130 million. The Greek Government paid this amount to OA in accordance with Law 3185/2003.

(125) The conclusion reached by the expert is that if recognised accounting practices had been used, the Greek Government would have been able to make only a much lower contribution to OA under Law 3185/2003. Considering the cash position of OA and NOA at the time of the restructuring, such a reduction in the cash available from the Government would have had significant implications for the ability of OA and NOA to continue trading.

(126) They further conclude that the final outcome of the spin-off, privatisation and asset sale process is that OAG will be left with no trading activities, minimal assets and debts amounting to hundreds of millions of euros. The insolvency provisions under Greek Law are likely to be applied to OA and OAv and they will be liquidated. The creditors, principally the Greek state, will bear the costs.

5.2 Experts conclusion on OA (OAS) post restructuring

(127) The experts have examined the situation of OA (OAS) following on from the decision of 11 December 2003. The company has continued to make losses and these losses have eaten away at the company's own funds and have severely hampered its borrowing possibilities.

5.2.1 OA (OAS) tax & social security situation

(128) The experts have found that OA's balance sheet contains large taxation and social security liabilities. These have been increasing year on year as payments to the tax authorities have not matched annual liabilities. The tax liability relates mainly to employee payroll tax dating back several years and also includes airport tax, VAT and profit tax liabilities. Under the spin off of flight operations into NOA only one month's tax and social security liabilities were transferred to the newly created entity. The social security liability relates primarily to the company's main pension fund. In 2003 and 2004 the liability increased by a total of EUR137 million. In this period the company made payments of EUR7.7 million relating to a Settlement Agreement for years prior to 2003.

+ Covered by the obligation of professional secrecy

	2002(a)(EUR M)	2003(a) (EUR M)	2004(b) (EUR M)
Taxes	219	374	431
Social security	54	148	196
Total	273	522	627

(a) Figures from audited financial statements (qualified)
(b) Draft, un-audited figures from OA accounting records
Note: 2005 figures are not available as OA's accounting records have not been updated beyond 31.12.04

(129) The experts note that the OA audit report for 2003 states that "the company's books and records have not followed to a great extent the provisions required by tax legislation". The report also states that "the tax audit for the years 1998 and 1999 concluded that the books and records were inadequate" and "being also that the company has not been audited by the tax authorities for the years 2000 to 2003 inclusive, its tax obligations for the years 1998 to 2003, inclusive, are not final".

(130) The experts conclude that OA has a history, going back several years, of not paying its taxation and social security liabilities in full. They indicate that the total liability at the end of 2002 was already large, at EUR 273 million, and this has continued to grow significantly over the period since then. The experts point out that the estimated liability at the end of 2004, of EUR 627 million, is over 75% of the combined annual turnover of NOA and OAG for 2003. They add that the under-payment of taxation liabilities by OA has provided a cash flow benefit to OA both before and after the restructuring.

5.2.2 The EUR130,312,459 transferred to OA (OAS)

(131) The Greek Government made cash transfers totalling EUR130,312,459 to OAG in seven tranches between 24 December 2003 and 13 May 2004. These were examined by The experts to see how they were paid and what they were subsequently used for.

(132) This money was paid under the provisions of Law 3185/2003 and was based on the nominal value of the share capital in the newly established NOA. The sum was according to the law "*for the payment of the severance payments and remaining expenses for the retirement, in any way whatsoever, of the employees, as well as the covering of the financial obligations of Olympic Airways and Olympic Aviation in the course of the transformation and liquidation procedure*"

(133) The experts found that the transfers were made at times when OA's bank account was depleted of funds. A pattern was evident of the Government transfers being gradually utilised over a period of weeks as cash receipts from other sources were less than cash payments out. At the point that the bank account was close to running out of funds, another transfer was made and the process was repeated.

Date of transfer	EUR
24-Dec-03	32,960,288
14-Jan-04	10,091,143
30-Jan-04	35,356,335
13-Feb-04	10,000,000
8-Apr-04	8,000,000
22-Apr-04	12,000,000
13-May-04	21,904,693
Total	130,312,459

(134) Using this payment schedule and information provided by OA management, […] [Ψ] while analysis of what the funding was used for by OA cannot easily be verified because the funds from the 'special account' were mixed with all other funds received into the company's main bank account, the management of OA have indicated to the Commission's experts that the funds were spent as follows:

Expense category	EUR
Aircraft leasing	51,012,257
Retirement payments	29,953,077
Payroll	34,407,994
Repayment of loan - Emporiki Bank	14,939,131
Total	130,312,459

5.2.3 Repayment by Greek State of part of ABN Amro Bank loan to OA

(135) On 9 February 2001, OA entered into a loan agreement with ABN Amro Bank for a loan of EUR 182,198,160 to finance the relocation of OA to the new Athens International Airport.

(136) The loan was repayable in sixteen six-monthly instalments of EUR 11,387,385, plus interest, between 9 August 2003 and 9 February 2011, and was backed by a Government guarantee giving ABN Amro the right to demand fulfilment of OA's payment obligations directly from the Government.

(137) Under the terms of the spin-off of flight operations to Olympic Airlines on 11 December 2003, the loan remained as a liability in Olympic Airways. As at 31 December 2003, OA had paid one scheduled instalment of the loan and the liability in OA's balance sheet was EUR 170,810,775.

Ψ Covered by the obligation of professional secrecy

(138) In their review of the accounting records of OA the Commission's experts found that ABN Amro had invoked the Government's guarantee in respect of the second, third and fourth instalments of the loan. As a consequence the Greek state had paid the following instalments on behalf of OA:

Date of payment	Amount paid (EUR)
10 May 2004	12,390,090(a)
8 October 2004	12,288,017(a)
9 March 2005	12,267,250(a)
Total	36,945,357

(a) Principal plus interest

(139) The experts also found that the Greek government requested the Greek tax authorities recover the money from OA. The tax authorities submitted debit notes to OA requesting payment of the money. The amount is recorded in the books of OA as a liability to the tax authorities but as yet has not been repaid.

5.2.4 Aircraft (A340) finance lease payments

(140) In their review of OA's accounts the Commission's experts found that on 24 September 2004, the Greek State made lease payments totalling EUR 11,774,684 as guarantor under two finance lease agreements with Credit Lyonnais for two A340 aircraft. The payments relate to the 29 July 2004 six-monthly instalment due under the lease contracts for the aircraft.

(141) The experts found that the Government requested the Greek tax authorities recover the money from OA. The tax authorities submitted debit notes to OA requesting payment of the money. The amount is recorded in the books of OA as a liability to the tax authorities but has not yet been repaid.

5.2.5 Direct cash funding to OA from Government

(142) The Commission's experts also found that on 9 August 2004 the Greek Government made a payment in cash to OA of EUR 8.2 million. This amount was paid by the Government as an advance to OA of money that OA had paid into an escrow account as a guarantee over aircraft finance lease payments to Credit Lyonnais for two A340 aircraft. Credit Lyonnais had agreed to allow the money to be released from the escrow account on conclusion in December 2004 of the transfer (novation) of the aircraft lease contracts from OA to the Government. The novation of the contracts to the state was concluded in December 2004.

(143) The experts also found that when OA recovered the money from the escrow account in December 2004, it did not repay the advance from the Government. On 23 March 2005 the Government wrote to OA requesting repayment of the amount, plus interest. At the date of their final report to the Commission (14 June 2005) the experts confirmed that OA had not repaid the amount to the State.

5.2.6 Other expenses

(144) In their review of OA books, The experts found that the creditor balances at 31 December 2004 showed an amount of EUR8 million owing to the state-owned Greek National Organisation of Telecommunications (OTE). OA's general ledger showed that OA did not pay OTE in 2003 and 2004 relating to services at some locations. EUR 4.5 million of the balance relates to periods before 2003.

5.3 Experts conclusions on NOA post restructuring

5.3.1 NOA results in 2004

(145) The experts have found that NOA experienced a difficult trading year in 2004 resulting in an operating loss of EUR 94.5 million on turnover of EUR 616.7 million and a net loss for the year before taxation of EUR 87.1 million. Even at the gross operating profit level (turnover less direct costs of services) the company achieved a profit of just EUR 4 million. They also point out that the 2003 result include, in extraordinary items, a provision of EUR 13.0 million of which EUR 12.6 million was released back to income in 2004. It is therefore more appropriate to view the loss for 2004 as EUR 99.7 million rather than EUR 87.1 million.

(146) The experts point out that the net assets of the company (EUR 24.3 million) are reduced to 18.6% of share capital (EUR 130.4 million) at the end of 2004. Furthermore, if the goodwill of EUR 18 million was written off, the net assets would be reduced to 4.8% of share capital. Under Greek company law 2190, when the net worth of a company falls below 50% of share capital, a shareholders' meeting must be convened and a plan of action decided upon to restore the company's balance sheet and therefore the protection for creditors, this has not happened in the present case. Under the same law, if the net worth of a company falls below 10% of share capital, the Greek Ministry of Commerce may withdraw the company's licence to trade. The experts point out however that this measure is a last resort and rarely happens in practice.

(147) The principal reasons advanced by NOA management for this result were:

– a negative response by the tourism market to the Group restructuring resulting in lower bookings in the Christmas 2003/New Year 2004 holiday period,

– cabin crew strikes between December 2003 and February 2004 that resulted in cancelled flights, lower bookings and increased costs during that period,

– additional costs relating to the restructuring including the need to employ significantly more pilots than envisaged, and higher lease costs and more wet leases than expected.

(148) As NOA did not have cash reserves to finance these losses, the experts concluded that its only options were to borrow money or obtain extended credit terms with its suppliers. The Commission's experts carried out an analysis of the cash flow of the company during 2004 and were able to show that it followed the latter route with creditors increasing by EUR[…][+]million in the year. Among the most significant increases in the suppliers account the following can be noted; an amount of EUR […]+ million due to AIA (in 2003 this had been EUR […]+million). In April 2005, NOA entered into a Settlement Agreement with AIA for the payment of EUR[…]+5M of the EUR […]+ million debt outstanding at that date. The terms of the Agreement were for fixed monthly payments to be made between 30 April 2005 and 30 November 2005. Another significant element of the debt owed by NOA as of 31 December 2004 is an inter-company balance with OAv of EUR[…]+million; this sum has increased from EUR […]+million as of 31 December 2003.

(149) In relation to the activities of NOA in 2005, the experts point out that financial statements are not available for periods after 31 December 2004, but from other financial records and discussions with management they conclude that NOA incurred further losses in the first quarter of 2005. As in previous years, this has resulted in a squeeze in cash flow and has forced management to seek short-term financing solutions. Additional positive cash flow has been created through the delayed payment of charges to Athens International Airport, security has been provided for in the form of mortgages over aircraft totalling EUR 36 million.

(150) The experts conclude that the business of NOA is heavily cyclical, as evidenced by the negative cash flow in the months of October to March, which is compensated for by positive cash flow in the months of April to September. This cycle repeats itself each year. The net inflows in the summer months do not compensate in full the net outflows in the winter months so that, overall, there is an ongoing need for additional facilities. The experts state that it is not clear when the company will become cash-flow positive year on year but management hope that this will be in 2006 at the earliest and 2007 at the latest, under new ownership.

5.3.2 Tax (income tax, corporation tax, social security and VAT)

(151) The Commission's experts reviewed the accounts, books and records of NOA in relation to employee income tax, social security contributions and VAT for the period from December 2003 to May 2005. They note that under the terms of the spin-of of flight operation to NOA only one month's tax and social security liabilities in respect of OA staff transferred to NOA for the new company were transferred.

(152) The experts also found that total tax and social security bill due by NOA to the Greek state increased from December 2003 to December 2004 by EUR20.2 million. This forms parts of the EUR94.4 million owed by NOA.

[+] Covered by the obligation of professional secrecy

(153) In relation to social security contributions (IKA), employee and employer social security contributions were accounted for and paid to the State on time up to October 2004. Between October 2004 and February 2005, payments were not made. In March 2005, the company entered into a Settlement Agreement with the tax authorities to pay the outstanding debt of EUR[…]+ million in 18 monthly instalments starting in March 2005 which effectively converted the creditor balance into an eighteen month loan facility. Since March 2005 the company has complied with this arrangement, together with its ongoing monthly obligations.

(154) As regards VAT, the experts found that NOA properly accounted for and paid VAT during the period.

5.3.3 Aircraft

Aircraft Type	**Number**	**[…]+**	**No. of seats**	**Ownership**
Airbus A340-313	4	[…]+	295	Leased
Airbus A300-65	3	[…]+	269	Leased
Boeing 737-400	14	[…]+	150	Own 7/Lease 7
Boeing 737-300	2	[…]+	136	Leased
Boeing 717-200	3	[…]+	100	Leased
ATR-72-320	7	[…]+	68	Own
ATR-42-320	6	[…]+	50	Own 4/Lease 2
DHC-8	4	[…]+	37	Leased
Total	43			

(155) The experts report that NOA commenced operations with a fleet of 43 aircraft, 18 owned and 25 leased. Since the start of operations to date, NOA owned aircraft have remained the same and the number of NOA leased aircraft has fallen by three. Two Airbus A300-600 aircraft owned by OA and leased by NOA were sold in February 2005 and the lease of one Boeing 737-3000 was not renewed when it expired in March 2005.

5.3.3.1 Operating Leases

(156) NOA sub-leases aircraft from OA, OAv (OAS) and, in the case of four finance leases, directly from the Greek Government (see Section 5.3.3.2). Eighteen aircraft are currently leased on operating leases, either directly from the lessors or sub-leased from OA or OAv (OAS). As the leases between the lessors and OA and OAv (OAS) expire, NOA enters into new lease contracts directly with the lessors.

+ Covered by the obligation of professional secrecy

(157) The experts have found that where aircraft are sub-leased from OA or OAv (OAS), the sub-lease charges are lower than the head lease obligations. When they have asked NOA management why this was and how it could be justified they have been told that the sub-leases are at market rates. According to NOA management OA (OAS) benefits as it has a lessee for its aircraft, NOA also insists that it could source its leased aircraft from elsewhere if OA did not offer market rates. NOA benefits by virtue of being able to lease the aircraft at what it considers to be current market rates rather than historical higher rates.

(158) The experts have carried out a comparison of the head-lease and sub-lease rates and have found that for the year to 31 December 2004, the total sub-lease charges from OA to NOA were EUR 29.7 million compared to total head lease costs paid by OA for the same aircraft over the same period of EUR 67.3 million. The resulting lease cost borne by OA is EUR 37.6 million (55% of the total lease cost).

5.3.3.2 Finance leases

(159) The experts report that in relation to 4 Airbus A340-300 aircraft the lease for which has been guaranteed by Greece that following the initial spin-off, these aircraft were initially sub-leased from OA to NOA. However, because of the perceived uncertainty over the future of OA and NOA at the time of the spin-off, the financial institutions involved (lessors) had imposed more onerous payment and security conditions on the leases. In order to relieve these conditions, both for OA and for itself as state guarantor, the Greek government decided to "step-in" to OA's shoes and the head leases for all four aircraft were transferred ("novated") from OA to the Greek Government, two in December 2004 and two in April 2005. The experts report that in order to be able to do this legally it was necessary for the Greek parliament to pass new legislation (Article 53 of Law 3283/2004).

Aircraft	Reg. No.	Price per head-lease OA/HR- Lessor	Price per sub-lease OA-NOA	Price per sub-lease HR-NOA (after novation)
AIRBUS A340-300 MSN 280 Lease agreement date	SX-DFC	EUR789,648 08/10/1999	US$600,000 27/05/2004	US$ 600,000 27/04/2004
AIRBUS A340-300 MSN 292 Lease agreement date	SX-DFD	EUR770,599 08/10/1999	US$600,000 27/05/2004	US$ 600,000 25/04/2004
AIRBUS A340-300 MSN 235 Lease agreement date	SX-DFA	EUR744,509 08/10/1999	US$525,000 12/12/2003	EUR395,000 17/12/2004
AIRBUS A340-300 MSN 239 Lease agreement date	SX-DFB	EUR744,509 08/10/1999	US$525,000 12/12/2003	EUR395,000 17/12/2004*

Note 1: Head lease payments are half-yearly in arrears.
Note 2: Sub-lease payments are monthly in advance.
Note 3: All payments shown in the table are on a monthly basis. Head lease monthly payments are based on annual payments for 2004 divided by 12.

* Reason B(1)

Note 4: All amounts exclude interest.

(160) The experts have also carried out a comparison between the head-lease rates and the sub-lease rates in respect of these four aircraft. They have found that the head-leases paid by the state are approximately EUR750,000 per month whereas the sub-lease charges range from approximately EUR 400,000 to EUR 500,000 per month. In effect the Greek State loses between EUR250,000 and EUR350,000 on each of these four aircraft each month.

(161) The experts have also indicated that between December 2004 and the end of March 2005, NOA did not make any payments to the Government for the two A340s sub-leased by the Government. At the end of March 2005, NOA's liability to the Government in respect of these two sub-leases was EUR 5.1 million. NOA paid the amount, plus April's lease cost, in April 2005.

5.3.4 Spatosimo

(162) The experts report that between the commencement of NOA operations in December 2003 and 31 December 2004, airport tax collected by NOA from its customers amounted to EUR[…][+] million and the amount paid to the tax authorities amounted to EUR[…]+ million. In March 2004, and from June to September 2004, payments to the tax authorities were made on time (by the 20th of the month following collection). For the other months between December 2003 and March 2005, payments were made between one and five months late. The balance at 31 December 2004, of EUR[…]+ million, represented about 3 months' collections. At 31 March 2005, the amount of airport tax due was EUR[…]+ million, representing approximately two and a half months' collections.

5.3.5 Charges paid by NOA to OAS for ground-handling and technical support

(163) As NOA only incorporates the flight divisions of OA and OAv it is unable to carry out the ancillary functions essential for the running of an airline (line maintenance, refuelling, ground-handling etc.) itself and has to pay to have these done. The Commission tasked its external expert with verifying the claim of the Hellenic authorities that in this respect NOA paid market prices for these services and that the contracts there fore had been concluded on arms-length conditions.

(164) The experts have reported that a series of seven contracts have been concluded between NOA and OAS (including with OAv and with Olympic Catering S.A.) for a range of services including ground handling, technical maintenance, cargo and mail handling, storehouse management, accounting support and consulting, human resources training and general flight itinerary programming services, information technology and telecommunications services and catering. The experts found that in 2004, companies within the OAG provided NOA services with a value of approximately EUR[…][+] million. The main service contracts between NOA and OAG are for ground handing and maintenance services. NOA uses OAG for […]+% of its ground handling services and for all of its maintenance. The contracted fees for 2004,

[+] Covered by the obligation of professional secrecy

[+] Covered by the obligation of professional secrecy

based on scheduled flight activity, were EUR […]+ million for ground-handling and EUR[…]+ million for maintenance.

(165) The Commission's experts examined the rates charged by OAG to NOA and to other airlines. While a lower rate for ground handling services was noted this was attributed by NOA management to commercial reasons as NOA is the largest customer and receives volume discounts. With respect to catering NOA appears to pay market prices for the services it receives and in relation to technical maintenance services OA charges NOA on a different basis to other customers so it was not possible to make a meaningful comparison. NOA management stated that, in their view, the rates for all the services supplied by OA were negotiated at arm's length and represent fair market value.

5.3.6 AIA charges

(166) AIA is a 55% state-owned company responsible for the construction, operation and development of Athens International Airport. Although majority state owned, the company is run as a private sector company under the Airport Development Agreement and is not subject to the laws on Greek State controlled entities.

(167) AIA was/is OA/NOA's largest creditor with annual charges of approximately EUR 60 million. As AIA costs form such an important component of NOA's cost base it was necessary for the Commission's expert to examine the relationship between NOA and AIA to determine if the airline received favourable terms which might amount to indirect state support. The experts were able to determine that NOA's liabilities and payments to AIA for the period since it began operations up to 19 May 2005 were:

[…]+	[…]+	[…]+	[…]+
[…]+	[…]+	[…]+	[…]+
[…]+	[…][+]	[…]+	[…]+
[…]+	[…]+	[…]+	[…]+
[…]+	[…]+	[…]+	[…]+

(168) The experts report that AIA imposes charges on airlines for a range of services provided by the airport, including aircraft landing and parking fees, security and ground-handling infrastructure. The charges are levied at standard rates, which are set out in AIA's *Guidelines for Customers Terms and Conditions of Use and Schedule of Traffic Charges*, dated June 2003. Standard payment terms are 20 calendar days. Late payment interest is payable at 3% above EURIBOR.

[+] Covered by the obligation of professional secrecy

(169) The Commission's experts learned that in late 2004, NOA entered into a "Financial Settlement of Accounts" agreement with AIA enabling NOA to settle the invoices from AIA within a period of 45 days instead of the 20 days applicable under AIA's normal payment conditions. The extended payment terms applied from 1 July 2004 to 28 February 2005. As a condition of receiving these extended terms, NOA was required to execute a mortgage in favour of AIA on two […]+ aircraft up to a maximum amount of EUR […]+ million as security. The liability at 31 December 2004 represented approximately 4 months' charges and at May 2005 represented approximately 5 months' charges, which is clearly in excess of the 45-day payment terms under the Financial Settlement of Accounts Agreement.

(170) On 22 April 2005, NOA entered into a further "Settlement Agreement" with AIA for the payment of EUR […]+ million of the EUR […]+ million debt that existed at that date, this included further security of EUR […]+ million. The terms of this Agreement were for variable monthly payments to be made between 30 April 2005 and 30 November 2005. EUR […]+ million of the EUR […]+ million would come from PSO income. Security of EUR […]+ million is provided by preferred mortgages over two […] +aircraft and four engines.

(171) On the basis of the above information, the experts are of the opinion that by allowing the build-up of a EUR […]+ million trade creditor over the winter season and then converting it into an eight-month short-term loan to be paid over the summer season effectively constitutes providing NOA with seasonal working capital financing. This financing, together with continued tolerance of late payments, suggests that NOA is receiving treatment from AIA that would not be available to other airlines.

6 APPRAISAL OF AID

6.1 Legal basis for appraisal

(172) By virtue of Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threaten to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between the Member States, be incompatible with the common market.

(173) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.

(174) The present decision relates only to aid granted after the 2002 Decision. It does not cover any possible state aid element in connection with any future transaction or transactions concerning the shares or assets of any of the concerned companies.

(175) Article 228 of the EC Treaty provides that if the European Court of Justice finds that a Member State has failed to fulfil an obligation under the Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice. In the current situation aid was found to be illegal and incompatible with the common market by the 2002 Decision. In its judgment of 12 May 2005 in Case C-415/03 the Court of Justice found that the Member State did not take the necessary measures.

(176) Article 228(2) provides that if the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations (by letter of formal notice), issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

6.2 Existence of aid

(177) The Commission has carried out a close and in-depth analysis of the comments received in the course of the opening of procedure as well as of the observations of Greece and of the expert study carried out into the restructuring of OA and of the behaviour of OA and NOA since restructuring. In this regard it has decided to carry out its appraisal on the existence of aid under four main headings being; (i) the restructuring itself, (ii) whether NOA has received other State aid since 2003, (iii) the grant of EUR130 million to OA and (iv) whether OA has received other State aid.

6.2 (i) *What was the nature of the restructuring of the OAG carried in December 2003?*

(178) The intention of the Hellenic Authorities in drawing up and implementing Law 3185/2003 seems to have been to enable the flying divisions of OAG, in its new guise as NOA, to continue trading and proceed to privatisation. The Commission must therefore examine the relationship between OA and NOA. NOA was established out of the flight divisions within OA and continues the core flight activity of OA, it initially took over all OA aircraft and currently operates 40 aircraft compared to the 43 previously flown by OA with the same crews on the same routes. On the question of routes NOA has acquired the route network, the PSO contracts and rights on bilateral air routes to non-EU countries previously operated by OA by "succession". As previously mentioned NOA was established under the provisions of Law 3185/2003 which is specific to OA/NOA and provides derogation from the normally applicable provisions of Greek company law.

(179) In the present case the scission has resulted in the removal from an already heavily indebted OA (previously found by the Commission to have received illegal and incompatible State aid) of its revenue generating flight divisions while at the same time very few of the corresponding liabilities have been transferred. All long-term debt has been left with the predecessor companies and of the taxes, social security and other duties payable to the Greek State by OAG only one month's liabilities have been transferred to NOA. In addition to the tax liabilities owed directly to the Greek State, at the date of scission OA's liability to AIA was approximately EUR93 million; no part of this was transferred to NOA under the terms of the spin-off but remained in OA.

(180) The Commission also concludes that as the privatisation process envisaged by Law 3185/2003 continues over time the already heavily indebted OAG will be left with no trading activities, minimal assets and debts amounting to hundreds of millions of euros. It will therefore be even less likely to repay the incompatible State aid required by the 2002 decision. Subsequently it is the intention of the Hellenic authorities that the insolvency provisions be applied to OA and OAv and they will be liquidated. The creditors, principally the Greek state, will bear the costs. The Commission notes that as Greece is 100% owner of both OA and NOA, the creation of NOA is less a restructuring and more in the nature of an artificial intra-group reorganisation. This approach is also supported on examination of the provision of

Law 3185/203 whereby NOA obtains 'protection' from the normally applicable provisions of the Greek Civil and commercial code in respect of debts contracted by OA before the 'scission' of the flight division. This suggests that in the absence of this specific law the application of the normal provisions of national law would also lead to the conclusion of "continuity" between the two companies.

(181) The Commission notes additionally that the classification of NOA as a successor company to OA was explicitly acknowledged by Greece in its letter to the Commission of 2 June 2005 in which it refers to NOA as being a '*successor company*' to OA for the purposes of recovery.

(182) The ECJ in its judgement in case C-415/2003 has also considered the transfer of assets to NOA which is the essential aspect of the restructuring. The court concluded[11] that the transfer of "*the assets of the company Olympic Airways free of all debts to the new company Olympic Airlines…was structured in such a way as to make it impossible, under national law, to recover the debts of the former company Olympic Airways from the new company Olympic Airlines*". It added that "*the operation created an obstacle to the effective implementation of Decision 2003/372* (the 2002 Decision) *and to the recovery of the aid by means of which the Greek State had supported the commercial activities of that company. The purpose of that decision, which aims to restore undistorted competition in the civil aviation sector, was thus seriously compromised"*. The ECJ has concluded therefore that the essence of the restructuring which was to artificially insulate the flying divisions of OA from what had happened before.

(183) It is therefore obvious that the restructuring of OA in 2003 whereby NOA was created, while it led to the creation of a separate legal entity, was done so as to avoid recovery following the 2002 decision and that NOA is a successor company to OA at least for the purposes of recovery of State aid arising prior to the splitting.

6.2 (ii) *Has NOA received state aid since its creation?*

(184) As has been concluded by the Commission's expert, since its creation NOA has lost money. In relation to the points raised in the opening of procedure, the Commission's experts have found that concerning the payments of 'spatosimo', NOA has made all required payments since its establishment; on the issue of ground-handling and maintenance services provided by OA to NOA the Commission does not have enough information to be able to take a view on whether these contain elements of state aid. With regard to NOA's tax and social security obligations the experts have found that except for some delayed payments (which have incurred penalties) NOA has met its obligations.

(185) Therefore with respect to its 'spatosimo', and its tax and social security obligations the Commission concludes that NOA has not received state aid since it came into being. However, during their examination of the company's books the expert found that in two respects NOA benefited from favourable terms from its suppliers.

(186) In the case of aircraft leases NOA sub-leases aircraft from OA, OAv and, in the case of four finance leases, directly from the Greek State. As the Commission's expert has shown in all cases, the sub-lease rates are lower than the main leases with the head lessors. In the case of the 4 finance leases the Greek State absorbs a loss of between

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EUR 250,000 and EUR 350,000 on each aircraft per month. In the case of the aircraft sub-leased by OA to NOA the difference between what NOA pays and what OA pays has meant that in 2004 OA has lost EUR37.6 million (or 55% of the lease costs).

(187) In examining the relationship between NOA and AIA, the Commission's experts came to the conclusion that by allowing the build-up of a EUR […][+] million trade creditor over the winter season and then converting it into an eight-month short-term loan to be paid over the summer season that this constituted providing NOA with seasonal working capital financing. This financing, together with continued tolerance of late payments, suggests that NOA is receiving treatment from AIA that would not be available to other airlines.

(188) In considering this favourable treatment the Commission can firstly conclude that the decision by the Hellenic authorities to sub-lease aircraft to NOA and to thereby absorb a loss of between EUR 250,000 and EUR 350,000 per aircraft per month is clearly a transfer of state resources from the State to NOA. This measure mitigates costs that NOA would otherwise have to pay. The measure is specific in that it is directed solely at NOA and it distorts or threatens to distort competition in that NOA operates in fully liberalised air transport market.

(189) It is settled case-law that no distinction is to be drawn between cases where aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid[12]. However, for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, first, be granted directly or indirectly through State resources[13] and, second, be imputable to the State[14].

(190) In relation to the actions taken by OA and AIA the Commission has therefore to decide if this action is imputable to the State. As previously discussed in paragraph 192 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 the measures were taken.

(191) In relation to the decision by OA to sublease its aircraft to NOA at prices significantly below the head-leases and by so doing to lose EUR37.6 million the Commission notes that the State held 100% of the shares of both OA and of NOA. In addition all the management and boards of both companies were appointed by the State. In these circumstances, it has to be concluded that OA and NOA were (and still are) under the control of the State. Greece was able directly and indirectly (as OA largest creditor) to exercise dominant influence over both undertakings. As such the decision by OA to sub-lease aircraft to NOA was not the act of an independent undertaking.

(192) In relation to AIA, notwithstanding Greece's insistence that it has no role to play in influencing the commercial behaviour of AIA, the Commission notes that the state owns 55% of the share capital of AIA and appoints 4 of its 9 directors. In deciding on

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[+] Covered by the obligation of professional secrecy

12 Case 78/76 *Steinike & Weinlig* v *Germany*, (1977) ECR 595, paragraph 21.

13 Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer*, (1993) ECR I-887, paragraph 19.

14 Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission*, (1988) ECR 219 paragraph 35.

imputability the ECJ[15] has indicated other criteria that can be used in determining an aid measure taken by a public undertaking is imputable to the State. These include, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains. In the present case although AIA is majority state-owned it is operated as a private enterprise independent of the Greek State in its day-to-day business (only 4 f its 9 directors are appointed by the State) and given that all debts owed by OA/NOA to AIA are repaid with interest and have been secured by mortgages on aircraft the Commission cannot conclude definitively that the actions of AIA are imputable to the State.

(193) Accordingly and for the reasons set out above, the Commission finds that the lease arrangements between OA and NOA distorts or threatens to distort competition as it is specific in that it favours one enterprise by freeing it from the liabilities that it would otherwise have to bear. The Commission also notes that the measures involved affect inter-state trade and distort or threaten to distort competition inside this market as they involve an Community air carrier (as set out in paragraph 193). The Commission therefore concludes that the lease arrangements whereby NOA leases aircraft either from OA or from the State constitute a grant of State aid to NOA for the purposes of Article 87(1) of the Treaty.

6.2 (iii) *What was the status of the cash 'pre-payment' from the special account provided for under Law 3185/2003, how was the cash disbursed and spent? Who has benefited from the cash disbursements?*

(194) In examining this payment the Commission can firstly reach the conclusion that the sum in question is a transfer of state resources (the money coming directly from the State budget and expressly provided for under the terms of Article 27 of Law 3185/2003) and is an individual measure as it is directed exclusively towards OA.

(195) It is the contention of the Hellenic authorities that the grant of EUR 130,312,459 to OA was the act of prudent investor. According to the applicable Community jurisprudence, the behaviour of the public investor has to be compared to that of a notional private investor who is guided by the possibilities of long term profitability[16]. A necessary capital increase to ensure the survival of a company which is experiencing temporary problems but which after taking appropriate restructuring measures is in a position to return to profitability is not necessarily an aid if a private investor would have reached the same conclusion. The ECJ has also indicated that there will not be aid if the capital increase is made on terms which would be acceptable for a private investor operating under normal market conditions[17].

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15 Case C-482/99 Commission v France (Stardust), (2002) ECR I-4397 paragraph 56

16 Case C-305/89 Italy v Commission (Alfa Romeo) (2002) ECR I-1603 paragraph 20

17 See joint cases C296/82 & C-318/82 (Leeuwarder Papierwarenfabriek), (1985) ECR 3727

(196) In the current situation at the time when the sum of EUR130,312,459 was advanced to OA, OA was already in a very difficult financial situation. It had been found by the Commission (s. the 2002 Decision) to have received illegal and incompatible state aid and recovery of this aid with interest had been ordered by the Commission decision. OA had also just been deprived of its flying divisions and had been saddled with most of the liabilities which would normally attach to these divisions. At the end of 2003 OA owed to the Greek State a total of EUR522 million in unpaid tax and social security liabilities. Given its financial situation, the Commission has to conclude that OA would have been manifestly unable to obtain a comparable cash advance from a private investor in the same situation. This is all the more the case when the 'investor' in the present case is also the largest creditor of OA and stands little realistic chance of recovering the sums that OA already owes it. 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[18]. On the contrary, a private creditor would have taken all legal steps to obtain payment of the arrears or the execution of its guarantees. The Commission cannot therefore agree with the contention of Greece that advancing the sum in question to OA was the act of a prudent investor.

(197) The Commission must then consider whether the sum of EUR130,312,459 can be considered to amount to a form of compensation to OA by the State for the assets which had been taken from OA and vested by the State in NOA as was the initial contention of Greece. In order to assess the validity of this argument the Commission has to examine the value of the assets taken from OA and transferred to NOA. According to the valuation carried out by the OA management the assets transferred to NOA amounted to EUR130,312,459. If this were the case there would be no State aid in the transfer of this amount to OA as no advantage would be conferred on OA.

(198) In this regard the Commission finds it significant that Olympic's own auditors (Deloitte & Touche) note in the annual accounts as of 31 December 2003 their reservation with respect to the valuations of assets retained and transferred as between OA and NOA. The auditors stated that in respect of goodwill, fixed assets at valuation and the debtors and creditors transferred from the component companies to NOA, they are not in a position to confirm the value of these items and therefore do not express an opinion on them.

(199) In their study carried out on behalf of the Commission, the Commission's expert has convincingly demonstrated that there was an overvaluation made of the assets that were transferred to NOA. To this end and on the instruction of the Commission the experts have themselves carried out a valuation of the assets transferred using accountancy techniques and standards which are accepted both in Greece and internationally. They have reached the conclusion that the value of the net assets transferred to NOA was not in the order of EUR 130 million but should rather be valued at approximately EUR 38 million. The Commission has carefully examined the data and methodology used by the experts and shares the analysis made by the experts in this respect. The Commission therefore concludes that the value of the assets transferred was overstated by approximately EUR91.5 million.

(200) Therefore and while a full audit of all the assets and liabilities would have to be carried out so as to obtain a fully accurate assessment of the amounts concerned the Commission can estimate that it is in the order of EUR91.5 million

18 Opinion of Advocate-General Mischo, case C-480/98, Magefesa, (2000) ECR I-8717 points 32 to 43,

(201) Having thus decided the Commission notes that the over-valuation is specific as it is expressly provides money directly to OA and confers an advantage on the company as it is to be used to pay for "*severance payments and remaining expenses for the retirement, in any way whatsoever ,of the employees, as well as the covering of the financial obligations of Olympic Airways and Olympic Aviation in the course of the transformation and liquidation procedure*"[19], in any way whatsoever a company in order to "cover its financial obligations". The Commission notes incidentally that this provision was interpreted widely and that the sum in question was used to pay for general OA operating costs (over EUR51 million of the sum advanced was used to pay for aircraft leases).

(202) The Commission also concludes that it distorts or threatens to distort competition and has an effect on inter-state trade as it involves a company which is in competition with other Community companies in particular since the entry into force of Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports20, where competition for ground handling is open in airports with an annual passenger threshold of 2 million passengers or 50,000 tonnes of freight. The Commission must therefore conclude that the amount by which the assets transferred to NOA has been overvalued which has been paid to OA amounts to a grant of state aid to OA within the meaning of Article 87(1) of the Treaty.

6.2(iv) *Has OA (OAS) received state aid since December 2002*?

(203) As has been demonstrated by the Commission's expert, since the date of the last Commission decision concerning OA (12 December 2002) and since the split from NOA, OA has received cash advances from the state and its tax and social security liabilities to the state have increased.

(204) In respect of the loan repayments on the ABN Amro loan of EUR36,945,357, the A340 finance lease payments of EUR 11,774,684 and the direct cash funding of EUR8.2 million to OA, it is clear that these cases involved direct transfers of state resources to OA by the State. It is also clear, for the reasons explained in point 7 of the present decision, that these measures are new unlawful aid measures, to the extent that they are not a mere execution of guarantees previously given by the Greek State. As has already been elaborated on in the examination of the 'advance' paid to OA, even if the State registers these amounts against OA with the tax authorities and they are recorded in OA's books as tax liabilities, the State stands little or no realistic chance of ever securing repayment of these amounts and as such cannot be said to have been acting in a rational or commercial manner when these payments were made.

(205) OA's (OAS's) difficult and deteriorating tax and social security situation has been previously described. OA's tax and social security liability at the end of 2002 was already large, at EUR273 million. This has continued to grow significantly over the period since then. The estimated liability at the end of 2004 is EUR627 million, meaning that in the period covered by the present decision that the liability of OA to the State has increased by EUR354 million.

(206) In relation to OA's mounting tax liabilities, it is the State itself through the tax administration which tolerates the constant deferral and non-payment of various taxes

19 Article 27(5)(b) of Law 3185/2003

20 OJ L272 of 25.10.1996.pp36-

and charges due by OA. With respect to social security contributions the body tasked with their collection (IKA) is a public body established by Greek Law[21], which has been made responsible, under State supervision for managing the social security system, and collecting mandatory social security contribution. It has the right[22] but not the obligation to enter into settlement agreements for late payments of debts. The ever increasing tax liability of OA to the state is therefore, clearly imputable to the State.

(207) The Commission then has to examine if this forbearance involves a transfer of State resources. Given that State aid includes not only positive benefits but measures that mitigate normal charges then this failure to act to enforce its debts on the part of Greece clearly involves such a transfer.

(208) Having established that a transfer of resources imputable to the state has taken place the Commission must determine if this aid distorts competition. The Commission finds that both grants of direct aid and the failure to act to collect outstanding debts on the part of the State give OA a significant commercial advantage over its competitors. The State does not act in a rational and commercial way vis-à-vis OA. There is accordingly a distortion of competition within a liberalised sector of the internal market as set out in paragraph 209. The Commission must therefore conclude that both the forbearance of the State concerning OA's unpaid and mounting tax and social security liabilities and the payments made by the State in place of OA amount state aid to OA within the meaning of Article 87(1) of the Treaty.

6.3 Compatibility of Aid

6.3. (i) Compatibility of aid granted to NOA

(209) Having reached the conclusion that NOA has received state aid since its creation, the Commission must then examine the measures in favour of NOA in the light of Articles 87 paragraphs (2) and (3) of the Treaty which provide for exemptions to the general rule of incompatibility set out in Article 87(1).

(210) The exemptions in Article 87(2) of the Treaty cannot apply in the present case because the aid measure does not have a social character and is not granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences nor are they granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(211) Further exemptions to the general prohibition on State aid are set out in Article 87(3). The exemptions in Articles 87(3)(b) and 87(3)(d) do not apply in this case because the does not promote the execution of an important project of common European interest or remedy a serious disturbance in the economy of a Member State nor does it promote culture and heritage conservation.

(212) Article 87(3)(a) and (c) of the 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).

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21 Law 1846/1951, article 11.

22 Law 2676/1999.

(213) With regard to the objectives of regional aid in relation to aviation services the Commission considers that they are normally met more easily through the imposition of PSOs. In the case of Greece these are imposed by the State on companies offering services between the Greek mainland and the islands as well as between islands and in some cases (so-called thin routes) they may be contracted out by the State to a service provider who receives compensation for their provision. The Commission considers that in general compensation for PSOs is necessary targeted support and provided that the operator is chosen on the basis of a transparent and non-discriminatory procedure and does not receive over compensation such State support does not generally give rise to issues of incompatible state aid. This had been the case in respect of the contracts operated by OAv. Under the terms of the restructuring these routes are currently operated by NOA as the 'successor' company. Having regard to the limited information at its disposal the Commission cannot exclude in relation to the manner in which the public service contracts have been transferred from OAv to NOA that the procedures provided for by Council Regulation 2408/92 of 23 July 1992on access for Community air carriers to intra-Community air routes[23] in respect of PSOs may not have been respected. In any event and in relation to the sums granted to NOA since its establishment Greece cannot avail of the derogation provided by Article 87(3)(a).

(214) 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 will have to examine whether this proviso can apply to the current situation. In carrying out this examination the Commission has to have regard to the applicable guidelines relating to State aid in the aviation sector [24] as well as the Community Guidelines on State aid for rescuing and restructuring firms in difficulty[25].

(215) With reference to the aid granted to NOA by means of the reduced cost of aircraft leases, the Commission refers once again to the 'aviation state aid guidelines. The guidelines provide in paragraph 14 that direct aid to cover operational losses is in general not compatible with the common market and may not benefit from an exemption from the general prohibition of State aid. The guidelines go on to specify that direct operational subsidisation of air routes can only be accepted in the case of PSOs and of aid of a social character granted to individual consumers.

(216) In the present case the aid granted to NOA either directly by the Greek State through its leases or indirectly via OA cannot fall within either of the categories of acceptable operational subsidisation of air routes. It is also settled law[26] in respect to state aid that new aid cannot be compatible with the common market as long as aid which has previously held to be unlawful has not been repaid, since the combined effects of all the aid would be to significantly distort competition in the common market. Since for the above-mentioned reasons NOA is the successor of OA's flight division and therefore a successor for the purposes of recovery, new aid to NOA cannot be compatible as long as this aid remains un-recovered. Additionally, the grant of aid is

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23 OJ L 240, 24.08.1992 p.8

24 "Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector" (OJ C 350, 10.12.94, p 5)

25 OJ C 288, 9.10.1999, p.2

26 Case C-355/95 Textilwerke Deggendorf GmbH (TWD) v Commission (1995) ECR II-2265

an infringement of previous commitments given by Greece not to grant any further aid (Article 1(e) of the 1994 Decision) to OA and by extension to successor companies.

(217) Although the Hellenic authorities have not argued that the sums received by NOA since its establishment arise as a result of the restructuring and even though the Commission has concluded that NOA is a successor company to OA at least for the purposes of recovery arising from State aid prior to the scission, for the sake of completeness the Commission will examine the aid granted to NOA additionally in the light of the Rescue and Restructuring Guidelines 1999. Paragraph 7 of these guidelines provides that a newly created firm is not eligible for rescue or restructuring aid even if its financial position is insecure, therefore this aid cannot be covered by those guidelines.

(218) Accordingly the aid granted to NOA since its establishment does 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 NOA by means of the discounted sub-leases concluded with NOA.

6.3(ii) (a) Compatibility of aid granted to OA

(219) Having concluded that the amount by which the assets of NOA were over-valued which was then paid by the Greek State to OA amounts to State aid, the Commission must examine the measure in the light of Articles 87 paragraphs (2) and (3) of the treaty which provide for exemptions to the general rule of incompatibility set out in Article 87(1).

(220) The exemptions in Article 87(2) of the Treaty cannot apply in the present case because the aid measure does not have a social character and is not granted to individual consumers, nor does it make good the damage caused by natural disasters or exceptional occurrences nor are they granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(221) Further exemptions to the general prohibition on State aid are set out in Article 87(3). The exemptions in Articles 87(3)(b) and 87(3)(d) do not apply in this case because the does not promote the execution of an important project of common European interest or remedy a serious disturbance in the economy of a Member State nor does it promote culture and heritage conservation.

(222) 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. Although Greece is a region falling entirely within the scope of Article 87(3)(a), this provision cannot apply for the reasons set out in paragraph 211.

(223) 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 Hellenic authorities have requested the Commission in the event that it concludes that the prepayment is not the action of a market economy investor and therefore has to be seen as State aid within the meaning of Article 87(1) of the Treaty to examine the measure to see if it can fall to be considered as rescue aid.

6.3.(ii)(b) *Possible Rescue aid*

(224) In this respect, as the sum in question was disbursed between December 2003 and May 2004 the applicable community framework for deciding on compatibility is the Community guidelines for the State aid for the Rescue and Restructuring of Firms in Difficulty of 1999. According to paragraph 104 of the 2004 Rescue and Restructuring Guidelines[27], the 1999 guidelines are applicable in respect of measures where the aid was granted prior to 10 October 2004.

6.3.(ii)(c) Applicability of the Rescue and restructuring guidelines 1999

(225) Paragraph 4 of the 1999 guidelines states that there is not a Community definition of a company in difficulty, and adds that "*the Commission regards a firm as being in difficulty when it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term*".

(226) Subsequently the guidelines clarify that "*a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines in the following circumstances (a) in the case of a limited liability 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*".

(227) In paragraph 6 it is also stated that "*The usual signs of a firm in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value*".

(228) The Commission notes that OA is a chronically indebted company which has already lost a significant part of its authorised capital. The Commission notes that OA's debt to the Greek State for tax and social security went from EUR273 million at the end of 2002 to EUR522 million at the end of 2003 when "pre-payment" was paid to it. As has been indicated the company has not been able to secure any source of commercial finance and stands little realistic possibility of being able to pay its debts to the State. The Commission can therefore conclude that OA is a company in difficulty within the meaning of the 1999 Rescue and Restructuring Guidelines.

6.3.(ii)(d) Conditions for the authorisation of rescue aid

(229) The Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty 1999 lay down five cumulative conditions under which rescue aid can be granted. The Commission would have to verify that all these conditions have been complied with in the present case.

(230) Firstly, "*the rescue aid must consist of liquidity support in the form of loan guarantees or loans, in both cases the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms and in particular the reference rates adopted by the Commission, any loan must be reimbursed and any guarantee must come to an end with in a period of not more than six months after the disbursement of the first instalment to the firm*".

[27] OJ C 244 1.10.2004 p. 2)

(231) In the present case the rescue aid takes the form of a cash grant (described as a 'pre-payment') in the sum of EUR130,312,450 granted by Greece to OA and OAv ostensibly to assist these two companies in their restructuring following the scission of the flight activities of both and the creation of NOA. In this case no loan interest is to be charged to OA and OAv and it is intended that the sum of EUR130,312,450 will be paid back to the State directly from the sales proceeds of the privatisation of NOA a company which Greece insists is outside the ownership of the OAG. If the sale of NOA does not generate sufficient funds to reimburse this 'pre-payment' then other the assets of OA will be sold to make up the difference. In these circumstances it is not possible to conclude that the first condition of the rescue and restructuring guidelines 1999 has been therefore satisfied.

(232) Secondly, the aid must be "*linked to loans that are to be reimbursed over a period of not more than twelve months after disbursement of the last instalment to the firm*". In the present case as indicated above the sum in question cannot properly be described as a loan to OA and OAv repayment being contingent on the sale of another company. The sum of EUR130,312,450 was disbursed in tranches pending on the needs of OA and OAv over a period from 24 December 2003 to 13 May 2004. To date, over a year later, no reimbursement of this amount has been carried out so the second condition cannot be satisfied. Given that the measure in question has failed to satisfy the first two conditions further examination of the other three conditions is redundant.

(233) In the present case the Commission notes that the grant to OA in 2003 is also in contravention of previous commitments given by Greece not to grant any further aid (Article 1(e) of the 1994 Decision) to OA. The Commission considers that the measure in question does not meet the conditions as required by the rescue and restructuring guidelines to be considered as rescue aid.

(234) The Commission must also take into consideration the grants totalling almost EUR57 million made by the Greek state to OA and the forbearance on the part of the State towards OA which has seen OA's tax and social security liabilities rise from EUR273 million at the end of 2002 when the restructuring took place to EUR627 million at the end of 2004 which it has previously decided amount to grants of State aid. Having regard the fact that the exceptions provided for in Articles 87(2) and 87(3) (a)(b) & (d) cannot apply to OA (see paragraphs 219 to 221), the Commission has to assess if the derogation provided by Article 87(3)(c) of the Treaty can apply in this case.

(235) As previously mentioned any new aid to OA is an infringement of previous commitments not to grant any further aid (Article 1(e) of the 1994 Decision). More importantly, the grant of the new unlawful aid has to be seen 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 Aviation State aid guidelines and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty. Additionally the Commission notes the jurisprudence of the Court[28] according to which that new aid cannot be compatible with the common market as long as aid which has previously held to be unlawful has not been repaid. 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).

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[28] Case C-355/95 as above,

(236) Accordingly the Commission concludes that by overvaluing the assets transferred to NOA that Greece has granted illegal and incompatible state aid to OA in the amount of this over valuation. It also finds that the grants totalling almost EUR57 million to OA and the Greek state's tolerance of late and non-payment of OA tax and social security bill amounts to illegal and incompatible state aid.

7 LEGITIMATE EXPECTATION AND STATE GUARANTEES

(237) In relation to the 4 finance loans in respect of the A340/300 aircraft and also for the loan from ABN Amro several repayments of which were made by Greece the guarantees for these loans from the state to OA predate the 2002 decision. It is the contention of Greece that, as the 2002 Decision did not explicitly call for the suspension or termination of guarantees granted by the Greek State to OA after 1998, this implicitly means that the Commission accepted their continuation and any payments made under them. The Commission cannot accept this assertion for the following reasons.

(238) The Commission is of the opinion that the operative parts of the 2002 Decision are sufficient clear and unambiguous, "*Article 1: The restructuring aid granted by Greece to Olympic Airways in the form of:…(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;…is considered to be incompatible with the common market within the meaning of Article 87(1) of the Treaty…*" that it should not have given rise to any confusion as regards the incompatibility of these guarantees.

(239) In relation to the obligation to recover, the 2002 Decision distinguished between the period 1994-1998, and 1998-2002. In accordance with Article 14(1) of Regulation (EC) 659/1999[29] and in relation to the period 1994-1998, the Commission decided that no recovery was necessary for aid granted before 14 August 1998. However, the guarantees at stake were granted by the State well after that date (in October 1999 for the four aircrafts and in February 2001 for the ABN Amro loan). In any event the Commission recalls that, for the mere execution of a previously given State guarantee not to constitute the granting of a new aid, the measures at stake must fully respect the conditions of the original guarantee (like the identity of the beneficiary, the deadlines, the amount covered, the need of a previous declaration of bankruptcy, etc.). If a Member State makes a payment in relation to a guaranteed loan under conditions other than those initially agreed at the granting stage, then the Commission will regard this payment as creating a new aid which has to be notified under Article 88(3)[30].

(240) Precisely, it appears that the payments recently made by the Greek government in respect of the abovementioned loans could not respect the conditions provided in the original guarantees as described by the Greek authorities at the time. For instance:

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[29] "The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law"

[30] (see Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, *Official Journal C 71, 11.03.2000, pages 14-18*)

- As regards the ABN Amro loan, the Government directly paid in the instalments (around 36 Millions €) in place of the undertaking without a previous default of payment and without a previous legal declaration of bankruptcy or insolvency. The fact that the Government subsequently asked the company to pay back shows that the payment was not a mere execution of a previously granted guarantee.

- The same considerations apply to the loans relating to the aircraft finance lease payments and to the direct cash funding of around 11 and 8 Millions €.

- Moreover, in the cases relating to the four aircrafts the loan contracts were formally modified (*novatio*) to replace the undertaking by the State as beneficiary of the loans. These very substantial changes predated the payments at stake.

- As regards the advance of 8 Millions € in view of the modification of two of the lease contracts this was clearly a measure not envisaged in the original guarantee.

(241) To the extent that there are changes and that these were never notified to the Commission nor approved by the Commission these payments constitute clearly new unlawful aid. The Commission is however ready to examine during the phase of execution of the present decision any further element that may be submitted by the Greek authorities concerning the payments of around 36 Millions € of the instalments of the ABN Amro loan and/or the payments of around 11 Millions of instalments of the lease contract related to the acquisition of the four aircrafts and the compatibility or not of part or all of these payments with the conditions of the original guarantees.

8 DECISION

HAS ADOPTED THIS DECISION:

Article 1

1. The acceptance by Olympic Airways and by Greece of aircraft sub-lease payments from Olympic Airlines which are lower than the amounts paid by way of head-leases, with the resulting losses borne by Olympic Airways in the order of EUR37 million in 2004 and by the State up to May 2005 in the order of EUR2.75 million constitutes illegal state aid to Olympic Airlines which is incompatible with the Treaty.

2. Greece has granted illegal and incompatible state aid to Olympic Airways in the amount by which it overvalued the assets of Olympic Airlines at the time when Olympic Airlines was created; this amount is provisionally estimated by the Commission to be approximately EUR91.5 million

3. The grant by the Greek State to Olympic Airways of sums totalling approximately EUR 8 million , and the additional payment by the Greek State of certain bank loan and finance lease instalments in place of Olympic Airways, to the extent that the latter do not constitute the mere execution of the guarantees referred to in Article 1.b) of decision 2003/372/CE, and of the related conditions, between May 2004 and March 2005 constitutes illegal state aid to Olympic Airways which is incompatible with the Treaty.

4. The continued forbearance of the Greek State towards Olympic Airways in relation to its tax and social security debts to the State of some EUR354 million between December 2002 and December 2004 constitutes illegal state aid to Olympic Airways which is incompatible with the Treaty.

Article 2

1. Greece shall recover from the beneficiaries thereof the aid referred to in Article 1.

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 3

Greece shall immediately suspend all further payments of aid to Olympic Airways and Olympic Airlines.

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 Articles 2 and 3.

Article 5

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 04/07/2006

For the Commission

Jacques Barrot
Vice-President of the Commission

DECISION

The Commission has therefore decided, on the basis of Articles 253 and 287 of the EC Treaty and on the basis of Regulation 659/1999, as interpreted in the Commission Communication of 1 December 2003 on professional secrecy in State aid decisions, to publish the text of the decision concerning State aid found to have been granted to Olympic Airways and Olympic Airlines in case C11/04 deleting only those parts of the text which appear between brackets ([…]+) as indicated above.

In the even that the Greek authorities wish to submit additional arguments with regard to this publication, you are requested to inform the Commission thereof within 15 working days of receipt of this letter. If the commission does not receive a duly motivated request in this regard within the prescribed time limit, it will consider that you agree to the proposed text and to its transmission to third parties and its publication in the authentic language on its website http://europa.eu.int/comm/secretariat_general/sgb/state_aids/.

Your request should be sent by registered letter or fax to

European Commission
Directorate General for Energy and Transport
Direction A – General Affairs
B-1049 Brussels
Fax : ++ 32 2 26 41 04

For the Commission

Jacques Barrot
Vice-President of the Commission