JUDGMENT OF THE COURT

5 November 2002 *

In Case C-466/98,

Commission of the European Communities, represented by F. Benyon, acting as Agent, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, acting as Agent, assisted by D. Anderson QC, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

Kingdom of the Netherlands, represented by M.A. Fierstra and J. van Bakel, acting as Agents,

intervener,

APPLICATION for a declaration that, by concluding and applying an Air Services Agreement signed on 23 July 1977 with the United States of America which provides for the revocation, suspension or limitation of traffic rights in cases where air carriers designated by the United Kingdom of Great Britain and Northern Ireland are not owned by the United Kingdom or United Kingdom nationals, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 52 of the EC Treaty (now, after amendment, Article 43 EC),

THE COURT,

composed of: J.-P. Puissochet, President of the Sixth Chamber, acting for the President, R. Schintgen (President of Chamber), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris (Rapporteur), F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: H. von Holstein, Deputy Registrar, and D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 May 2001, during which the Commission was represented by F. Benyon, the United Kingdom by J.E. Collins, assisted by D. Anderson, and the Kingdom of the Netherlands by J. van Bakel, H.G. Sevenster and J. van Haersolte, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 December 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by concluding and applying an Air Services Agreement signed on 23 July 1977 with the United States of America which provides for the revocation, suspension or limitation of traffic rights in cases where air carriers designated by the United Kingdom of Great Britain and Northern Ireland are not owned by the United Kingdom or United Kingdom nationals, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2 By order of the President of the Court of 8 July 1999, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the United Kingdom.

Background to the dispute

3 Towards the end of the Second World War or shortly thereafter, several States which subsequently became Members of the Community, including the United Kingdom, concluded bilateral agreements on air transport with the United States of America.

4 One such bilateral agreement, the first of the Bermuda Agreements (hereinafter 'the Bermuda I Agreement'), was concluded between the United Kingdom and the United States in 1946. Under Article 6 of that agreement, '[e]ach Contracting Party reserves the right to withhold or revoke the exercise of the rights specified in the Annex to this Agreement by a carrier designated by the other Contracting Party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of either Contracting Party...'.

5 Subsequently, another agreement, the second of the Bermuda Agreements (hereinafter 'the Bermuda II Agreement'), replaced the Bermuda I Agreement with effect from 23 July 1977, the date upon which it was signed and entered into force. Article 5 of the Bermuda II Agreement provides:

'(1) Each Contracting Party shall have the right to revoke, suspend, limit or impose conditions on the operating authorisations or technical permissions of an airline designated by the other Contracting Party where:

(a) substantial ownership and effective control of that airline are not vested in the Contracting Party designating the airline or in nationals of such Contracting Party;

...

(2) ... such rights shall be exercised only after consultation with the other Contracting Party.'

6 Furthermore, according to Article 3(6) of the Bermuda II Agreement, each Contracting Party is required to grant the appropriate operating authorisations and technical permissions to an airline when certain conditions are satisfied, including the condition that substantial ownership and effective control of that airline be vested in the Contracting Party designating the airline or in its nationals.

7 The documents before the Court show that, in 1992, the United States of America took the initiative of offering to individual European States the possibility of concluding a bilateral 'open skies' agreement. In 1993 and 1994, the United States of America strengthened its efforts to conclude such agreements with the largest possible number of European States.

8 In a letter of 17 November 1994, addressed to the Member States, the Commission drew their attention to the negative effects that such bilateral agreements could have on the Community and stated its position to the effect that that type of agreement was likely to affect internal Community legislation. It added that negotiation of such agreements could be carried out effectively, and in a legally valid manner, only at Community level.

9 In the light of that correspondence, by letter of 20 April 1995, the Commission sought an assurance from the Government of the United Kingdom that it would not negotiate, initial, conclude or ratify a bilateral agreement with the United States of America. However, the United Kingdom continued to negotiate an agreement with the United States and concluded that agreement on 5 June 1995.

Facts and pre-litigation procedure

10 On 17 July 1995, the Commission sent a letter of formal notice to the United Kingdom, stating *inter alia* that, as far as it was aware, the traffic rights accorded to the United Kingdom by the United States of America under their agreement were to be granted solely on the basis of the nationality of the carrier. According to the Commission, that constituted an infringement of Article 52 of the EC Treaty because, under the terms of that agreement, amongst the air carriers which had obtained a licence from the United Kingdom in accordance with Council Regulation (EEC) No 2407/92 on licensing of air carriers (OJ 1992 L 240, p. 1), those established in the United Kingdom which were owned and controlled by nationals of another Member State would have traffic rights in the United States of America refused to them, whereas those owned and controlled by United Kingdom nationals would be granted those rights.

11 The United Kingdom replied to the Commission's letter of formal notice by letter of 13 September 1995. It is apparent from that letter that the United Kingdom

and the United States of America agreed to amend the Bermuda II Agreement by the agreement concluded on 5 June 1995. In relation to Article 52 of the Treaty, the United Kingdom indicated that the clause in the Bermuda II Agreement on the ownership and control of air carriers had not been amended by the agreement of 5 June 1995. In its view, that provision did not prohibit the designation by the United Kingdom authorities of air carriers which were not owned or controlled by United Kingdom nationals, but only gave the United States of America the opportunity to refuse to accept such a designation whilst allowing the United Kingdom to seek consultations in the event of such a refusal.

12 In reply, the Commission sent the United Kingdom a reasoned opinion on 16 March 1998, in which it stated that, by concluding the Bermuda II Agreement with the United States of America and by applying that agreement, which provides for the revocation, suspension or limitation of traffic rights in cases where air carriers designated by the United Kingdom are not owned by the United Kingdom or United Kingdom nationals, the United Kingdom had failed to fulfil its obligations under Article 52 of the Treaty. It called upon the United Kingdom to comply with the reasoned opinion within two months of notification thereof.

13 The United Kingdom replied, by letter of 19 June 1998, that the disputed provision of the Bermuda II Agreement merely repeated a clause in the Bermuda I Agreement, which was concluded before the accession of the United Kingdom to the European Communities. In its view, therefore, the disputed right enjoyed by the United States of America under the Bermuda II Agreement had its origin in the Bermuda I Agreement and was maintained by virtue of Article 234 of the EC Treaty (now, after amendment, Article 307 EC).

14 Since it was not convinced by the United Kingdom's arguments, the Commission brought the present action.

The action

15 In its action, the Commission charges the United Kingdom with having infringed its obligations under Article 52 of the Treaty by concluding and applying the Bermuda II Agreement, which includes the abovementioned clause concerning the ownership and control of air carriers.

16 In its defence, the United Kingdom begins by arguing that the right granted to the United States of America to revoke, suspend or limit traffic rights in cases where air carriers designated by the United Kingdom are not owned by the latter or its nationals is covered and therefore maintained by Article 234 of the Treaty. It then contends that Article 52 of the Treaty does not apply in this case or, if it does, that that article has not been infringed. Finally, it argues that the clause on the ownership and control of air carriers is, in any event, justified under Article 56 of the EC Treaty (now, after amendment, Article 46 EC).

The applicability of Article 234 of the Treaty

Arguments of the parties

17 The United Kingdom submits that the protection afforded by Article 234 of the Treaty is not limited to agreements which were concluded by Member States before the Treaty entered into force in their territory, but extends to the rights and obligations arising from such agreements. According to the United Kingdom, the question whether a pre-accession agreement has been amended or even

replaced since the accession of the Member State concerned to the Community is of only secondary importance. Thus, Article 234 of the Treaty does not apply to rights and obligations contained in an agreement after the expiry of the latter, save in circumstances where substantially similar rights and obligations are carried over, without interruption, into a new agreement.

18 That, the United Kingdom submits, is the case here. Although the Bermuda II Agreement was concluded in 1977, four years after the EEC Treaty entered into force in the United Kingdom, the right granted to the United States by Article 5 of that agreement was originally conferred in relation to scheduled services by Article 6 of the Bermuda I Agreement and has not, in substance, changed. Even though their wording is not in all respects the same, reflecting the different structure of the two Bermuda agreements, Article 6 of the Bermuda I Agreement and Article 5 of the Bermuda II Agreement are in substance identical in their application to scheduled air services, which illustrates the continuity of the right in question between the two agreements. Although there is a substantive difference between the effects of the Bermuda I Agreement and those of the Bermuda II Agreement, in that the latter also applies to charter flights, that is not a difference in principle between the two agreements but an amendment made in order to adapt to the growing importance of charter flights.

19 The Netherlands Government, which also argues that Article 234 of the Treaty applies in this case, submits that the amendments that the United Kingdom made to the Bermuda II Agreement by the agreement of 5 June 1995 cannot be considered to be a new agreement, because it is apparent that only the amendments to Annex I to the Bermuda II Agreement in regard to traffic rights are substantial amendments.

20 The Commission disputes the United Kingdom's line of argument. It maintains that Article 234 of the Treaty applies only to agreements concluded, in the case of the United Kingdom, before its accession to the Community in 1973, whereas the

Bermuda II Agreement was concluded later, namely in 1977. According to the Commission, Article 234 must, as an exception to the Treaty provisions, be interpreted strictly. In particular, it does not follow from that provision that it must apply to the rights and obligations which formed part of agreements in force at a given moment, without taking account of the fact that those agreements have since expired. Even if those rights and obligations are repeated in another agreement, that cannot justify the claim that the initial agreement is in some way perpetuated.

21 In this case, the final recital in the preamble to the Bermuda II Agreement clearly states that that agreement was concluded 'for the purpose of replacing' the Bermuda I Agreement and therefore any possible application of Article 234 of the Treaty disappeared along with the Bermuda I Agreement. Consequently, the Commission argues, it is impossible to bring within that article a clause of the Bermuda I Agreement the formulation of which, moreover, was altered when introduced into the Bermuda II Agreement.

Findings of the Court

22 The first paragraph of Article 234 of the Treaty provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States, on the one hand, and one or more non-member countries, on the other, are not to be affected by the provisions of the Treaty. However, the second paragraph of that article requires Member States to take all appropriate steps to eliminate any incompatibilities between such agreements and the Treaty.

23 Article 234 of the Treaty is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting application of the Treaty (Case 812/79 *Attorney General* v *Burgoa* [1980] ECR 2787, paragraph 6; Case C-158/91 *Levy* [1993] ECR I-4287, paragraph 11; Case C-62/98 *Commission* v *Portugal* [2000] ECR I-5171, paragraph 43).

24 As is clear from paragraph 8 of the judgment in *Burgoa*, the purpose of the first paragraph of Article 234 of the Treaty is to make it clear, in accordance with the principles of international law [see, in that connection, Article 30(4)(b) of the Convention on the Law of Treaties signed in Vienna on 23 May 1969] that application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder.

25 According to Article 5 of the Act concerning the conditions of accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ, English Special Edition 1972 (27 March)), Article 234 of the Treaty applies to agreements concluded by the United Kingdom before its accession, that is to say before 1 January 1973.

26 However, the rights and obligations which flow for the United States of America and the United Kingdom respectively from the clause on the ownership and control of air carriers arise, not from an agreement before, but from an agreement after the accession of the United Kingdom to the European Communities, namely the Bermuda II Agreement, which was concluded in 1977.

27 As a result, Article 234 of the Treaty cannot apply in this case.

28 That finding cannot be called into question by the fact that a clause drafted in similar terms already appeared in the Bermuda I Agreement, which, having been concluded before the accession of the United Kingdom to the European Communities, remained in force until 1977.

29 As the final recital in its preamble states, the Bermuda II Agreement was concluded 'for the purpose of replacing' the Bermuda I Agreement, in particular in order to take into account the development of traffic rights between the Contracting Parties. It thus gave rise to new rights and obligations between those parties. In those circumstances, it is not possible to attach to the Bermuda I Agreement the rights and obligations which, for the United Kingdom and the United States of America, have flowed from the clause in the Bermuda II Agreement concerning the ownership and control of air carriers since the entry into force of that latter agreement.

30 It is therefore necessary to consider whether, as the Commission maintains, the content of that clause infringes Article 52 of the Treaty.

Infringement of Article 52 of the Treaty

Arguments of the parties

31 The Commission submits that, unlike Article 59 of the EC Treaty (now, after amendment, Article 49 EC), on the freedom to provide services within the Community, application of which to the transport sector was expressly excluded by Article 61 of the EC Treaty (now, after amendment, Article 51 EC), application of Article 52 of the Treaty is neither suspended nor excluded in relation to that sector. Article 52 applies in all sectors, including air transport, and, as a basic provision of the Treaty, also applies to the other areas falling within the competence of Member States (Case C-221/89 *Factortame and Others* [1991] ECR I-3905; Case C-151/96 *Commission* v *Ireland* [1997] ECR I-3327; Case C-336/96 *Gilly* [1998] ECR I-2793; Case C-274/96 *Bickel and Franz* [1998] ECR I-7637 and Case C-212/97 *Centros* [1999] ECR I-1459).

32 In this case, the Commission argues, Article 5 of the Bermuda II Agreement is contrary to Article 52 of the Treaty in that it permits the United States of America to refuse to issue operating authorisations or technical permissions to airlines designated by the United Kingdom but of which a substantial part of the ownership and effective control is not vested in the United Kingdom or United Kingdom nationals, or to revoke, suspend or limit operating authorisations or technical permissions already granted to such airlines. Under Article 5 of that agreement, an airline owned or controlled by a Member State other than the United Kingdom or by nationals of such a Member State, established in the United Kingdom, is prevented from receiving the same treatment as that reserved for airlines owned and controlled by the United Kingdom or by United Kingdom nationals.

33 Contrary to what the United Kingdom maintains, the conduct of the United States of America is not relevant in this action, since infringement of Article 52 of the Treaty consists in the granting by the United Kingdom to the United States of America of the right contained in Article 5 of the Bermuda II Agreement which it negotiated and concluded.

34 The United Kingdom submits, to begin with, that Article 52 of the Treaty cannot cover a type of trade with non-member countries, namely air transport outside the Community, in respect of which the Community has never exercised a legislative power. Moreover, the only economic activity which has the potential to be affected by Article 5 of the Bermuda II Agreement is largely located outside the Community.

35 It then maintains that, even if Article 52 of the Treaty were applicable, the United Kingdom has not in any way infringed it. First, Article 5 of the Bermuda II Agreement grants the United Kingdom no power to discriminate in any way against other Community airlines on the basis of their ownership or control, or in relation to their establishment in the United Kingdom or their designation. Second, the power to refuse traffic rights to airlines not controlled or owned by United Kingdom nationals is a sovereign choice of the United States of America, which the United Kingdom is in no position to influence or prevent. The power of

the United States of America to discriminate in that way does not originate in the Bermuda I and II Agreements, so that the United Kingdom cannot be held responsible for the signature and application of an agreement permitting that discrimination. Possible discrimination against Community nationals by the authorities of a non-member country lies outside the categories of mischief which Article 52 of the Treaty was designed to prohibit.

36 At the hearing, the United Kingdom relied in that respect on the judgment in Case C-307/97 *Saint-Gobain* v *Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, paragraphs 59 and 60, which shows, in its submission, that, although Article 52 of the Treaty may require a Member State to amend its legislation unilaterally so as not to discriminate against an undertaking of another Member State established in its territory, that provision cannot require it to amend agreements already concluded with non-member countries in order to impose new obligations upon them. This, the United Kingdom submits, is what the Commission is asking it to do in this case in relation to authorisations issued by the United States of America, which, moreover, concern the use of the United States' own airspace.

37 Finally, the United Kingdom submits that the Commission has not given any example of a Community airline that has been harmed by the application of the clause concerning the ownership and control of air carriers.

38 The Netherlands Government also contends that there has been no infringement of Article 52 of the Treaty by the United Kingdom.

Findings of the Court

39 As regards the applicability of Article 52 of the Treaty in this case, it should be pointed out that that provision, which the United Kingdom is charged with infringing, applies in the field of air transport.

40 Whereas Article 61 of the EC Treaty (now, after amendment, Article 51 EC) precludes the Treaty provisions on the freedom to provide services from applying to transport services, the latter being governed by the provisions of the title concerning transport, there is no article in the Treaty which precludes its provisions on freedom of establishment from applying to transport.

41 It is to be observed, next, that the application of Article 52 of the Treaty in a given case depends, not on the question whether the Community has legislated in the area concerned by the business which is carried on, but on the question whether the situation under consideration is governed by Community law. Even if a matter falls within the power of the Member States, the fact remains that the latter must exercise that power consistently with Community law (*Factortame and Others*, paragraph 14; Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 25; Case C-264/96 *ICI* v *Colmer* [1998] ECR I-4695, paragraph 19).

42 Consequently, the claim by the United Kingdom that the Community has not legislated on air transport outside the Community, even if substantiated, is not capable of rendering Article 52 of the Treaty inapplicable in that sector.

43 The same applies to the United Kingdom's claim that the only economic activity capable of being affected by Article 5 of the Bermuda II Agreement is largely located outside the Community. All companies established in a Member State within the meaning of Article 52 of the Treaty are covered by that provision, even if the subject-matter of their business in that State consists in services directed towards non-member countries.

44 As regards the question whether the United Kingdom has infringed Article 52 of the Treaty, it should be borne in mind that, under that article, freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58 of the EC Treaty (now the second paragraph of Article 48 EC) under the conditions laid down for its own nationals by the legislation of the Member State in which establishment is effected.

45 Articles 52 and 58 of the Treaty thus guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State (*Saint-Gobain*, paragraph 35), both as regards access to an occupational activity on first establishment and as regards the exercise of that activity by the person established in the host Member State.

46 The Court has thus held that the principle of national treatment requires a Member State which is a party to a bilateral international treaty with a non-member country for the avoidance of double taxation to grant to permanent establishments of companies resident in another Member State the advantages provided for by that treaty on the same conditions as those which apply to companies resident in the Member State that is party to the treaty (see *Saint-Gobain*, paragraph 59, and judgment of 15 January 2002 in Case C-55/00 *Gottardo* v *INPS* [2002] ECR I-413, paragraph 32).

47 In this case, Article 5 of the Bermuda II Agreement permits the United States of America, *inter alia*, to revoke, suspend or limit the operating authorisations or technical permissions of an airline designated by the United Kingdom but of which a substantial part of the ownership and effective control is not vested in that Member State or its nationals.

48 There can be no doubt that airlines established in the United Kingdom of which a substantial part of the ownership and effective control is vested either in a Member State other than the United Kingdom or in nationals of such a Member State ('Community airlines') are capable of being affected by that clause.

49 By contrast, it is clear from Article 3(6) of the Bermuda II Agreement that the United States of America is in principle under an obligation to grant the appropriate operating authorisations and the required technical permissions to airlines of which a substantial part of the ownership and effective control is vested in the United Kingdom or its nationals ('United Kingdom airlines').

50 It follows that Community airlines may always be excluded from the benefit of the Bermuda II Agreement, while that benefit is assured to United Kingdom airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the United Kingdom, accords to its own nationals.

51 Contrary to what the United Kingdom maintains, the direct source of that discrimination is not the possible conduct of the United States of America but Article 5 of the Bermuda II Agreement, which specifically acknowledges the right of the United States of America to act in that way.

52 Consequently, by concluding and applying that agreement, the United Kingdom has failed to fulfil its obligations under Article 52 of the Treaty.

53 That finding cannot be disturbed by the argument which the United Kingdom derives from the Court's reasoning in paragraphs 59 and 60 of the *Saint-Gobain* judgment.

54 In those paragraphs, the Court merely held that the extension to permanent establishments of companies having their seat in a Member State other than the Federal Republic of Germany of a tax advantage provided for by a bilateral international agreement concluded by the Federal Republic of Germany with a non-member country could be decided upon unilaterally by the former without in any way affecting the rights of the non-member country arising from that agreement and without imposing any new obligations on that non-member country. That does not mean, however, that, where the infringement of Community law results directly from a provision of a bilateral international agreement concluded by a Member State after its accession to the Community, the Court is prevented from holding that that infringement exists so as not to compromise the rights which non-member countries derive from the very provision which infringes Community law.

Justification under Article 56 of the Treaty

Arguments of the parties

55 The United Kingdom submits that, even if there was discrimination prima facie contrary to Article 52 of the Treaty, it is justified on grounds of public policy under Article 56 of the Treaty. In particular, the United Kingdom asserts a

public-policy interest in retaining the right to revoke, suspend, limit or impose conditions on the operating authorisations or technical permissions of airlines designated by the United States of America but owned and effectively controlled by other non-member countries or their nationals. If the Commission's view were to be accepted, Member States would lose their power to restrict the access of any airline which the United States of America chose to designate. The implications of such a loss of power go beyond the purely economic aspects and encompass foreign policy, safety and security considerations.

56 The Commission contends that the public-policy exception in Article 56 of the Treaty is a derogation from a fundamental freedom and must therefore be construed narrowly (see Case 79/85 *Segers* [1986] ECR 2375). According to the Commission, that exception may never be relied on in order to pursue economic aims (Case 352/85 *Bond van Adverteerders and Others* v *Netherlands State* [1988] ECR 2085). Moreover, the Commission maintains that in the light of the provisions of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), which require public-policy considerations to relate to the conduct of a particular individual and not to be based simply on general conduct, it is not clear how Article 5 of the Bermuda II Agreement, which discriminates against an entire class of operators, can be justified as a measure of public policy under Article 56 of the Treaty.

Findings of the Court

57 It should be recalled that, according to settled case-law, recourse to justification on grounds of public policy under Article 56 of the Treaty presupposes the need to maintain a discriminatory measure in order to deal with a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see, to that effect, Case 30/77 *R* v *Bouchereau* [1977] ECR I-1999, paragraph

35; Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 46; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 21). It follows that there must be a direct link between that threat, which must, moreover, be current, and the discriminatory measure adopted to deal with it (see, to that effect, Case 352/85 *Bond van Adverteerders and Others*, paragraph 36; and *Calfa*, paragraph 24).

58 In this case, Article 5 of the Bermuda II Agreement does not limit the power to refuse operating authorisations or the necessary technical permissions to an airline designated by the other party solely to circumstances where that airline represents a threat to the public policy of the party granting those authorisations and permissions.

59 In any event, there is no direct link between such (purely hypothetical) threat to the public policy of the United Kingdom as might be represented by the designation of an airline by the United States of America and generalised discrimination against Community airlines.

60 The justification put forward by the United Kingdom on the basis of Article 56 of the Treaty must therefore be rejected.

61 Having regard to all the foregoing considerations, it must be held that, by concluding and applying an Air Services Agreement signed on 23 July 1977 with the United States of America which allows that non-member country to revoke, suspend or limit traffic rights in cases where air carriers designated by the United Kingdom are not owned by the United Kingdom or its nationals, the United Kingdom has failed to fulfil its obligations under Article 52 of the Treaty.

Costs

62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.

63 Pursuant to Article 69(4) of the Rules of Procedure, the Kingdom of the Netherlands is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by concluding and applying an Air Services Agreement signed on 23 July 1977 with the United States of America which allows that non-member country to revoke, suspend or limit traffic rights in cases where air carriers designated by the United Kingdom of Great Britain and Northern**

Ireland are not owned by it or its nationals, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 52 of the EC Treaty (now, after amendment, Article 43 EC);

2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;

3. Orders the Kingdom of the Netherlands to bear its own costs.

Puissochet	Schintgen	Gulmann
Edward	La Pergola	Jann
Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	

Delivered in open court in Luxembourg on 5 November 2002.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President