JUDGMENT OF THE COURT

5 November 2002 *

In Case C-471/98,

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

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, acting as Agent, assisted by J.H.J. Bourgeois, avocat, and N.F. Köhncke, Rechtsanwältin, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

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

intervener,

APPLICATION for:

— as its principal claim, a declaration that, by having individually negotiated, initialled and concluded, in 1995, and applied an 'open skies' agreement with the United States of America in the field of transport, the Kingdom of Belgium has failed to fulfil its obligations under the EC Treaty, and in particular Articles 5 (now Article 10 EC) and 52 (now, after amendment, Article 43 EC) thereof, and also under secondary law adopted pursuant to that Treaty, and in particular Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8), Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1), as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 (OJ 1993 L 278, p. 1), and Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1); and,

— in the alternative and, in part, in addition, a declaration that, in so far as the 1995 agreement cannot be regarded as having radically amended and thus replaced the agreements previously concluded, the Kingdom of Belgium has, by not rescinding those provisions of the said previously concluded agreements which are incompatible with the EC Treaty, especially Article 52 thereof, and with secondary law, or by failing to take all legally possible steps to that end, failed to comply with its obligations under Article 5 of the Treaty and under secondary law,

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, at which the Commission was represented by F. Benyon, the Kingdom of Belgium

by J.H.J. Bourgeois and N.F. Köhncke, and the Kingdom of the Netherlands by J. van Bakel and 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:

— as its principal claim, a declaration that, by having individually negotiated, initialled and concluded, in 1995, and applied an 'open skies' agreement with the United States of America in the field of transport, the Kingdom of Belgium has failed to fulfil its obligations under the EC Treaty, and in particular Articles 5 (now Article 10 EC) and 52 (now, after amendment, Article 43 EC) thereof, and also under secondary law adopted pursuant to that Treaty, and in particular Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8), Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1), as amended by Council Regulation (EEC)

No 3089/93 of 29 October 1993 (OJ 1993 L 278, p. 1, 'Regulation No 2299/89'), and Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1); and,

— in the alternative and, in part, in addition, a declaration that, in so far as the 1995 agreement cannot be regarded as having radically amended and thus replaced the agreements previously concluded, the Kingdom of Belgium has, by not rescinding those provisions of the said previously concluded agreements which are incompatible with the EC Treaty, especially Article 52 thereof, and with secondary law, or by failing to take all legally possible steps to that end, failed to comply with its obligations under Article 5 of the Treaty and under secondary law.

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 Kingdom of Belgium.

Legal background

3 Article 84(1) of the EC Treaty (now, after amendment, Article 80(1) EC) provides that the provisions of Title IV, relating to transport, of Part Three of the Treaty are to apply only to transport by rail, road and inland waterway. Paragraph 2 of that article provides:

'The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

The procedural provisions of Article 75(1) and (3) shall apply.'

4 Pursuant to that provision and with a view to the gradual establishment of the internal market in air transport, the Council adopted three 'packages' of measures, in 1987, 1990 and 1992 respectively, designed to ensure freedom to provide services in the air-transport sector and to apply the Community's competition rules in that sector.

5 The legislation adopted in 1992, the 'third package', comprises Regulations Nos 2407/92, 2408/92 and 2409/92.

6 According to Article 1 of Regulation No 2407/92, that regulation concerns requirements for the granting and maintenance of operating licences by Member States in relation to air carriers established in the Community. In that respect, Article 3(3) provides that no undertaking established in the Community is to be permitted within the territory of the Community to carry by air passengers, mail and/or cargo for remuneration and/or hire unless the undertaking has been granted the appropriate operating licence. Under Article 4(1) and (2), a Member State may grant that licence only to undertakings which have their principal place of business and registered office, if any, in that Member State and, without prejudice to agreements and conventions to which the Community is a contracting party, which are majority owned and effectively controlled by Member States and/or their nationals.

7 Regulation No 2408/92, as its title indicates, concerns access for Community air carriers to intra-Community air routes. According to the definition given in Article 2(b) of that regulation, a Community air carrier is an air carrier with a valid operating licence granted in accordance with Regulation No 2407/92. Article 3(1) of Regulation No 2408/92 provides that Community air carriers are

to be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community. Article 3(2), however, introduces the possibility for Member States, until 1 April 1997, to make an exception to that provision in relation to the exercise of cabotage rights.

8 Articles 4 to 7 of Regulation No 2408/92 govern, *inter alia*, the possibility of Member States imposing public-service obligations on given routes. Article 8 permits Member States, without discrimination on grounds of nationality or identity of the air carrier, to regulate the distribution of traffic between the airports within an airport system. Finally, Article 9 permits the Member State responsible, when serious congestion and/or environmental problems exist, to impose conditions on, limit or refuse the exercise of traffic rights, in particular when other modes of transport can provide satisfactory levels of service.

9 As stated in Article 1(1) of Regulation No 2409/92, that regulation lays down the criteria and procedures to be applied for the establishment of fares and rates on air services for carriage wholly within the Community.

10 Article 1(2) and (3) of that regulation provide:

'2. Without prejudice to paragraph 3, this Regulation shall not apply:

(a) to fares and rates charged by air carriers other than Community air carriers;

(b) to fares and rates established by public service obligation, in accordance with Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes.

3. Only Community air carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products.'

11 In addition to Regulations Nos 2407/92, 2408/92 and 2409/92, enacted in 1992, the Community legislature adopted other measures in relation to air transport, in particular Regulations Nos 2299/89 and 95/93.

12 In accordance with Article 1 thereof, Regulation No 2299/89 applies to computerised reservation systems (hereinafter 'CRSs') to the extent that they contain air transport products when offered for use and/or used in the territory of the Community, irrespective of the status or nationality of the system vendor, the source of the information used or the location of the relevant central data processing unit, or the geographical location of the airports between which air carriage takes place.

13 However, Article 7(1) and (2) of the same regulation provides:

'1. The obligations of a system vendor under Articles 3 and 4 to 6 shall not apply in respect of a parent carrier of a third country to the extent that its CRS outside

the territory of the Community does not offer Community air carriers equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.

2. The obligations of parent or participating carriers under Articles 3a, 4 and 8 shall not apply in respect of a CRS controlled by (an) air carrier(s) of one or more third country (countries) to the extent that outside the territory of the Community the parent or participating carrier(s) is (are) not accorded equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.'

14 Finally, it is undisputed that Regulation No 95/93 also applies to air carriers from non-member countries. However, Article 12 of that regulation provides:

'1. Whenever it appears that a third country, with respect to the allocation of slots at airports:

(a) does not grant Community air carriers treatment comparable to that granted by Member States to air carriers from that country;

or

(b) does not grant Community air carriers de facto national treatment;

or

(c) grants air carriers from other third countries more favourable treatment than Community air carriers,

appropriate action may be taken to remedy the situation in respect of the airport or airports concerned, including the suspension wholly or partially of the obligations of this Regulation in respect of an air carrier of that third country, in accordance with Community law.

2. Member States shall inform the Commission of any serious difficulties encountered, in law or in fact, by Community air carriers in obtaining slots at airports in third countries.'

Background to the dispute

The Commission's initiatives with a view to the conclusion by the Community of international air transport agreements

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

16 Wishing to replace that set of bilateral agreements by a single agreement to be concluded between the Community and the United States of America, the European Commission has since the early 1990s repeatedly sought to obtain from the Council a mandate to negotiate an air transport agreement of that kind with the American authorities.

17 Thus, on 23 February 1990 the Commission submitted to the Council a first request to that effect in the form of a proposal for a Council decision on a consultation and authorisation procedure for agreements concerning commercial aviation relations between Member States and third countries. That was followed, on 23 October 1992, by a second, slightly modified, proposal for a decision (OJ 1993 C 216, p. 15). Both proposals were based on Article 113 of the EC Treaty (now, after amendment, Article 133 EC), because the Commission took the view that the conclusion of international air transport agreements fell within the sphere of the commercial policy of the Community.

18 The Council declined to give effect to those initiatives by the Commission. It set out its position on the subject in its Conclusions of 15 March 1993, in which it indicated as follows:

— Article 84(2) of the Treaty constituted the proper legal basis for the development of an external policy on aviation;

— the Member States retained their full powers in relations with third countries in the aviation sector, subject to measures already adopted or to be adopted by the Council in that domain. In this regard, it was also emphasised that, in the course of bilateral negotiations, the Member States concerned should take due account of their obligations under Community law and should keep themselves informed of the interests of the other Member States;

— negotiations at Community level with third countries could be conducted only if the Council deemed such an approach to be in accordance with the common interest, on the basis that they were likely to produce a better result for the Member States as a whole than the traditional system of bilateral agreements.

19 In April 1995, the Commission raised the matter once more, recommending the adoption by the Council of a decision authorising it to negotiate an air transport agreement with the United States of America. Following that latest request, in June 1996 the Council gave the Commission a limited mandate to negotiate with

that country, in liaison with a special committee appointed by the Council, in relation to the following matters: competition rules; ownership and control of air carriers; CRSs; code-sharing; dispute resolution; leasing; environmental clauses and transitional measures. In the event of a request from the United States to that effect, authorisation was granted to extend the negotiations to State aid and other measures to avert bankruptcy of air carriers, slot allocation at airports, economic and technical fitness of air carriers, security and safety clauses, safeguard clauses and any other matter relating to the regulation of the sector. On the other hand, it was explicitly stated that the mandate did not cover negotiations concerning market access (including code-sharing and leasing in so far as they related to traffic rights), capacity, carrier designation and pricing.

20 The two institutions concerned added a number of declarations to the minutes of the Council meeting at which the negotiating mandate in question was conferred on the Commission. In one of those declarations, which was made jointly by both institutions ('the common declaration of 1996'), it was stated that, in order to ensure continuity of relations between the Member States and the United States of America during the Community negotiations and in order to have a valid alternative in the event of the negotiations failing, the existing system of bilateral agreements would be maintained and would remain valid until a new agreement binding the Community was concluded. In a separate declaration, the Commission asserted that Community competence had now been established in respect of air traffic rights.

21 No agreement has yet been reached with the United States of America following the conferment of the negotiating mandate on the Commission in 1996.

22 By contrast, as the documents before the Court show, the Community concluded a civil aviation agreement with the Kingdom of Norway and the Kingdom of Sweden in 1992, approved by Council Decision 92/384/EEC of 22 June 1992

(OJ 1992 L 200, p. 20), has reached an agreement in principle in that field with the Swiss Confederation, and, at the time when this action was brought, was negotiating with 12 European countries an agreement on the creation of a 'common European airspace'.

The bilateral air transport agreement between the Kingdom of Belgium and the United States of America

23 A bilateral air transport agreement, known as a '"Bermuda" type agreement', was first concluded between the Kingdom of Belgium and the United States of America in 1946. It included clauses relating to general principles, designation clauses requiring that the air transport companies be owned or effectively controlled by the other party or by nationals of the other party, clauses relating to capacity which must meet the public's air transport needs, clauses relating to the fixing and approval of fares and rates, various clauses relating to laws and regulations (on, *inter alia*, the exemption from customs duties, arbitration, consultation and termination) and clauses concerning the airlines.

24 The agreement was amended in 1972, 1977 and 1978 with a view to liberalising international air traffic. Thus, the protocol signed by the Kingdom of Belgium and the United States of America on 8 November 1978 ('the 1978 protocol') increased pricing freedom, furthered the liberalisation of charter services already introduced in 1972 and abolished the unilateral restrictions on volume, traffic, frequency and regularity of service. Moreover, the two parties undertook to take any appropriate measures to eliminate any form of discrimination and unfair competitive practices against the airlines of the other party. Finally, the 1978 protocol liberalised regular air services. With respect to the traffic rights of the United States of America, under Article 3 of that protocol that country was granted, *inter alia*, access to routes from its territory, via intermediary points, to

Belgium and beyond to any point outside of Belgium without any geographical limitation with regard to the number and type of aircraft used. The traffic rights of the Kingdom of Belgium were extended to two fixed points and three variable points in the United States of America and further rights were granted to all points in Canada and to Mexico from a point in the United States of America.

25 That liberalisation was continued by the air transport agreement between the Kingdom of Belgium and the United States of America of 23 October 1980 ('the 1980 Agreement'). The agreement provides that:

— the parties will intervene in the fixing of prices only in order to prevent 'predatory' or discriminatory prices and practices, to protect consumers against unreasonably high or restrictive prices due to the abuse of a dominant position or to protect airlines against artificially low prices resulting from direct or indirect State aid, it being stated that each party will permit an airline to set its prices in line with the lowest or most competitive price of an airline of the other party; moreover, a system of mutual disapproval of the prices charged by the airlines of one of the parties is to be introduced (Article 12);

— the rules on charter flights are to be liberalised (Annex II);

— the bilateral restrictions on capacity, frequency and the type of aircraft are to be removed and the parties undertake to offer the airlines of the two parties an equal and fair opportunity to compete with one another (Article 11);

— user charges must be fair, reasonable and non-discriminatory (Article 10);

— multi-designation is permitted;

— traffic rights are unlimited for carriers from the United States of America; however, for those from the Kingdom of Belgium, access to the American air services market remains limited to the access provided for in the 1978 protocol. Those rights are not subject to any limits as regards geography, direction or amendments of the type or number of aircraft used (Sections 2 and 3 of Annex I).

26 An amendment made in 1986 was limited to the replacement of Article 7 of the 1980 agreement concerning air transport security.

27 Adjustments negotiated in 1991 enabled the Kingdom of Belgium to obtain, in addition, access to three fixed points [Boston, Chicago and Detroit (United States of America)], two points of its choice and 10 additional points on the basis of 'code sharing'. The carriers obtained the right to conclude joint commercialisation agreements, with the exception, however, of cabotage and 'revenue pooling' services. In a new Annex III to the 1980 agreement, the parties agreed that CRSs were to be subject to the principles of non-discrimination, transparency and fair competition and granted free access (each for its market) to CRSs and to CRS services on their territory. Those adjustments entered into force only in January 1994 when a carrier requested entitlement to benefit from the new freedom of code sharing agreed in 1991.

28 The documents before the Court show that, in 1992, the United States of America took the initiative in offering to various European States the possibility of concluding a bilateral 'open skies' agreement. Such an agreement was intended to facilitate alliances between American and European carriers and conform to a number of criteria set out by the American Government such as free access to all routes, the granting of unlimited route and traffic rights, the fixing of prices in accordance with a system of 'mutual disapproval' for air routes between the parties to the agreement, the possibility of sharing codes, etc.

29 During 1993 and 1994, the United States of America intensified its efforts to conclude bilateral air transport agreements under the 'open skies' policy with as many European States as possible.

30 In a letter sent to Member States on 17 November 1994, 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.

31 During the negotiations held on 28 February and 1 March 1995, representatives of the Belgian and American Governments reached a consensus on a new amendment of the 1980 Agreement, which was subsequently confirmed by an exchange of diplomatic notes. The following amendments were made ('the 1995 amendments'). In the body of the text of the 1980 Agreement, Articles 1 (Definitions), 3 (Designation and Authorisation), 6 (Safety), 7 (Aviation Security), 8 (Commercial Opportunities), 9 (Customs Duties and Taxes), 10

(User Charges), 11 (Fair Competition), 12 (Pricing), 13 (Surface Transportation/ Intermodal Services), 14 (Commissions), 15 (Enforcement), 17 (Settlement of Disputes) and 20 (Multilateral Agreement) were amended or revoked in order to make the agreement comply with the American 'open skies' model agreement. In addition, Annexes I and II to the 1980 Agreement, containing schedules of routes and opportunities for their use, were amended to bring them into line with that model (in relation, for example, to routes, operational flexibility, charter flights, etc.).

32 Article 3 of the 1980 Agreement makes the granting by each contracting party of the appropriate operating authorisations and the necessary technical permissions to airlines designated by the other party subject to the condition that a substantial part of the ownership and effective control of that airline be vested in the party designating the airline, nationals of that party or both ('the clause on the ownership and control of airlines'). According to Article 4 of that agreement, those authorisations and permissions may be revoked, suspended or limited where the above condition is not fulfilled.

The pre-litigation procedure

33 Having learned that the negotiations aimed at amending the 1980 Agreement had been successful, the Commission sent the Belgian Government a letter of formal notice on 2 June 1995, in which it stated, essentially, that, since Community air transport legislation had established a comprehensive system of rules designed to establish an internal market in that sector, the Member States no longer had the competence to conclude bilateral agreements such as that which the Kingdom of Belgium had just negotiated with the United States of America. Furthermore, it considered that such an agreement was contrary to primary and secondary Community law.

34 The Belgian Government having challenged, in its reply of 4 September 1995, the Commission's view on the matter, the Commission sent the Kingdom of Belgium a reasoned opinion on 16 March 1998, in which it concluded that the bilateral commitments resulting from the amendments made to the 1980 Agreement in 1995 infringed Community law and called upon that Member State to comply with the reasoned opinion within two months from its notification.

35 Finding the Belgian Government's reply of 12 June 1998 unsatisfactory, the Commission brought the present action.

Admissibility

36 The Belgian Government submits that the bringing of the present action constitutes a misuse of procedure because the Commission is attempting, by that means, to secure a Community competence for which it was unable to obtain recognition at the level of the Council, and which it can secure only by taking action against that institution. In the alternative, the Belgian Government submits in its rejoinder that the present action infringes the legitimate expectation which the Kingdom of Belgium derived from the common declaration of 1996, which was made after the sending of the letter of formal notice of 2 June 1995 and from which it was clear that the procedure for failure to fulfil its obligations which had been initiated against it would not be pursued.

37 It should be noted in that regard that this action is for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Community law in that it concluded a bilateral agreement in the field of air transport with the United States of America.

38 By bringing this action for failure to fulfil obligations in accordance with Article 169 of the Treaty, the Commission has properly applied the Treaty rules, since it has chosen the proceedings specifically envisaged by the Treaty for cases where it considers that a Member State has failed to fulfil one of its obligations under Community law.

39 As regards the Belgian Government's argument concerning the Commission's motives in choosing to bring the present action rather than taking action against the Council, it must be borne in mind that, in its role as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and on account of which conduct or omission attributable to the Member State concerned those proceedings should be brought (see Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22).

40 This plea must therefore be rejected.

41 As regards the plea submitted in the alternative by the Belgian Government, it should be pointed out that, pursuant to Article 42(2) of the Court's Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

42 The plea alleging breach of the principle of the protection of legitimate expectations was first raised in the rejoinder and is not based on matters of law or of fact which came to light in the course of the procedure.

43 That plea is therefore inadmissible.

The need to rule on the existence of a new agreement in consequence of the amendments made in 1995

44 The formulation of the Commission's principal and alternative claims shows that, in its view, examination of the substance of one or other of those claims necessarily presupposes that the Court will have taken a position on a preliminary issue, namely whether the amendments made in 1995 had the effect of transforming the pre-existing 1980 Agreement into a new 'open skies' agreement incorporating the provisions of the 1980 Agreement as successively amended. If such an effect did in fact take place, so the Commission argues, the Court should rule only on the principal claim and review the new agreement for its compatibility with the relevant Community provisions in force in 1995. If the opposite were the case, there would, according to the Commission, be no need to rule on the principal claim and the Court should then rule on the alternative claim and review the provisions in the pre-existing agreements, particularly the 1980 Agreement, for their compatibility with, in particular, Article 5 of the Treaty.

45 The Belgian Government submits that, even before the amendments made in 1995, the 1980 Agreement was already a liberal air transport agreement. The Commission considerably overestimates the scope of the amendments, in particular by focusing on the number of clauses affected thereby. Analysing those amendments point by point, the Belgian Government submits that they are essentially limited to granting the Kingdom of Belgium the same unlimited traffic rights as those which the United States of America has enjoyed since the 1978

Protocol. Apart from those made to Annex I to the 1980 Agreement with a view to completing the exchange of traffic rights in relation to regular services, the amendments made in 1995 are purely editorial. They cannot therefore constitute a newly-concluded agreement.

46 In order to defend its argument, the Commission minutely examines the amendments made in 1995. It points out, first of all, that several provisions of the 1980 Agreement, such as, in particular, Articles 7 and 8, have been subjected to fundamental amendments. Further, Articles 10, 13 and 20 of the 1980 Agreement have been replaced while Articles 14 and 15 have been revoked. Finally, Annex I to the 1980 Agreement, which was amended in order to take into account the development of the traffic rights between the contracting parties, has totally transformed the 1980 Agreement from a classic 'Bermuda' type agreement into an 'open skies' agreement conforming to the American model.

47 It must be noted in that regard that an examination of the substance of the Commission's principal claim does not necessarily require the Court to take a view on the question whether the amendments made in 1995 transformed the pre-existing 1980 Agreement into a new agreement.

48 While it is true that the 1980 Agreement developed into something approaching an 'open skies' agreement as a result of the amendments made before 1995, it is none the less clear from the file and from the oral argument before the Court that the amendments made in 1995, described in paragraph 31 above, had the effect of totally liberalising air transport between the United States of America and the Kingdom of Belgium by ensuring free access to all routes between all points situated within those two States, without limitation of capacity or frequency, without restriction as to intermediate points and those situated behind or beyond ('behind, between and beyond rights') and with all desired combinations of aircraft ('change of gauge'). That total freedom has been complemented by provisions concerning opportunities for the airlines concerned to conclude code-sharing agreements and by provisions furthering competition or non-discrimination.

49 It follows that the amendments made in 1995 to the 1980 Agreement have had the effect of creating the framework of a more intensive cooperation between the United States of America and the Kingdom of Belgium, which entails new and significant international commitments for the latter.

50 It must be pointed out, moreover, that the amendments made in 1995 provide proof of a renegotiation of the 1980 Agreement in its entirety. It follows that, while some provisions of the agreement were not formally modified by the amendments made in 1995 or were subject only to marginal changes in drafting, the commitments arising from those provisions were none the less confirmed during the renegotiation. In such a case, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law (see, to that effect, Case C-62/98 *Commission* v *Portugal* [2000] ECR I-5171 and Case C-84/98 *Commission* v *Portugal* [2000] ECR I-5215).

51 The finding in the preceding paragraph applies, in particular, to access to intra-Community routes granted to airlines designated by the United States of America. Even if, as the Belgian Government maintains, that access originates in commitments entered into before 1995, it is clear from Part 1 of Annex I to the 1980 Agreement, concerning the list of routes, as amended in 1995, that access for carriers designated by the United States of America to intra-Community routes was, at the very least, reconfirmed in 1995 in the context of the exchange of traffic rights agreed by the two States.

52 Furthermore, it must be regarded as undisputed that, as the Advocate General rightly pointed out in paragraphs 136 to 138 of his Opinion with respect to the clause on the ownership and control of airlines, the amendments made to the agreement in its entirety in 1995 affect the scope of the provisions, such as that

clause, which were not formally modified by the amendments or were modified only to a limited extent.

53 It follows that all the international commitments challenged in the principal claim must be assessed in relation to the provisions of Community law cited by the Commission in support of that claim which were in force at the time when those commitments were entered into or confirmed, namely, in any event, in 1995.

54 Since the Court is in a position to rule on the principal claim, there is no need to rule on the alternative claim. The way in which the alternative claim is formulated shows that examination of it depends, not upon the extent to which the principal claim is allowed, but upon whether the Court considers itself to be in a position to rule on that claim.

Infringement of the external competence of the Community

55 The Commission charges the Kingdom of Belgium with having infringed the external competence of the Community by entering into the disputed commitments. It maintains in that respect that that competence arises, first, from the necessity, within the meaning of Opinion 1/76 of 26 April 1977 ([1977] ECR 741), of concluding an agreement containing such commitments at Community level, and, second, from the fact that the disputed commitments affect, within the meaning of the judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263 (the '*AETR*' judgment), the rules adopted by the Community in the field of air transport.

The alleged existence of an external competence of the Community within the meaning of Opinion 1/76

Arguments of the parties

56 The Commission submits that, according to Opinion 1/76, subsequently clarified by Opinion 1/94 of 15 November 1994 ([1994] ECR I-5267) and Opinion 2/92 of 24 March 1995 ([1995] ECR I-521), the Community has exclusive competence to conclude an international agreement, even in the absence of Community provisions in the area concerned, where the conclusion of such an agreement is necessary in order to attain the objectives of the Treaty in that area, such objectives being incapable of being attained merely by introducing autonomous common rules.

57 As indicated in Opinion 2/92, the reasoning followed in Opinion 1/94, delivered previously, did not in any way invalidate the conclusion reached in Opinion 1/76. The reference in paragraph 86 of Opinion 1/94 to the absence of an inextricable link between the attainment of freedom to provide services for nationals of the Member States and the treatment to be accorded in the Community to nationals of non-member countries concerns the area of services in general. In the field of air transport, however, purely internal measures would hardly be effective given the international nature of the activities carried on and the impossibility of separating the internal and external markets. It was for that reason, moreover, that, in a number of cases, it was found necessary to prescribe, through Community measures on air and sea transport, the treatment to be accorded to third-country carriers and to conclude the corresponding agreements.

58 The discrimination, the distortions of competition and the destabilisation of the Community market which result from the bilateral 'open skies' agreements concluded by certain Member States prove that the aims pursued by the common air transport policy cannot be attained without the conclusion of an agreement between the Community and the United States of America.

59 In particular, the commitments in dispute, whether considered individually or in the perspective of their effect combined with that produced by the corresponding commitments entered into by other Member States, bring about changes in the structure of traffic flows towards the United States of America and allow American carriers to operate on the intra-Community market without being subject to all the obligations of the system established by Community rules, and to compete in this way with their Community counterparts.

60 The necessity for Community action in relation to non-member countries is easy to establish, having regard to the provisions of the Treaty on transport. Although Article 84(2) of the Treaty does not define in advance the specific content of the provisions to be laid down for air transport, it specifically declares the procedural provisions of Article 75(3) of the EC Treaty (now, after amendment, Article 71(2) EC) to be applicable. The fact that Article 84(2) of the Treaty clearly gives the Community the power to conclude air transport agreements with non-member countries has, moreover, been demonstrated by its use as a legal basis for concluding such an agreement with the Kingdom of Norway and the Kingdom of Sweden in 1992.

61 The Community's exclusive external competence in the sector covered by the disputed commitments precludes the Kingdom of Belgium from entering into such commitments even if the Community has not exercised that competence.

62 According to the Belgian Government, the conferment on the Community of an implied external competence within the meaning of Opinion 1/76 is subject to the fulfilment of two conditions: firstly, the existence of an internal competence to attain a specific objective and, secondly, the need for the Community's participation in an international commitment in order to attain that objective. The conditions for conferment on the Community of external competence within the meaning of Opinion 1/76 are different from those for external competence in the sense contemplated in the line of authority beginning with the *AETR* judgment since, in accordance with that opinion, the Community must have exercised that external competence in order for it to become exclusive, as the Court pointed out in Opinion 1/94.

63 In that opinion, the Court also stated that, in the services sector, achievement of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be accorded in the Community to the nationals of non-member countries or in non-member countries to the nationals of the Member States.

64 Furthermore, even if the Court should find that the economic consequences alleged by the Commission render the exercise by the Community of the external competence within the meaning of Opinion 1/76 necessary, the Belgian Government points out that the Council has yet to settle the question whether a Community agreement entails significant advantages as compared with the existing system of bilateral relations. It has therefore not considered the exercise of that external competence to be necessary.

Findings of the Court

65 In relation to air transport, Article 84(2) of the Treaty merely provides for a power for the Community to take action, a power which, however, it makes dependent on there being a prior decision of the Council.

66 Accordingly, although that provision may be used by the Council as a legal basis for conferring on the Community the power to conclude an international agreement in the field of air transport in a given case, it cannot be regarded as in itself establishing an external Community competence in that field.

67 It is true that the Court has held that the Community's competence to enter into international commitments may arise not only from express conferment by the Treaty but also by implication from provisions of the Treaty. Such implied external competence exists not only whenever the internal competence has already been used in order to adopt measures for implementing common policies, but also if the internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, the competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4).

68 In a subsequent opinion, the Court stated that the hypothesis envisaged in Opinion 1/76 is that where the internal competence may be effectively exercised only at the same time as the external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.

69 That is not the case here.

70 There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to the United

States of America, or to prevent them prescribing the approach to be taken by the Member States in their external dealings, so as to mitigate any discrimination or distortions of competition which might result from the implementation of the commitments entered into by certain Member States with the United States of America under 'open skies' agreements (see, to that effect, Opinion 1/94, paragraph 79). It has therefore not been established that, by reason of such discrimination or distortions of competition, the aims of the Treaty in the area of air transport cannot be achieved by establishing autonomous rules.

71 In 1992, moreover, the Council was able to adopt the 'third package', which, according to the Commission, achieved the internal market in air transport based on the freedom to provide services, without its having appeared necessary at the time to have recourse, in order to do that, to the conclusion by the Community of an air transport agreement with the United States of America. On the contrary, the documents before the Court show that the Council, which the Treaty entrusts with the task of deciding whether it is appropriate to take action in the field of air transport and to define the extent of Community intervention in that area, did not consider it necessary to conduct negotiations with the United States of America at Community level (see paragraph 18 above). It was not until June 1996, and therefore subsequent to the exercise of the internal competence, that the Council authorised the Commission to negotiate an air transport agreement with the United States of America by granting it for that purpose a restricted mandate, while taking care to make it clear, in its joint declaration with the Commission of 1996, that the system of bilateral agreements with that country would be maintained until the conclusion of a new agreement binding the Community (see paragraphs 19 and 20 above).

72 The finding in the preceding paragraphs cannot be called into question by the fact that the measures adopted by the Council in relation to the internal market in air transport contain a number of provisions concerning nationals of non-member countries (see, for example, paragraphs 12 to 14 above). Contrary to what the Commission maintains, the relatively limited character of those provisions precludes inferring from them that the realisation of the freedom to provide services in the field of air transport in favour of nationals of the Member States is inextricably linked to the treatment to be accorded in the Community to nationals of non-member countries, or in non-member countries to nationals of the Member States.

73 This case, therefore, does not disclose a situation in which internal competence could effectively be exercised only at the same time as external competence.

74 In the light of the foregoing considerations, it must be found that, at the time when the Kingdom of Belgium agreed the amendments made in 1995 with the United States of America, the Community could not validly claim that there was an exclusive external competence, within the meaning of Opinion 1/76, to conclude an air transport agreement with that country.

75 The claim that the Kingdom of Belgium has failed in its obligations by infringing such a competence is therefore unfounded.

The alleged existence of an external Community competence in the sense contemplated in the line of authority beginning with the AETR judgment

Arguments of the parties

76 The Commission claims that, with the legislative framework established by the 'third package' of air transport liberalisation measures, the Community legislature established a complete set of common rules which enabled the internal market in air transport based on the freedom to provide services to be created. In the context of those common rules, the Community determined the conditions governing the functioning of the internal market, in particular in relation to the rules on access to that market, in the form of traffic rights on routes between and within Member States. In addition, a large number of those measures include

provisions relating to third-country carriers or to countries in which and from which those carriers operate. To that set of rules there should also be added Regulations Nos 2299/89 and 95/93, as examples of measures prescribing for Member States the approach to be taken in relation to non-member countries.

77 In view of that complete set of common rules, the Commission submits that Member States are no longer competent, whether acting individually or collectively, to enter into commitments affecting those rules by exchanging traffic rights and opening up access for third-country carriers to the intra-Community market. The negotiations leading to and the entry into such international commitments thus fall within the exclusive competence of the Community. In support of its submission, the Commission relies in particular on the *AETR* judgment and on Opinions 1/94 and 2/92.

78 Such international commitments, if not entered into by the Community, are contrary to Community law and deprive the latter of its effectiveness, because they have a discriminatory effect, cause distortions of competition and disturb the Community market through the participation in it of airlines of non-member countries. American carriers could thus operate in the Community without being subject to all the Community obligations, traffic would be drawn towards one Member State to the detriment of the others, and the equilibrium sought by the establishment of common rules would be broken.

79 It follows from paragraphs 25 and 26 of Opinion 2/91 of 19 March 1993 ([1993] ECR I-1061) that Member States are not entitled to enter into international commitments, even in order to follow existing Community legislation, since this risks making that legislation excessively rigid by impeding its adaptation and amendment, thereby 'affecting' it.

80 In the alternative, the Commission submits that, even if a complete set of common rules had not been established, that would be irrelevant to the outcome of this case since, as the Court confirmed in paragraphs 25 and 26 of Opinion 2/91, Community competence is recognised as established if the agreement concerned falls within an area already largely covered by progressively adopted Community rules, as is the case here.

81 Should the Court nevertheless find that the Community legislation cannot be regarded as complete on the ground that, as the Kingdom of Belgium maintains, certain essential elements are still missing from it, that, too, would not be decisive for the outcome of the action. If the Community is not exclusively competent to enter into the disputed commitments in their entirety, the Kingdom of Belgium likewise has no competence and, therefore, in no way may it enter individually into those commitments, as the Commission has complained it has.

82 The Belgian Government contends that the Community does not have exclusive external competence in the matter and that the Kingdom of Belgium has retained its competence to negotiate and conclude agreements and, *a fortiori*, to negotiate and conclude amendments to air transport agreements with respect to traffic rights. Such rights are either not covered by Community provisions (in the case of the rights of traffic to or from points situated outside the Community) or relate to points access to which has already been liberalised under the 'third package' scheme (in the case of the rights of traffic to points situated before Belgium within the Community, since, in accordance with Regulation No 2408/92, the Kingdom of Belgium has access to such points irrespective of the disputed commitments).

83 Furthermore, the Belgian Government submits that the 'third package' of measures liberalising air transport clearly does not regulate air transport services from the Community to third countries or vice versa. On the contrary, in its submission, the Council was at that time aware of the problems that the

extension of the 'third package' to air transport services between the Community and non-member countries would have caused at the level of international relations, which, in this sector, continue to be regulated under bilateral arrangements between the Member States and non-member countries.

84 The Belgian Government adds that the very wording of Regulation No 2408/92 makes it clear that it applies neither to third-country carriers and their access to intra-Community air routes nor to the access of Community carriers to routes to non-member countries. This is also shown by Articles 1 and 3(1) of that regulation. It follows that Regulation No 2408/92 does not cover Community carriers' traffic rights to non-member countries, such as those granted to the Kingdom of Belgium in accordance with the amendments made to the 1980 agreement in 1995, just as it does not cover the rights to points situated earlier outside of the Community which were granted to the United States of America.

85 Consequently, the Belgian Government submits that the obligations into which it entered under the 1980 Agreement, as amended in 1995, do not affect the common rules because there is no contradiction between the content of the former and the latter. In that respect, it rejects more particularly the Commission's argument relating to traffic rights, designation of air carriers, slots, CRSs and fares.

86 Finally, the Belgian Government contends that the Commission's arguments with regard to the economic consequences of the bilateral commitments entered into by some Member States with the United States of America for the internal air transport market cannot give rise to an external competence of the Community in the sense contemplated in the line of authority beginning with the *AETR* judgment and thus deprive the Kingdom of Belgium of its competence to negotiate and conclude amendments to the 1980 Agreement.

87 Should the Court hold that the Kingdom of Belgium no longer had that competence, the Belgian Government submits in the alternative that the Council authorised the Kingdom of Belgium to maintain its bilateral relations with the United States of America, that is to say, to maintain the 1980 Agreement, as amended in 1995. For that purpose, it relies on the Council's Conclusions of 15 March 1993 (see paragraph 18 above) and the common declaration of 1996 (see paragraph 20 above).

Findings of the Court

88 It must be recalled that, as has already been found in paragraphs 65 and 66 above, whilst Article 84(2) of the Treaty does not establish an external Community competence in the field of air transport, it does make provision for a power for the Community to take action in that area, albeit one that is dependent on there being a prior decision by the Council.

89 It was, moreover, by taking that provision as a legal basis that the Council adopted the 'third package' of legislation in the field of air transport.

90 The Court has already held, in paragraphs 16 to 18 and 22 of the *AETR* judgment, that the Community's competence to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that, in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting

individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.

91 Since those findings imply recognition of an exclusive external competence for the Community in consequence of the adoption of internal measures, it is appropriate to ask whether they also apply in the context of a provision such as Article 84(2) of the Treaty, which confers upon the Council the power to decide 'whether, to what extent and by what procedure appropriate provisions may be laid down' for air transport, including, therefore, for its external aspect.

92 If the Member States were free to enter into international commitments affecting the common rules adopted on the basis of Article 84(2) of the Treaty, that would jeopardise the attainment of the objective pursued by those rules and would thus prevent the Community from fulfilling its task in the defence of the common interest.

93 It follows that the findings of the Court in the *AETR* judgment also apply where, as in this case, the Council has adopted common rules on the basis of Article 84(2) of the Treaty.

94 It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.

95 According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (*AETR* judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).

96 Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33).

97 The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the *AETR* judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).

98 On the other hand, it follows from the reasoning in paragraphs 78 and 79 of Opinion 1/94 that any distortions in the flow of services in the internal market which might arise from bilateral 'open skies' agreements concluded by Member States with non-member countries do not in themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence of the Community.

99 There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to non-member countries or to prevent them prescribing the approach to be taken by the Member States in their external dealings (Opinion 1/94, paragraph 79).

100 It is in the light of those considerations that it falls to be determined whether the common rules relied on by the Commission in the present action are capable of being affected by the international commitments entered into or confirmed by the Kingdom of Belgium in 1995.

101 It is undisputed that the commitments in question comprise an exchange of fifth-freedom rights by virtue of which an airline designated by the United States of America has the right to transport passengers between the Kingdom of Belgium and another Member State of the European Union on flights the origin or destination of which is in the United States of America. The Commission's first argument is that that commitment, particularly when viewed in the context of the combined effect produced by all the bilateral commitments of that type contracted by Member States with the United States of America, in that it allows American carriers to use intra-Community routes without complying with the conditions laid down by Regulation No 2407/92, affects both that regulation and Regulation No 2408/92.

102 That argument must be rejected.

103 As is clear from the title and Article 3(1) of Regulation No 2408/92, that regulation is concerned with access to intra-Community air routes for Community air carriers alone, these being defined by Article 2(b) of that regulation as air carriers with a valid operating licence granted by a Member State in accordance with Regulation No 2407/92. That latter regulation, as may be seen from

Articles 1(1) and 4 thereof, defines the criteria for the granting by Member States of operating licences to air carriers established in the Community which, without prejudice to agreements and conventions to which the Community is a contracting party, are owned directly or through majority ownership by Member States and/or nationals of Member States and are at all times effectively controlled by such States or such nationals, and also the criteria for the maintenance in force of those licences.

104 It follows that Regulation No 2408/92 does not govern the granting of traffic rights on intra-Community routes to non-Community carriers. Similarly, Regulation No 2407/92 does not govern operating licences of non-Community air carriers which operate within the Community.

105 Since the international commitments in issue do not fall within an area already covered by Regulations Nos 2407/92 and 2408/92, they cannot be regarded as affecting those regulations for the reason put forward by the Commission.

106 Moreover, the very fact that those two regulations do not govern the situation of air carriers from non-member countries which operate within the Community shows that, contrary to what the Commission maintains, the 'third package' of legislation is not complete in character.

107 The Commission next submits that the discrimination and distortions of competition arising from the international commitments at issue, viewed on the basis of their effect combined with that produced by the corresponding international commitments entered into by other Member States, affect the normal functioning of the internal market in air transport.

108 However, as has been pointed out in paragraph 98 above, that kind of situation does not affect the common rules and is therefore not capable of establishing an external competence of the Community.

109 The Commission maintains, finally, that the Community legislation on which it relies contains many provisions relating to non-member countries and air carriers of those countries. That applies in particular, it maintains, to Regulations Nos 2409/92, 2299/89 and 95/93.

110 In that regard, it should be noted, first, that, according to Article 1(2)(a) of Regulation No 2409/92, that regulation does not apply to fares and rates charged by air carriers other than Community air carriers, that restriction however being stated to be 'without prejudice to paragraph 3' of the same article. Under Article 1(3) of Regulation No 2409/92, only Community air carriers are entitled to introduce new products or fares lower than the ones existing for identical products.

111 It follows from those provisions, taken together, that Regulation No 2409/92 has, indirectly but definitely, prohibited air carriers of non-member countries which operate in the Community from introducing new products or fares lower than the ones existing for identical products. By proceeding in that way, the Community legislature has limited the freedom of those carriers to set fares and rates, where they operate on intra-Community routes by virtue of the fifth-freedom rights which they enjoy. Accordingly, to the extent indicated in Article 1(3) of Regulation No 2409/92, the Community has acquired exclusive competence to enter into commitments with non-member countries relating to that limitation on the freedom of non-Community carriers to set fares and rates.

112 It follows that, since the entry into force of Regulation No 2409/92, the Kingdom of Belgium has no longer been entitled, despite the renegotiation of the 1980 Agreement, to enter on its own into or maintain in force international commitments concerning the fares and rates to be charged by carriers of non-member countries on intra-Community routes.

113 A commitment of that type arises from Article 12 of the 1980 Agreement, as amended in 1995. The Kingdom of Belgium has thus infringed the Community's exclusive external competence resulting from Article 1(3) of Regulation No 2409/92.

114 The Belgian Government's argument that that commitment, in so far as it establishes the principle of the freedom to determine prices and limits the intervention of the contracting parties in the determination of prices to specific anomalous situations ('predatory' or discriminatory prices, prices which are unreasonably high due to abuse of a dominant position or artificially low due to State aid), does not contradict Regulation No 2409/92, which is likewise founded on the principle of free determination of prices, cannot disturb the finding in the preceding paragraph. The failure of the Kingdom of Belgium to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own or to maintain it in force when renegotiating the 1980 Agreement, even if the substance of that commitment does not conflict with Community law.

115 Secondly, it follows from Articles 1 and 7 of Regulation No 2299/89 that, subject to reciprocity, that regulation also applies to nationals of non-member countries, where they offer for use or use a CRS in Community territory.

116 By the effect of that regulation, the Community thus acquired exclusive competence to contract with non-member countries the obligations relating to CRSs offered for use or used in its territory.

117 It is not in dispute that, in 1991, the Kingdom of Belgium and the United States of America added to the 1980 Agreement an Annex III, which entered into force in 1994, concerning the principles relating to CRSs, including those applying to CRSs offered for use or used in Belgian territory. During the renegotiation of the 1980 Agreement in 1995, the Kingdom of Belgium maintained that annex in force. By acting in that way, the Kingdom of Belgium infringed the exclusive external competence of the Community arising from Regulation No 2299/89.

118 As regards the alternative argument submitted by the Belgian Government that the Council authorised the Kingdom of Belgium to maintain the 1980 Agreement, as amended in 1995, it is sufficient to observe that, without its being necessary to rule on the relevance of the Council's Conclusions of 15 March 1993 and the common declaration of 1996 in order to define the objective scope of the rules of Community law, those documents can in no way be regarded as having authorised the Kingdom of Belgium to infringe the exclusive external competence of the Community arising from Regulations No 2409/92 and No 2299/89.

119 Accordingly, that argument must be rejected.

120 Thirdly, and finally, as has been pointed out in paragraph 14 above, Regulation No 95/93 on common rules for the allocation of slots at Community airports applies, subject to reciprocity, to air carriers of non-member countries, with the result that, since the entry into force of that regulation, the Community has had exclusive competence to conclude agreements in that area with non-member countries.

121 However, as the Advocate General rightly pointed out in paragraph 107 of his Opinion, the Commission has not succeeded in establishing that, as it maintains,

the clause relating to fair competition in Article 11 of the 1980 Agreement, as amended in 1995, also falls to be applied to the allocation of slots.

122 That clause is limited to providing that 'each party must grant to the airlines designated by the two parties a fair and equal opportunity to compete with respect to the provision of international air carriage services covered by the [1980] Agreement'. The general terms in which such a clause is formulated do not, in the absence of relevant evidence clearly establishing the intention of both parties, permit the inference that the Kingdom of Belgium entered into a commitment in relation to the allocation of slots. In support of its assertion, the Commission relied solely on a report of the American administrative authority according to which clauses of that type normally also cover the allocation of slots.

123 The failure to fulfil obligations with which the Kingdom of Belgium is charged in that respect therefore appears to be unfounded.

124 Article 5 of the Treaty requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

125 In the area of external relations, the Court has held that the Community's tasks and the objectives of the Treaty would be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or of altering their scope (see Opinion 2/91, paragraph 11, and also, to that effect, the *AETR* judgment, paragraphs 21 and 22).

126 It follows from the foregoing considerations that, by entering into or maintaining in force, despite the renegotiation of the 1980 Agreement, international commitments concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes and concerning CRSs offered for use or used in Belgian territory, the Kingdom of Belgium has failed to fulfil its obligations under Article 5 of the Treaty and under Regulations Nos 2409/92 and 2299/89.

Infringement of Article 52 of the Treaty

Arguments of the parties

127 The Commission submits that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty because the Kingdom of Belgium does not accord to the nationals of other Member States, and in particular to airlines and undertakings of those Member States established in the Kingdom of Belgium, the treatment reserved for Belgian nationals.

128 The Belgian Government submits that the clause on the ownership and control of airlines does not fall within the scope of Article 52 of the Treaty. As it regulates the exercise of traffic rights to points situated in non-member countries, that clause does not relate to the freedom of establishment but to the right of air carriers to offer services in non-member countries.

129 Moreover, by virtue of that clause, refusal of an airline designated by the Kingdom of Belgium would be the act of the United States of America.

130 Should the Court hold that the clause is contrary to Article 52 of the Treaty, the Belgian Government maintains, by way of an alternative argument, that, in 1995, the Kingdom of Belgium proposed to the United States of America an amendment of the clause removing that country's ability to reject the designation of a non-Belgian Community airline. Thus, although the United States of America rejected the proposal, the Kingdom of Belgium took all reasonable steps to eliminate the abovementioned incompatibility.

Findings of the Court

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

132 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.

133 Article 52 of the Treaty is in particular properly applicable to airline companies established in a Member State which supply air transport services between a Member State and a non-member country. All companies established in a

Member State within the meaning of Article 52 of the Treaty are covered by that provision, even if their business in that State consists of services directed to non-member countries.

134 As regards the question whether the Kingdom of Belgium 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.

135 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 (see Case C-307/97 *Saint-Gobain* v *Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, 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.

136 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).

137 In this case, the clause on the ownership and control of airlines does, amongst other things, permit the United States of America to withdraw, suspend or limit

the operating licences or technical authorisations of an airline designated by the Kingdom of Belgium but of which a substantial part of the ownership and effective control is not vested in that Member State or Belgian nationals.

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

139 By contrast, the formulation of that clause shows that the United States of America is in principle under an obligation to grant the appropriate operating licences and required technical authorisations to airlines of which a substantial part of the ownership and effective control is vested in the Kingdom of Belgium or Belgian nationals ('Belgian airlines').

140 It follows that Community airlines may always be excluded from the benefit of the air transport agreement between the Kingdom of Belgium and the United States of America, while that benefit is assured to Belgian airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the Kingdom of Belgium, accords to its own nationals.

141 Contrary to what the Kingdom of Belgium maintains, the direct source of that discrimination is not the possible conduct of the United States of America but the

clause on the ownership and control of airlines, which specifically acknowledges the right of the United States of America to act in that way.

142 It follows that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty.

143 The efforts made by the Kingdom of Belgium in 1995 to eliminate the incompatibility of the clause with Article 52 of the Treaty, however commendable, are clearly insufficient to disturb the finding made in the preceding paragraph.

144 In those circumstances, the claim that the Kingdom of Belgium has failed to fulfil its obligations under Article 52 of the Treaty appears to be well founded.

145 Having regard to the whole of the foregoing considerations, it must be held that, by entering into or maintaining in force, despite the renegotiation of the 1980 Agreement, international commitments with the United States of America

— concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes,

— concerning CRSs offered for use or used in Belgian territory, and

— recognising the United States of America as having the right to withdraw, suspend or limit traffic rights in cases where air carriers designated by the Kingdom of Belgium are not owned by the latter or by Belgian nationals,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 5 and 52 of the Treaty and under Regulations Nos 2409/92 and 2299/89.

Costs

146 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 Kingdom of Belgium has been essentially unsuccessful, the latter must be ordered to pay the costs.

147 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 entering into or maintaining in force, despite the renegotiation of the air transport agreement between the Kingdom of Belgium and the United States of America of 23 October 1980, international commitments with the United States of America

— concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes,

— concerning computerised reservation systems offered for use or used in Belgian territory, and

— recognising the United States of America as having the right to withdraw, suspend or limit traffic rights in cases where air carriers designated by the Kingdom of Belgium are not owned by the latter or by Belgian nationals,

the Kingdom of Belgium has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and under Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services and Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems, as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993;

2. Dismisses the remainder of the application;

3. Orders the Kingdom of Belgium to pay the costs;

4. 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