JUDGMENT OF THE COURT

5 November 2002 *

In Case C-476/98,

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

applicant,

v

Federal Republic of Germany, represented by C.-D. Quassowski, acting as Agent, assisted by G. Schohe, Rechtsanwalt,

defendant,

* Language of the case: German.

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 1994 and 1996, 'open skies' agreements with the United States of America in the field of air transport, the Federal Republic of Germany 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, in relation to part of its principal claim, a declaration that, in so far as the 1994 and 1996 agreements cannot be regarded as having radically amended and thus replaced the agreements previously concluded, the Federal Republic of Germany 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, in relation to the agreements concluded before the EC Treaty entered into force, to comply with its obligations under Article 234 of the EC Treaty (now, after amendment, Article 307 EC) and, in relation to the agreements concluded after the entry into force of the Treaty, with its obligations 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 J. Sack and F. Benyon, the Federal

Republic of Germany by B. Muttelsee-Schön, acting as Agent, assisted by G. Schohe, 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:

— as its principal claim, a declaration that, by having individually negotiated, initialled and concluded, in 1994 and 1996, 'open skies' agreements with the United States of America in the field of air transport, the Federal Republic of Germany 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, hereinafter '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, in relation to part of its principal claim, a declaration that, in so far as the 1994 and 1996 agreements cannot be regarded as having radically amended and thus replaced the agreements previously concluded, the Federal Republic of Germany 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, in relation to the agreements concluded before the EC Treaty entered into force, to comply with its obligations under Article 234 of the EC Treaty (now, after amendment, Article 307 EC) and, in relation to the agreements concluded after the entry into force of the Treaty, with its obligations 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 Federal Republic of Germany.

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 Federal Republic of Germany, 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 Federal Republic of Germany and the United States of America

23 A bilateral air transport agreement was concluded between the Federal Republic of Germany and the United States of America on 7 July 1955, and amended in 1978 and 1989 ('the 1955 Agreement'). The two countries decided, in the early 1990s, to renegotiate the 1955 Agreement. While waiting for those negotiations to come to fruition, transitional rules were agreed by an agreement concluded on 24 May 1994 ('the transitional regime of 1994').

24 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.

25 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.

26 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.

27 On 29 February 1996, representatives of the German and American Governments reached a consensus on the amendment of the 1955 Agreement. On 23 May 1996, the Federal Republic of Germany and the United States of America signed a protocol amending the 1955 Agreement ('the 1996 amending protocol'). As from that date, the transitional regime of 1994 was suspended.

28 Under the 1996 amending protocol, the following amendments were made to the 1955 Agreement. In the body of the text of that agreement, Articles 1 (Definitions), 2 (Grant of Rights), 3 (Designation and Authorisation), 4 (Revocation of Authorisation), 6 (Safety), 7 (Customs Duties and Charges), 8 (Fair Competition), 9 (Commercial Opportunities), 10 (Pricing), 11 (Aviation Security) and 12 (Consultations) were amended or revoked in order to make the agreement comply with the American 'open skies' model agreement. In addition, two new articles, Article 7 *bis* (User Charges) and 12 *bis* (Preferential Treatment and Reciprocity) were added. Parts I and II of the Annex to the 1955 Agreement, containing schedules of routes and opportunities for using them, were also

amended to bring them into line with the American 'open skies' model agreement (in relation, for example, to routes, operational flexibility, charter flights, etc.). Finally, a Part III, concerning the principles relating to the CRSs, was added to the Annex.

29 Article 3 of the 1955 Agreement, as amended by the 1996 amending protocol, 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 contracting party designating the airline, nationals of the contracting party or both ('the clause on the ownership and control of airlines'). According to Article 4 of that Agreement, as amended by the 1996 amending protocol, those authorisations and permissions may be revoked, suspended or limited where the above condition is not fulfilled.

30 In addition, Article 3(3) of the 1955 Agreement, as amended by the 1996 amending protocol, contains a provision concerning minority shareholders in third-country airlines. By the effect of that provision, the United States of America undertakes, on certain conditions, to waive its right to withhold or revoke the necessary authorisations to airlines designated by other Member States under a bilateral 'open skies' agreement concluded by them with the United States of America, in which German natural or legal persons hold less than 50% of the capital ('the minority shareholders provision').

The pre-litigation procedure

31 On account of the conclusion of the 1996 amending protocol between the Federal Republic of Germany and the United States of America, the Commission sent the

German Government a letter of formal notice on 20 May 1996, 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, Member States no longer had the competence to conclude bilateral agreements. Furthermore, it considered that the 1996 amending protocol was contrary to primary and secondary Community law.

32 The German Government having challenged, in its reply of 26 June 1996, the Commission's view on the matter, the Commission sent the Federal Republic of Germany a reasoned opinion on 16 March 1998, in which it concluded that the bilateral commitments resulting from the transitional regime of 1994 and the 1996 amending protocol infringed Community law and called upon that Member State to comply with the reasoned opinion within two months from its notification.

33 Finding the German Government's reply of 14 May 1998 unsatisfactory, the Commission brought the present action.

Admissibility

34 The German Government raises four pleas of inadmissibility on the grounds, respectively, of misuse of procedure and lack of any interest of the Commission in bringing an action, of the fact that the action is also directed against the transitional regime of 1994, of the imprecise and general nature of the letter of formal notice, and of the imprecise nature of the Commission's alternative claim.

Misuse of procedure and lack of any interest in bringing an action

35 The German 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 by political means at the level of the Council, and which it can secure only by taking action against that institution. In those circumstances, the Federal Republic of Germany submits that the Commission has no interest in bringing an action against it and that the present action is inadmissible.

36 It should be noted in that regard that this action is for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Community law in that it concluded bilateral agreements in the field of air transport with the United States of America.

37 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.

38 As regards the German 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, and that, in exercising those powers which it holds under Article 169 of the Treaty, the Commission does not have to show that there is a specific interest in bringing an action (Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraphs 21 and 22).

39 This plea must therefore be dismissed.

The admissibility of the action in so far as it is directed against the transitional regime of 1994

40 The German Government submits that the action is inadmissible in so far as it is directed against the transitional regime of 1994, which has produced no legal effects since 23 May 1996, a date preceding that on which the reasoned opinion was sent.

41 The Commission states that, although it is true that the transitional regime has produced no legal effects since 23 May 1996, it has included it in its action in order that the infringement of Community competence which results from the adoption of that regime may also be denounced.

42 In that regard, it is sufficient to observe that, according to settled case-law, in an action under Article 169 of the Treaty, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion (see, in particular, Case C-214/96 *Commission* v *Spain* [1998] ECR I-7661, paragraph 25).

43 In this case, it is undisputed that, at the end of the two-month period laid down in the reasoned opinion of 16 March 1998, the transitional regime of 1994 was no longer in force, having been suspended on 23 May 1996.

44 The action must therefore be declared inadmissible in so far as it is directed against the transitional regime of 1994.

The imprecise and general nature of the letter of formal notice

45 The German Government claims that the Commission does not indicate in its letter of formal notice of 20 May 1996 which specific provisions of the 1996 amending protocol should have been amended and in what way. Given its imprecise and general nature, that letter did not put the Federal Republic of Germany in a position to submit its observations in accordance with the first paragraph of Article 169 of the Treaty, or to identify the conduct which the Commission considered it had to adopt in order to comply with Community law.

46 In that respect, it should be borne in mind that the purpose of the pre-litigation procedure laid down by Article 169 of the Treaty is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission. The proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraphs 16 and 17).

47 It follows from that function that the purpose of the letter of formal notice is, first, to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence and, second, to enable the Member State to comply with its obligations before proceedings are brought before the Court (judgment in Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 54).

48 Although the reasoned opinion under Article 169 of the Treaty must contain a coherent and detailed statement of the reasons which have led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 54).

49 In this case, in its letter of formal notice, the Commission described briefly, but with sufficient precision, the subject-matter of the international commitments entered into by the Federal Republic of Germany of which it complains, referring in particular to the clause on the ownership and control of airlines which appears in the 1996 amending protocol, and set out the reasons for which it considers that those commitments, including those resulting from that clause, were contrary to Community law.

50 By proceeding in that way, the Commission defined the subject-matter of the failure to fulfil obligations with which it charges the Federal Republic of Germany, and provided it with the necessary information for preparing its defence. In particular, given that the failure complained of essentially consists of infringement of Community competence by the very fact of having subscribed to bilateral commitments in the field of air transport, and of infringement of Article 52 of the Treaty by having agreed, as part of those commitments, to a

clause concerning the ownership and control of airlines, it was not necessary for the Commission, from the moment of giving formal notice, to refer to all the specific provisions of the 1996 amending protocol.

51 This plea must therefore be dismissed.

The imprecise nature of the Commission's alternative claim

52 The German Government further maintains that the Commission's alternative claim is inadmissible for lack of precision. It claims that it is not clear from the application in what hypothesis that claim is submitted.

53 According to the Commission, it is already specified in the application that the alternative claim is formulated 'in so far as the 1994 and 1996 agreements cannot be regarded as having radically amended and thus replaced the agreements previously concluded'. The words 'in the alternative, in relation to part of the principal claim', which introduce that claim, were merely intended to make clear at the outset that it does not relate to the whole of the principal claim but to part of it.

54 It is sufficient to observe in that respect that the very formulation of the Commission's alternative claim shows that it is submitted only in the event that the Court, rejecting the premiss on which the Commission's principal claim is based, should take the view that the 1996 amending protocol does not amend radically, and thus replace, the 1955 Agreement. Moreover, the words 'in the alternative, in relation to part of the principal claim' are designed to indicate that

the alternative claim relates only to part of the principal claim, namely that concerning the provisions which have not been radically altered by that 1996 protocol, and which, therefore, cannot be regarded as forming part of the commitments entered into in 1996 but as belonging to the 1955 Agreement.

55 As the Commission's alternative claim is not imprecise, the plea put forward on this point by the German Government must be dismissed.

Questions prior to examination of the merits of the case

56 Before considering the merits of the case, a position must be taken on the difference between the parties as to what is the subject-matter of the Commission's principal claim and on the question whether, in order to rule on that claim, it is necessary to determine whether the amendments made to the 1955 Agreement in 1996 have had the effect of transforming that agreement into a new agreement, of which the provisions of the 1955 Agreement form an integral part.

The subject-matter of the Commission's principal claim

57 The German Government maintains that the Commission's principal claim relates only to the 1996 amending protocol and not, therefore, to the 1955 Agreement, which is concerned only by the Commission's alternative claim. In any event, the Commission did not indicate in its application that its principal claim was directed to examination of the 1955 Agreement, and it is attempting in its reply to amend the subject-matter of that claim so that the 1955 Agreement

may be reviewed as if it were a new agreement to which the objection under Article 234 of the Treaty does not apply.

58 The Commission argues that, in its principal claim, it does not criticise either the conclusion of the 1955 Agreement or its maintenance in force until 23 July 1992. It does, however, criticise the Federal Republic of Germany for having carried over to the new agreement resulting from the 1996 amending protocol a number of provisions — and therefore rights — contained in the pre-existing 1955 Agreement, which the Commission regards as forming an integral part of the new agreement or which, in any event, are the confirmation of an existing agreement. The 'old' rights and provisions are therefore also covered by the principal claim. That was made explicitly clear in the Commission's arguments from the time of its letter of formal notice until the bringing of its action.

59 In that regard, it must be observed that it is clear both from the reasoned opinion and from the Commission's application that, in its principal claim, the Commission starts from the premiss that the amendments to the 1955 Agreement made in 1996 were so radical that the result was the conclusion of a totally new air transport agreement between the United States of America and the Federal Republic of Germany. What was involved, according to the Commission, was the recasting of mutual rights and obligations in a totally novel context. In the Commission's submission, even if application of the 1955 Agreement has been continued at a formal level, that agreement constitutes no more than the envelope for entirely new material.

60 It follows that, contrary to what the German Government maintains, the Commission's principal claim is also directed against the provisions appearing in the 1955 Agreement which were repeated in what it maintains constitutes a new agreement in consequence of the amendments made in 1996.

The need to rule on the existence of a new agreement in consequence of the amendments made in 1996

61 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 1996 had the effect of transforming the pre-existing 1955 Agreement into a new 'open skies' agreement incorporating the provisions of the 1955 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 1996. 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 1955 Agreement for their compatibility with, in particular, Article 234 of the Treaty.

62 It must be pointed out, however, that examination of the substance of the principal claim does not necessarily presuppose the Court's first taking a position on the preliminary issue referred to above.

63 In that regard, it is clear from the file and from the oral argument before the Court that the amendments made in 1996 to the 1955 Agreement, described in paragraph 28 above, had the effect of totally liberalising air transport between the United States of America and the Federal Republic of Germany 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, in relation to CRSs for example.

64 It follows that the amendments made in 1996 to the 1955 Agreement have had the effect of creating the framework of a more intensive cooperation between the United States of America and the Federal Republic of Germany, which entails new and significant international commitments for the latter.

65 In particular, that finding applies to access to intra-Community routes granted to airlines designated by the United States of America. Even if, as the German Government maintains, that access originates in commitments entered into before 1996, it is clear from Part 1 of the Annex to the 1955 Agreement, concerning the list of routes, as amended in 1996, that access for carriers designated by the United States of America to intra-Community routes was, at the very least, reconfirmed in 1996 in the context of the exchange of traffic rights agreed by the two States.

66 As for the clause concerning the ownership and control of airlines, it is undisputed that Articles 3 and 4 of the 1955 Agreement, which contained a corresponding clause, were entirely rewritten by the 1996 amending protocol. Furthermore, even if, as the German Government claims, the basis of that clause is not the 1996 amending protocol but the 1955 Agreement, it must be observed that, as the Advocate General has rightly pointed out in paragraphs 136 to 138 of his Opinion, the amendments made in 1996 to other provisions in the 1955 Agreement have also affected the scope of that clause and thus the extent of the international commitments of the Federal Republic of Germany resulting from it.

67 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, namely in 1996.

68 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.

69 Moreover, although Article 234 of the Treaty, referred to in the alternative claim, applies to rights and obligations flowing from agreements concluded by Member States before the Treaty entered into force, it cannot apply to amendments which Member States make to such agreements by entering into new commitments after the entry into force of the Treaty.

Infringement of the external competence of the Community

70 The Commission charges the Federal Republic of Germany 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

71 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.

72 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, to use the expression employed in paragraph 85 of Opinion 1/94, given the international nature of the activities carried on and the impossibility of separating the internal and external markets both economically and legally. 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.

73 The discrimination, the distortions of competition and the disturbance of the Community market resulting 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.

74 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 the Community rules, and to compete in this way with their Community counterparts.

75 Moreover, the necessity for Community action in relation to non-member countries is apparent from the wording of the provisions of Title IV of Part Three of the Treaty. Even if 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.

76 The German Government argues that the alleged competence in this case cannot be inferred from Title IV of Part Three of the Treaty, relating to transport. Article 75 of the Treaty, and particularly paragraph (1)(a) thereof, does not confer any competence on the Community to negotiate air transport agreements with non-member countries. Such a competence may be inferred only from Article 84(2) of the Treaty.

77 However, it follows from Article 84(2) of the Treaty that, so long as the Council has not, by an express decision based on that provision, created a Community competence to negotiate air transport agreements with non-member countries, Member States retain their competence to enter into bilateral commitments. That is the situation in the present case; as is clear from Opinions 1/94 and 2/92, the Council has not created such a competence in favour of the Community. The

examples given by the Commission concerning agreements concluded or negotiated with, respectively, the Kingdoms of Norway and Sweden, the Swiss Confederation and certain countries in central and Eastern Europe are of limited scope and cannot be transposed to other areas, such as that of agreements with the United States of America. The same is also clear from the Conclusions of the Council of 15 March 1993 and from the common declaration of the Council and the Commission of 1996, which show that, in the current state of Community law, competence to conclude international agreements in the field of air transport remains vested in the Member States.

78 Contrary to what the Commission argues, exercise of the Community's internal competence in the field of air transport is, the German Government submits, not inextricably linked to the exercise of external competence, and may be dissociated from it.

79 Moreover, paragraph 100 of Opinion 1/94 shows that harmonisation within the Community does not necessarily presuppose an external agreement. In any event, the Community is not prevented from using means less radical than the conclusion of an international agreement, such as the adoption of internal rules, in order to regulate the treatment of nationals of non-member countries in the Community.

Findings of the Court

80 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.

81 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.

82 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).

83 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.

84 That is not the case here.

85 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.

86 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).

87 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.

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

89 In the light of the foregoing considerations, it must be found that, at the time of the conclusion of the 1996 amending protocol, 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 the United States of America.

90 The claim that the Federal Republic of Germany 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

91 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.

92 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.

93 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 destabilise 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.

94 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.

95 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.

96 Should the Court nevertheless find that the Community legislation cannot be regarded as complete on the ground that, as the Federal Republic of Germany maintains, certain essential elements are still missing from it, that, too, would not be decisive for the outcome of the action. In that case, the exclusive competence of the Community would merely be partial, and an air transport agreement could be concluded with the United States of America only on a joint basis by the Community and the Member States, each party acting within its own area of competence.

97 The German Government submits that it is not possible to infer from the *AETR* judgment anything to suggest that any competence has been created which is not already provided for in the Treaty, and that Article 84(2) of the Treaty excludes the possibility of recognising the Community as having competence to conclude international air transport agreements on the strength of the fact that the Community has adopted certain provisions concerning the internal market in the air-transport sector.

98 In the alternative, should the Court hold that the Community does have competence to negotiate and conclude air transport agreements with non-member countries, the German Government submits, on the basis of Opinions 1/94 and 2/92, that that competence is not exclusive but concurrent. That means that, inasmuch as, and to the extent that, the Community has not fully exercised its own external competence, the Member States retain, without prejudice to the latter, their own external competence, and, unlike the situation in the case of 'mixed competence', may act without the collaboration of the Community.

According to the German Government, it follows from Declaration No 10, concerning Articles 109, 130 R and 130 Y of the EC Treaty, annexed to the Final Act of the Treaty on European Union, that concurrent competence of the Member States may subsist alongside the competence of the Community arising from the *AETR* judgment.

99 Having carried out a minute examination of the regulations relied upon by the Commission, the German Government argues that their reach does not extend beyond the Community. They thus concern only intra-Community air traffic and not the treatment of Community nationals in non-member countries or that of nationals of non-member countries in the Community. Therefore, the matters covered by the Community provisions alleged to be infringed, on the one hand, and those covered by the contested bilateral commitments, on the other, are, the German Government submits, fundamentally different.

100 The German Government further argues that the external competence of the Community resulting from the application of the principles established in the *AETR* judgment is governed by the principle of proportionality, and is therefore limited to actions of the Community in the international field which are necessary for the realisation of the internal Community objective. In this case, the Community has at its disposal means which are less radical than the transfer of the competence concerned from the Member States to the Community and which would make it possible to prevent, just as effectively, the common rules from being 'affected' within the meaning of the *AETR* judgment.

Findings of the Court

101 It must be recalled that, as has already been found in paragraphs 80 and 81 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.

102 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.

103 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.

104 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.

105 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.

106 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.

107 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.

108 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).

109 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).

110 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).

111 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.

112 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).

113 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 by the Federal Republic of Germany.

114 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 Federal Republic of Germany 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.

115 That argument must be rejected.

116 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.

117 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.

118 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.

119 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.

120 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.

121 However, as has been pointed out in paragraph 111 above, that kind of situation does not affect the common rules and is therefore not capable of establishing an external competence of the Community.

122 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.

123 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.

124 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.

125 It follows that, since the entry into force of Regulation No 2409/92, the Federal Republic of Germany has no longer been entitled to enter on its own into international commitments concerning the fares and rates to be charged by carriers of non-member countries on intra-Community routes.

126 It is not in dispute that a commitment of that type was entered into by the Federal Republic of Germany by virtue of the 1996 amending protocol. By proceeding in that way, that Member State thus infringed the Community's exclusive external competence resulting from Article 1(3) of Regulation No 2409/92.

127 That finding cannot be called into question by the fact that, in respect of the air transport to which Regulation No 2409/92 applies, the relevant clause in the 1996 amending protocol requires that regulation, and subsequent regulations which are no more restrictive, to be complied with. However praiseworthy that initiative by the Federal Republic of Germany, designed to preserve the application of Regulation No 2409/92, may have been, the fact remains that the failure of that Member State to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with Community law.

128 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.

129 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.

130 It is not in dispute that the 1996 amending protocol, concluded between the Federal Republic of Germany and the United States of America, added a Part III to the annex to the 1955 Agreement, concerning the principles relating to CRSs, including those applying to CRSs offered for use or used in the territory of the Federal Republic of Germany. By acting in that way, the Federal Republic of Germany infringed the exclusive external competence of the Community arising from Regulation No 2299/89.

131 That finding cannot be called into question either by the fact that the substance of those commitments does not conflict with Regulation No 2299/89, as the German Government maintains, or by the fact that, in the memorandum of consultations drawn up in the context of the negotiations which preceded the conclusion of the 1996 amending protocol, it is stated that the part concerning CRSs may apply only if it is compatible with the code of conduct established in that regard by the European Union. The failure of the Federal Republic of Germany to fulfil its obligations results from the very fact that it entered into the international commitments on CRSs referred to in the previous paragraph.

132 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.

133 However, the Commission has not identified the international commitments entered into by the Federal Republic of Germany which it claims are capable of affecting Regulation No 95/93.

134 The failure to fulfil obligations with which the Federal Republic of Germany is charged in that respect therefore appears to be unfounded.

135 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.

136 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).

137 It follows from the foregoing considerations that, by entering into 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 German territory, the Federal Republic of Germany 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

138 The Commission submits that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty because the Federal Republic of Germany does not accord to the nationals of other Member States, and in particular to companies and undertakings of those Member States established in the Federal Republic of Germany, the treatment reserved for German nationals.

139 Contrary to what the German Government maintains, the clause mentioned above cannot be justified under Article 56 of the EC Treaty (now, after amendment, Article 46 EC), the economic interests of the Federal Republic of Germany not being relevant for the purposes of applying that provision.

140 The German Government contends that, in this case, freedom of establishment does not apply either *ratione materiae* or *ratione loci.*

141 First, it maintains that freedom of establishment does not apply *ratione materiae.* Under this plea, the Commission is complaining of the fact that, in the context of the traffic rights agreed on a bilateral basis, companies of other Member States are not allowed to provide air transport services according to the same principles as German companies. Such a supply of services is, however, subject to the provisions of Title IV, concerning transport, in Part Three of the Treaty, provisions which, for their part, are not applicable in the field of air transport, in accordance with Article 84(2) of the Treaty.

142 Second, the German Government contends that freedom of establishment does not apply *ratione loci*, given that the Commission's complaint concerns an economic activity, namely the organisation of flights, which forms part of the relationship between the Community and a non-member country. Freedom of establishment, however, is limited to cross-border activities within the Community. Such activities are not concerned by the commitments at issue. On the other hand, the granting of the advantages provided for under those commitments depends on action taken by the United States of America.

143 Even if the clause on the ownership and control of airlines were to be regarded as contrary to Article 52 of the Treaty, it would nevertheless be justified on grounds of public policy in accordance with Article 56(1) of the Treaty. Specifically, the public interest of the Federal Republic of Germany requires maintenance of the possibility of refusing the designation by the United States of America of airlines the majority of whose capital is held by, or which are controlled by, other non-member countries, while, on its side, the United States of America is not willing to waive the disputed clause, at least in relation to companies owned or controlled by Member States other than the Federal Republic of Germany.

Findings of the Court

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

145 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.

146 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.

147 As regards the question whether the Federal Republic of Germany 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.

148 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.

149 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).

150 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 authorisations or technical permissions of an airline designated by the Federal Republic of Germany but of which a substantial part of the ownership and effective control is not vested in that Member State or in German nationals.

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

152 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 authorisations and required technical permissions to airlines of which a substantial part of the ownership and effective control is vested in the Federal Republic of Germany or German nationals ('German airlines').

153 It follows that Community airlines may always be excluded from the benefit of the air transport agreement between the Federal Republic of Germany and the United States of America, while that benefit is assured to German airlines. Consequently, Community airlines suffer discrimination which prevents them

from benefiting from the treatment which the host Member State, namely the Federal Republic of Germany, accords to its own nationals.

154 Contrary to what the Federal Republic of Germany 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.

155 Moreover, the provision on minority shareholders (see paragraph 30 above), inasmuch as it concerns airlines with a German shareholding designated by other Member States, is not capable of disturbing the finding in paragraph 151 above.

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

157 As for the German Government's arguments seeking to justify that clause, 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* v *Netherlands State* [1988] ECR 2085, paragraph 36; and *Calfa*, paragraph 24).

158 In this case, the clause concerning the ownership and control of airlines does not limit the power to refuse operating licences or the necessary technical authorisations 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 licences and authorisations.

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

160 The justification put forward by the Federal Republic of Germany on the basis of Article 56 of the Treaty must therefore be rejected.

161 In those circumstances, the claim that the Federal Republic of Germany has failed to fulfil its obligations under Article 52 of the Treaty appears to be well founded.

162 Having regard to the whole of the foregoing considerations, it must be held that, by entering into 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 German 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 Federal Republic of Germany are not owned by the latter or by German nationals,

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

Costs

163 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 Federal Republic of Germany has been essentially unsuccessful, the latter must be ordered to pay the costs.

164 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 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 German 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 Federal Republic of Germany are not owned by the latter or by German nationals,

the Federal Republic of Germany 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 Federal Republic of Germany 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 G.C. Rodríguez Iglesias

Registrar President