OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 31 January 2002 [1]

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1 Original language: Italian.

Introduction

1. By eight separate applications, lodged simultaneously on 18 December 1998, the Commission brought actions before the Court of Justice against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany. These actions, brought under Article 169 of the EC Treaty (now Article 226 EC), concern various breaches of Community law arising from the conclusion by those Member

States of bilateral air transport agreements with the United States of America. Specifically, defendant Member States are charged:

(a) with having concluded with the United States, in 1995 and 1996, highly liberal air transport agreements (known as 'open skies' agreements) contrary to the principles governing the division of external powers between the Community and the Member States (this charge does not apply to the United Kingdom, however, since its agreement with the United States is not regarded as being an 'open skies' agreement);

(b) with having infringed Article 52 of the EC Treaty (now Article 43 EC) by inserting or maintaining in bilateral agreements with the United States a clause known as a 'nationality clause' which in practice allows each party to refuse the rights provided for under the agreements to air carriers designated by the other contracting State but not owned or controlled by nationals of that State;

(c) in the alternative, with having infringed the second paragraph of Article 234 of the EC Treaty (now the second paragraph of Article 307 EC), or Article 5 of the EC Treaty (now Article 10 EC), as the case may be, by having failed to do everything in their power to bring fully into line with Community law agreements concluded with the United States before the entry into force of the EC Treaty or before the adoption of the Community rules on air transport, in particular the third legislative 'package' (this charge does not apply in the case of the United Kingdom either).

2. I do not need to dwell on the importance and sensitivity of these cases. The issues which the Court has to decide are of obvious economic and political significance, not only because of the unusual number of Member States involved and the repercussions on relations with the United States but especially because of their implications for the major restructuring taking place in the international aviation sector and hence also for the strategies of Community airlines operating in an economic context of market globalisation and growing international competition. But the aspect I wish most to underline for present purposes is that the actions under consideration are of particular interest in numerous respects and of singular complexity, notably on the legal level. This will become evident in the pages that follow; for now, I will merely note that this is the first time, to my knowledge, that the Commission has

brought actions of this kind against Member States for infringement of the Community's external competence.

I — The relevant legal framework

Community law

3. Air transport, it may be recalled, is accorded special treatment in the scheme of the Treaty. According to Article 84(1) of the EC Treaty (now Article 80(1) EC) the transport provisions, contained in Title IV (now Title V), apply to transport by rail, road and inland waterway only; Article 84(2) provides, on the other hand, that the Council may, acting by qualified majority, decide 'whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport'.

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 extend to the aviation sector both the freedom to provide services and the Community's competition rules.

5. The Council's approach was a gradual one, with the partial market liberalisation introduced under the first two packages of measures[2] eventually culminating in complete liberalisation of intra-Community air transport under the third package. The main measures comprising the third package are as follows.

(i) Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers,[3] laying down requirements for the granting and maintenance of operating licences by Member States in relation to air carriers established in the Community. It may be noted at this stage that Article 3(3) of the regulation provides that undertakings established in the Community are not permitted to carry passengers, mail and/or cargo by air, for remuneration, within the terri-

2 — Disregarding for these purposes the measures adopted in relation to competition, the first package consisted of Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States (OJ 1987 L 374, p. 12) and Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States (OJ 1987 L 374, p. 19). The second package comprised Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services (OJ 1990 L 217, p. 1) and Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States (OJ 1990 L 217, p. 8).

3 — OJ 1992 L 240, p. 1.

tory of the Community unless they are in possession of the appropriate operating licence. The regulation then goes on to provide, in Article 4, that, without prejudice to agreements and conventions to which the Community is a contracting party, licences may be granted only to undertakings established in a Member State which are majority-owned and effectively controlled by nationals of that State.[4] The regulation thus concerns only the licensing of Community carriers in relation to intra-Community routes.

(ii) Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes.[5] As far as concerns us here, it may be noted that Article 3(1) of that regulation provides that the Member States concerned are to permit Community air carriers (meaning air carriers licensed in accordance with Regulation No 2407/92) to exercise traffic rights on routes within the Community; Article 3(2) sets forth a number of exceptions of limited duration (until 1 April 1997) in relation to cabotage services only. The regulation also lays down particular rules governing the right of Member States to impose public service obligations on particular routes (Articles 4 to 7), to regulate the distribution of traffic between the airports within an airport system without discrimination on grounds of nationality or identity of the air carrier (Article 8), and, where 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 (Article 9).

(iii) Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services,[6] which 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. It should be pointed out that, while this regulation does not apply to fares and rates charged by air carriers other than Community air carriers (Article 1(2)(a)), Article 1(3) nevertheless provides that '[o]nly Community air carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products': with the obvious corollary that third country carriers are prohibited from so doing.

4 — Article 4(3) sets forth a number of exceptions, which are not relevant to the present cases.

5 — OJ 1992 L 240, p. 8.

6 — OJ 1992 L 240, p. 15.

6. In addition to the legislation adopted as part of these 'packages', the Community has also adopted a number of other measures in the field of air transport, of which the following are relevant for our purposes.

(i) Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems. [7] Article 1 provides that the regulation is to apply to computerised reservation systems (hereinafter 'CRSs') when offered for use and/or used in the territory of the Community for the distribution and sale of air transport products, 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 and the geographical location of the air transport product concerned. However Article 7 provides that:

'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 and 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.'

(ii) Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports. [8] This regulation, which is based on the principle that slots at Community airports must be allocated in a neutral, transparent and non-discriminatory way, applies also to third

7 — OJ 1989 L 220, p. 1. This regulation was amended first by Council Regulation No 3089/93 of 29 October 1993 (OJ 1993 L 278, p. 1) and then, after the institution of the present proceedings, by Council Regulation No 323/1999 of 8 February 1999 (OJ 1999 L 40, p. 1).

8 — OJ L 14, p. 1.

country carriers; however Article 12 provides that:

'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.'

International law

7. At international level, as we know, air transport is governed by the Chicago Convention on International Civil Aviation of 7 December 1944. For our purposes, it may be recalled that under Article 1 of the Convention 'every State has complete and exclusive sovereignty over the airspace above its territory'. Article 6 of the Convention further provides that '[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorisation'.

II — Facts and procedure

Commission initiatives with a view to the Community concluding international air transport agreements

8. Relations between the Member States of the European Community and the United States of America in the field of air transport have traditionally been governed by bilateral agreements under which carriers designated by the contracting parties are granted the permissions or authorisations referred to in Article 6 of the Chicago Convention, subject to the terms of the each agreement.

9. Starting in the early 1990s and with a view to replacing this set of bilateral agreements by a single agreement to be concluded between the Community and the United States of America, the European Commission repeatedly requested a mandate from the Council to negotiate an air transport agreement of this kind with the United States authorities.

10. The first such request was made on 23 February 1990 with the submission by the Commission 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'. [9] This was followed, on 23 October 1992, by a second, slightly modified, proposal for a decision. [10] Both proposals had as their legal basis Article 113 of the Treaty (now Article 133 EC), on the premiss that the conclusion of international air transport agreements fell within the commercial policy of the Community.

11. In both instances, however, the Council declined to give effect to the Commission's initiative. Its position was clearly set out in the Conclusions approved on 15 March 1993, according to which:

— in the view of the Council, Article 84(2) of the Treaty constitutes the proper legal basis for an operational development in the external aviation sector;

— 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

9 — Document COM(90) 17 final.

10 — OJ 1993 C 216, p. 15.

regard, it was emphasised, however, that in the course of bilateral negotiations the Member States concerned should take due account of their obligations imposed by 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.

12. In April 1995, the Commission raised the matter once more, recommending a Council 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. But 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.

13. 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. For our purposes, it should be noted that in one of these declarations, which was made jointly by both institutions, 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 was concluded. In a separate declaration, the Commission asserted that Community competence had now been established in respect of air traffic rights.

14. It appears that a further request for a negotiating mandate was submitted by the Commission in November 1997, but was not granted by the Council.

15. It should also be noted that no agreement has yet been reached with the United States following the conferment of the negotiating mandate on the Commission in 1996. In contrast, as pointed out in the Commission's pleadings, the Community concluded a civil aviation agreement with the Kingdom of Norway and the Kingdom of Sweden in 1992, [11] reached an agreement in principle with Switzerland, [12] and is negotiating an agreement on the creation of a 'common European airspace' [13] with 12 European countries (Bulgaria, Czech Republic, Estonia, Hungary, Iceland, Latvia, Lithuania, Norway, Poland, Romania, Slovakia and Slovenia)

The United States of America/Member States agreements and the pre-litigation procedure

16. The files in the cases show that, starting in 1992, the United States began to make proposals to various Member States of the Community for the amendment of the existing bilateral air transport agreements in order to bring them into line with a specific, particularly liberal model agreement (known as an 'open skies' agreement). According to the United States Government's guidelines, quoted in the Commission's applications, an 'open skies' agreement should meet the following criteria in particular:

'1. Free access to all routes;

2. Unlimited capacity and frequencies on all routes;

3. Unlimited route and traffic rights, in other words, the right to operate flights between any point in the United States and any point in the European country, without restrictions as to stopovers and destinations beyond, change of aircraft, flexibility in choice of itineraries, terminal sharing, or the right to carry fifth freedom traffic;

4. Double-disapproval system of pricing on third and fourth freedom markets: (1) on intra-Community markets: right to charge the same prices on third country markets; (2) on non-Community markets: right to set prices freely on the markets of third countries where the third and fourth freedom carriers have that right;

11 — OJ 1992 L 200, p. 20.

12 — As yet, however, it appears that no agreement has been concluded with Switzerland.

13 — The compatibility of such an agreement with Community law was considered by the Court in Opinion 1/2000.

5. Liberal agreement on charter flights (of the charter rules of the two governments, the less restrictive apply, regardless of the origin of the flight);

6. Liberal cargo regime (criteria as broad as those applicable to multi-modal transporters);

7. Agreement for the conversion and remittance of earnings (carriers can convert earnings and remit them in hard currency promptly and without restrictions);

8. Possibility of code-sharing arrangements;

9. Provisions relating to stopover services (right of the carrier to carry out/supervise the ground-handling services);

10. Provisions to boost competition with reference to commercial opportunities, user charges, fair competition and intermodal rights;

11. Explicit commitment to non-discriminatory use of and access to computerised reservation systems.

(note: an "open skies" agreement would obviously include standard provisions on safety and security)' [translation of text as cited in Commission's application in Case C-471/98].'

17. As also may be seen from these guidelines, a fundamental and defining feature of an 'open skies' agreement is a complete exchange of traffic rights. In addition to the exchange of so-called third and fourth freedoms, which are the right for an airline to carry passengers from its home country to another country and vice versa, agreements of this kind also provide for the exchange of fifth freedom rights, in other words the right to carry passengers between two countries in an aircraft of a third country on a route with origin/destination in that country. For example, an exchange of fifth freedom rights between Belgium and the United States of America would give a United States carrier the right to operate a Boston/Brussels/Berlin flight or a Berlin/Brussels/Boston flight (picking up and discharging passengers at the stopover airport), provided, of course, that the German authorities give their permission for the section of the flight under their jurisdiction, a permission that, in its turn, might result from individual decisions or could result, generally, from a similar exchange of fifth freedom rights between Germany and the United States. As far as directly concerns us here, it should then be

noted that an exchange of fifth freedom rights can allow United States carriers access to intra-Community routes, particularly if a series of such agreements have been entered into between the United States and different Member States of the Community.

18. In 1993/94, the United States stepped up their diplomatic efforts vis-à-vis various European countries. In 1995, they reached agreement with Denmark, Sweden, Finland, Belgium, Luxembourg and Austria to amend the existing agreements with those countries in line with the 'open skies' model; in 1996, they entered into a similar agreement with Germany, replacing a special transitional arrangement negotiated in 1994 (I will refer to these agreements hereafter as 'disputed agreements'); in 1995, finally, they also reached agreement with the United Kingdom to amend the bilateral agreement previously in force, although the new agreement was not aligned on the open skies model (this agreement, as we will see, is not the subject of any complaints by the Commission and is thus not a 'disputed agreement').

19. Even before the above agreements were entered into, however, the Commission, by letter of 17 November 1994, asked the Member States not to enter into negotiations with the United States without having first coordinated their responses and arrived at an agreed position; in that letter the Commission also proposed that it should participate as observer in exploratory discussions that might be held with the United States administration. Between March and April 1995 the Commission again wrote to the defendant Member States (with the exception of Germany), stating that bilateral agreements being proposed by the United States were incompatible with Community law and seeking an assurance that no such agreement would be negotiated or concluded.

20. In June and July 1995, the Commission, finding that its request had not been complied with, addressed letters of formal notice, in accordance with Article 169 of the EC Treaty, to the Member States concerned, claiming that they were infringing the Community's external competence (by entering into agreements on matters within the exclusive competence of the Community), the provisions governing the right of establishment (by including or maintaining in those agreements a 'nationality clause' [14]) and, in general, the duty of cooperation laid down in Article 5 of the EC Treaty (now Article 10 EC). A similar letter of formal notice was sent to Germany in May 1996.

14 — As indicated in the opening paragraphs and as will be discussed more fully below (paragraph 118), such a clause permits each party to refuse the rights provided for under the agreements to airlines designated by the other contracting State but which are not in the ownership or under the control of nationals of that State.

21. All the Member States replied to the letters of formal notice contesting the Commission's complaints. Among the replies of the defendant governments, particular mention should be made of the United Kingdom's reply which, as well as rejecting, as a matter of law, the infringements alleged in the letter of formal notice, also denied, as a matter of fact, having concluded an 'open skies' agreement with the United States. The United Kingdom Government argued that the agreement entered into with the United States administration in 1995, like the preceding agreement of 1977 (known as 'Bermuda II'), did not meet the key criteria of an open skies agreement, that is to say the abolition of all restrictions in terms of capacity, number of designated carriers, routes and the exchange of fifth freedom rights.

22. Not satisfied with the replies received, on 16 March 1998 the Commission sent to the Member States concerned a reasoned opinion in which it essentially confirmed the complaints set out in the letters of formal notice. In addition, in response to the argument put forward by several of the Member States that the agreements in force with the United States were covered by the first paragraph of Article 234 of the Treaty, the Commission replied that even if that were so the defendant Member States would still have been in breach of the second paragraph of that article, since they had not taken all steps necessary to bring into line with Community law agreements concluded before the entry into force of the Treaty. Only in the procedure relating to the United Kingdom did the Commission significantly modify the line adopted in the letter of formal notice, acknowledging that the agreement concluded by the United Kingdom with the United States administration in 1995 did not conform to the 'open skies' format. [15] Accordingly, the Commission did not charge the United Kingdom with infringement of the Community's external competence but only with breach of Article 52 of the EC Treaty; and since the 'nationality clause', which allegedly violated the right of establishment, had not been amended in the subsequent agreement of 1995, the Commission charged the United Kingdom with infringement of Article 52 of the Treaty by including that clause in the Bermuda II Agreement of 1977 (which, in the action against the United Kingdom, must thus be regarded as a disputed agreement). It should also be noted that the reasoned opinion addressed to the United Kingdom did not allege infringement of the second paragraph of Article 234 of the Treaty.

23. Not satisfied with the replies to the reasoned opinions, on 18 December 1998 the Commission brought the present actions for a declaration by the Court of infringement of Community law as alleged in the reasoned opinions. In particular, in the proceedings against the United Kingdom, the Commission has requested the Court to declare that, by concluding and applying the Bermuda II Agreement, which provides for the revocation, suspension or limitation of traffic rights in cases where air carriers designated by the United Kingdom are not owned by the United Kingdom or

15 — In this regard, the reasoned opinion notes that '[a]ccess to certain air routes between the United Kingdom and the United States of America is still highly restricted, access of US carriers to intra-Community air routes is not permitted, etc.'.

by its nationals, the United Kingdom has failed to fulfil its obligations under Article 52 of the Treaty.

24. In the remaining actions, on the other hand, the Commission has requested the Court:

— to declare that by negotiating, initialling and concluding (and, in the actions against Belgium and Luxembourg only, by applying) the disputed agreements, the defendant States have failed to fulfil their obligations under the Treaty, in particular under Articles 5 and 52, and under provisions of secondary legislation (in particular Regulations Nos 2407/92, 2408/92, 2409/92, 2299/89 and 95/93);

— in the alternative, should the Court regard the disputed agreements as not radically amending and replacing those previously in force, to declare that, by not eliminating the provisions of those agreements which are not compatible with the Treaty (and in particular with Article 52) and the secondary legislation, or by failing to take all steps necessary to that end, the defendant States have failed to fulfil their obligations under the second paragraph of Article 234 or under Article 5 of the Treaty, depending on whether the agreements were concluded before or after the entry into force of the Treaty (and, in the case of Germany only, in respect of agreements concluded subsequent to the entry into force of the Treaty, under the provisions of the secondary legislation).

25. The defendant Member States contest the Commission's complaints, arguing (with various differences which will be indicated in due course):

— that the actions are inadmissible on grounds of misuse of procedure, excessive duration of the pre-litigation phase, vagueness and generality of the letters of formal notice, the failure in those letters to mention complaints raised in the reasoned opinions, and failure to specify clearly the subject-matter of the action;

— that the Community does not have exclusive competence to conclude 'open skies' agreements with the United States of America;

— that the 'nationality clause' is in conformity with Community law on the right of establishment;

— that, in any event, the first paragraph of Article 234 of the Treaty is applicable and there is no breach of the obligations laid down by the second paragraph of that provision and by Article 5 of the Treaty.

26. Furthermore, the Kingdom of the Netherlands has intervened in support of the defendant States (having been granted leave to do so by order of 8 July 1999). The Commission has also initiated an infringement procedure under Article 169 of the Treaty, currently in the pre-litigation phase, against that Member State in respect of the conclusion of an 'open skies' agreement with the United States.

III — Legal analysis

27. In turning now to examine the many issues raised in these cases, the first thing to be said is that there are many and obvious overlaps between them, as is confirmed, besides, by the fact that the various applications lodged by the Commission are in large part similar and in certain passages actually identical. It seems to me, therefore, appropriate to consider the cases together, while pointing out the features specific to each as they arise. In so doing, I will naturally begin with the admissibility of the actions before moving on to a discussion of their merits.

A — Admissibility

28. As I have said, several of the defendant governments dispute the admissibility of the Commission's actions, putting forward, according to the case, variously, the following pleas: misuse of procedure; excessive duration of the pre-litigation procedure; vagueness and generality of the letter of formal notice; inclusion in the reasoned opinion of complaints not raised in the letter of formal notice; failure to specify clearly the subject-matter of the action. I will now consider these pleas in order.

Misuse of procedure

29. The Belgian, Luxembourg and German Governments submit that the actions should be declared inadmissible on the ground of misuse of procedure given that their true purpose is not to obtain judgment

against the defendant Member States in respect of the alleged infringements but to put pressure on the Council to authorise the opening of Community negotiations with the United States with a view to the conclusion of an agreement on air services. However, if that is the Commission's purpose, these governments point out, it should have brought proceedings not against the Member States but against the Council, either by challenging the decisions by which the Commission was refused authorisation to open negotiations or authorised to negotiate in respect of certain matters only, or by an action for failure to act.

30. It seems to me, however, that the Commission has a strong case in its response to this plea of inadmissibility, in which it cites the case-law of the Court according to which '[g]iven 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 failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought'. [16] The Commission has a wide discretion as to whether or not to initiate an infringement procedure against a Member State, the relevant assessments not being amenable to review by the Court. Therefore, if in making such assessments the Commission also takes into account the potential political and legal repercussions of a finding of infringement (which, in any event, is not proved to be the case here), this of itself does not render inadmissible an action under Article 169 of the Treaty; nor can such an action be rendered inadmissible by the fact that the purposes allegedly pursued could equally be achieved by a different action, since the Commission is free to choose, from among several actions that it could in theory bring, the one which it deems the most appropriate in a given case.

16 — Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22.

Excessive duration of the pre-litigation procedure

31. The Austrian Government, for its part, complains that the pre-litigation procedure took two years and nine months and that its long duration has created a situation of serious legal uncertainty for the defendant State. In effect, though it does not say so explicitly, I understand the Austrian Government to be seeking to challenge the admissibility of the Commission's action on the ground of the excessive duration of the pre-litigation procedure.

32. I must point out, however, as the Commission has also done in its pleadings, that 'as has been held in the case-law of the Court, the rules of Article 169 of the Treaty must be applied with no attendant obligation on the Commission to act within a specific period, save where the excessive duration of the pre-litigation procedure laid down by Article 169 is capable of making it more difficult for the Member State con-

cerned to refute the Commission's arguments and of thus infringing the rights of defence... Consequently, it is for the Member State concerned to provide evidence that it has been so affected.' [17] As the Austrian Government has not claimed that its own rights of defence were prejudiced by reason of the excessive length of the procedure, nor put forward any arguments that might support such a claim on other grounds, I consider that this plea must be rejected.

Vagueness and generality of the letter of formal notice

33. The German Government also objects that the Commission's letter of formal notice did not detail with sufficient precision the infringements complained of, and, in particular, that it did not specify which provisions of the disputed agreement should be modified and in what manner. The Commission, for its part, argues that the letter of formal notice can be confined to a general outline of the factual and legal situation giving rise to the infringement procedure without rendering the action inadmissible on that account.

34. On this point I would observe that, according to settled case-law, 'in view of the purpose assigned to the preliminary stage of the Treaty infringement procedure, the formal letter of notice is intended to define 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'. While the opportunity to submit observations at the pre-litigation stage constitutes an essential safeguard of Member States' rights of defence, there is no reason for this to take the same form at each step in the procedure. In particular, the Court states, although it is true 'that the reasoned opinion provided for in Article 169 of the EEC Treaty must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, it is not possible to impose such strict requirements as regards the formal letter of notice, which of necessity will contain only an initial brief summary of the complaints'. [18]

35. It follows from that case-law that the Commission was entitled to limit itself, in the letter of formal notice, to a statement in summary form of the complaints raised against Germany, while reserving the right to provide further details in the reasoned opinion, in the light *inter alia* of the information and explanations received from that Member State. For present purposes, therefore, I need merely note that the letter of formal notice enabled the Member State to ascertain with sufficient precision the subject-matter of the dispute and to prepare its own line of defence in relation to the complaints indicated by the Commission. Accordingly, the Commission did not curtail the rights of defence of that

17 — See Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraph 25, and the case-law cited therein.

18 — Case C-135/94 *Commission* v *Italy* [1995] ECR I-1805, paragraphs 5 and 7.

Member State, which subsequently had the opportunity of replying in full to the more detailed material set out in the reasoned opinion, the completeness of which has not been called into question in this action. It follows that this plea of inadmissibility must also be rejected.

Failure to include in the letter of formal notice complaints raised in the reasoned opinion

36. The Austrian Government also argues that the complaint relating to the second paragraph of Article 234 of the Treaty was raised for the first time in the reasoned opinion without having been mentioned in the letter of formal notice: this, it claims, constituted an improper widening of the procedure and now renders the action inadmissible with respect to the complaint in question. The Commission states, in response to that argument, that the need to allege infringement of the second paragraph of Article 234 arose only after the defendant government sought to rely, in its reply to the letter of formal notice, on the first paragraph of the same article; in any event, the Commission argues, the second paragraph of Article 234 is no more than a specific enunciation of the duty to cooperate in good faith laid down in Article 5 of the Treaty, infringement of which had already been alleged in the letter of formal notice.

37. I have already made the point, in relation to this matter, that the Commission may set out in more detail and define more precisely in the reasoned opinion the complaints formulated in general terms in the letter of formal notice; I would now add that this is clearly so, *a fortiori*, where the clarifications are rendered necessary by arguments put forward by the Member State in its reply to that letter. As the Court has held, '[a]lthough it is true that under the procedure provided for in Article 169 the action brought by the Commission must relate to the same subject-matter as the reasoned opinion, which must in turn be preceded by a letter inviting the Member State concerned to submit its observations, there is nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter. Indeed, the reply to that letter may give rise to a fresh consideration of those complaints'. [19]

38. As the Commission has pointed out, the obligation imposed on Member States by the second paragraph of Article 234 of the Treaty to take all appropriate steps to eliminate incompatibilities with Community law of agreements concluded before the entry into force of the Treaty itself is, in a way, an application, in this specific area, of the general duty of cooperation laid down in Article 5. Consequently, the Commission was entitled to point out in the reasoned opinion that if the first paragraph of Article 234 applied, as argued by the Austrian Government in its reply to the letter of formal notice, the failure of that government to comply with the duty to cooperate in good faith would have amounted to an infringement of the second

19 — Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 20.

paragraph of Article 234 of the Treaty. Given that it was the defendant government which invoked Article 234 of the Treaty and that the first two paragraphs of that article are closely interlinked, it cannot now argue that the alternative complaint formulated in the reasoned opinion regarding infringement of the second paragraph of Article 234 prevented it from fully exercising its rights of defence in the preliminary stage of the procedure. I therefore take the view that this plea must also fail.

Subject-matter of the action

39. Finally, the German Government points out that in the Commission's application it is claimed that the Community's external competence was infringed in relation to both to the 1996 agreement and to the earlier transitional regime which governed relations with the United States from 1994 until the conclusion of the agreement in 1996. That transitional regime was still in force when the letter of formal notice was sent but its effects had been exhausted before the reasoned opinion was delivered and consequently, the defendant government argues, could not form the subject-matter of the action. The Commission, on the other hand, contends that it is bound to allege all the successive infringements that took place in this matter, regardless of whether their effects had ceased by the time when the action was brought.

40. The German Government's point is well taken, however. According to settled case-law, actions under Article 169 must, in order to be admissible, concern infringements which are still taking place at the end of the period laid down in the reasoned opinion and not ones which have been remedied during the preliminary stage of the procedure. [20] Accordingly, if the letter of formal notice concerned a transitional legal regime which was superseded by a permanent regime before the reasoned opinion was sent, it is in relation to the latter that the Commission must bring its action. If that were not the case, the Court would be called upon to give judgment, contrary to what is stated in its own case-law, on a regime whose effects were exhausted before the end of the period laid down in the reasoned opinion. I therefore take the view that in the proceedings against Germany the Commission's action is not admissible in so far as it concerns the transitional regime which operated from 1994 and that, consequently, the Court must consider only the agreement of 1996.

B — Substance

1. Infringement of the Community's external competence

41. The Commission's first complaint is that by concluding the disputed agreements

20 — See, for example, Case 240/86 *Commission* v *Greece* [1988] ECR 1835, paragraph 16.

the defendant States (with the exception of the United Kingdom) infringed the external competence of the Community. In support of that complaint it puts forward two separate lines of argument: one based on the assertion that it is 'necessary', in the sense contemplated in Opinion 1/76,[21] for such agreements to be concluded at Community level; the other based on the assertion that the agreements in question 'affect', in the sense contemplated in the *AETR* judgment,[22] the common rules adopted by the Community in that field. I will consider these arguments separately and in turn.

A — *Infringement of an exclusive Community competence in the sense contemplated in Opinion 1/76*

Arguments of the parties

42. In its first line of argument, the Commission essentially contends that the Community had an exclusive competence to negotiate the agreements in question. Notwithstanding the absence of a basis in an express provision, this power is vested in it by virtue of the principles enunciated by the Court, in particular in Opinion 1/76, by reason of the fact that the agreements in question were 'necessary' in order to attain an objective of the Treaty.

43. According to the Commission, in that opinion the Court made it clear that the Community's external competence may prove to be exclusive not only in the cases expressly provided for but also in all other cases in which the conditions indicated by the Court are met. In particular, such exclusive competence arises where common rules have been adopted internally, as was held in the well-known judgment in *AETR*; but it also exists — and this is the point that is important here — where the internal competence has not been exercised but the conclusion of an agreement at Community level is 'necessary' in order to attain an objective of the Treaty. The Commission points out that in the light of Opinion 1/76, regardless of whether specific provisions have been adopted internally at Community level, '[t]he power to bind the Community vis-a-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is... necessary for the attainment of one of the objectives of the Community'.[23] In those circumstances, therefore, the 'necessity' for the exercise of the Community's external competence has the effect of establishing such competence and excluding that of the Member States.

44. On the strength of the foregoing, the Commission seeks to show that in the present cases the rights granted under the disputed agreements to United States carriers on intra-Community routes give rise

21 — Opinion 1/76 [1977] ECR 741.

22 — Case 22/70 *Commission* v *Council* [1971] ECR 263.

23 — Paragraph 4.

to serious discrimination and distortions of competition to the detriment of Community carriers and, more generally, destabilise the internal market. This, according to the Commission, creates the 'necessity', in the sense contemplated in Opinion 1/76, of joint action vis-à-vis the United States and, hence, exclusive Community competence to negotiate and conclude the relevant agreement; this is so, it maintains, not only irrespective of whether the internal competence has previously been exercised but even irrespective of the fact that the Council did not authorise the Commission to negotiate the agreement in question. It follows, according to the Commission, that the conclusion of the disputed agreements constituted an infringement of the Community's external competence.

45. The defendant Member States' response to those arguments is essentially, albeit with some differences, as follows:

— under Article 84(2) of the Treaty, the appropriateness or otherwise of concluding a Community agreement on air transport is a matter to be assessed from time to time by the Council, which, in this instance, explicitly rejected the necessity for such an agreement with the United States, considering it more appropriate to maintain in force the current system of bilateral agreements;

— in any event the Community's external competence in the sense contemplated in Opinion 1/76 could become exclusive only upon the conclusion of the agreement deemed 'necessary';

— at all events the Commission has not shown that it was 'necessary' to conclude a Community-level agreement with the United States.

Assessment

46. Let me say at once that I am unable to agree with the conclusions the Commission draws from Opinion 1/76 and, more generally, from the Court's case-law on the external competence of the Community.

47. To begin with, I would recall that that opinion had been requested from the Court in order to establish, *inter alia*, whether the Community had power to conclude with Switzerland an agreement, already initialled by the contracting parties, 'establishing a European laying-up fund for inland waterway vessels', even though there was no express provision in the Treaty conferring such a power, and the *AETR* decision could not be invoked since the Community had not adopted any internal measures in this domain. In its opinion, the Court was concerned first of all to point

out that an implied external power of the Community can arise not only 'in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies' but also where 'the internal Community measures are only adopted when the international agreement is concluded and made enforceable'. This was so, according to the Court, as mentioned earlier, because '[t]he power to bind the Community vis-a-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, *necessary* for the attainment of one of the objectives of the Community'.[24]

48. It can therefore be said that the Court has, in a sense, transposed to the sphere of the Community's external competence the logic underlying Article 235 of the Treaty (now Article 308 EC), which provides, as we know, that '[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'. Thus, just as, in the absence of internal powers, the Council may, subject to the conditions and in accordance with the procedure specified in Article 235, create such powers if they are 'necessary' for the attainment of an objective of the Community, so may the Community, if an agreement is 'necessary' to attain one of its objectives, affirm its own competence (again in accordance with the proper procedures, as I will shortly endeavour to show) to conclude that agreement, deriving it by implication from the corresponding internal competence, even if the latter has not yet been exercised. And if the corresponding internal competence is also lacking, the same result can be achieved, as has occasionally been done in practice,[25] by resorting directly to Article 235 at the time of concluding the agreement.

49. I will return to this parallelism shortly. For the moment, I would like to stress that the conclusions drawn by the Commission from the case-law mentioned above stem, in my view, from a mistaken belief that in affirming the Community's competence in the situations referred to in Opinion 1/76 the Court also held this competence to be automatically exclusive. From a careful reading of the quoted passages, however, it is apparent that all the Court actually affirmed is that in those situations, despite the absence of any express provision, the 'necessity' for an agreement in a given field

24 — Paragraph 4, emphasis added.

25 — For example, Article 235 has been invoked in the past to provide a basis for Community participation in various international agreements on the environment, a domain which at the time did not fall within the competence of the Community. There was, for example, the Paris Convention on the Prevention of Marine Pollution from Land-Based Sources (OJ 1975 L 194, p. 5); the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution (OJ 1977 L 240, p. 5); and the Bonn Convention for the Protection of the Rhine against Chemical Pollution (OJ 1977 L 240, p. 92).

may enable the Community to affirm its own external competence. But it will always and only be the specific recognition of such 'necessity', that is to say, the actual exercise of that competence, which will render it exclusive. The reasons for this are the same as those for which this type of competence is usually established, that is to say, because the assumption of international obligations in the same field by the Member States could jeopardise the attainment of the objective of the Community for which the agreement was in fact considered necessary.

50. That conclusion is supported, in my view, firstly by subsequent opinions of the Court which clarified the meaning and scope of Opinion 1/76 with respect to the point now under consideration. In these it is stated that 'where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules', then, according to Opinion 1/76, 'the external competence based on the Community's internal powers may be exercised, and *thus become exclusive*, without any internal legislation having first been adopted' (quoting Opinion 2/92; the same words are used subsequently in Opinion 1/94).[26]

51. But the above conclusions are confirmed above all, to my mind, by the problems which the Commission's argument raises when one goes on to consider how and by whom the assessment should be carried out as to the 'necessity' of an agreement in a situation where the competence in question has not previously been exercised by the Community (if it has, the ordinary processes for reviewing the legality of the conduct of the Community institutions apply in this respect). The view argued for by the Commission in the present cases would mean, if I understand it rightly, that that assessment could be conducted almost in the abstract and in any event without reference to any rule or pre-established procedure. On that view, Member States could (or, rather, should) carry out this assessment themselves when they have to decide whether or not to conclude an agreement. However, that assessment would be subject to review by

26 — Paragraph 35 of Opinion 2/92 (emphasis added) ([1995] ECR I-521) and paragraph 85 of Opinion 1/94 ([1994] ECR I-5267). From these statements it is clear that until such time as the Community exercises its (potential) power as described in Opinion 1/76, deeming the conclusion of a particular agreement necessary, the Member States remain free in the conduct of their external relations. This conclusion is not disturbed by the Commission's argument based on a different passage from Opinion 1/94 where it was held that '[s]ave where internal powers can only be effectively exercised at the same time as external powers (see Opinion 1/76 and paragraph 85 above), internal competence can give rise to exclusive external competence only if it is exercised' (paragraph 89). In my view, in fact, it is clear that the sole purpose of the reference to Opinion 1/76 is to confirm that, in cases falling within the scope of that opinion, the Community's exclusive external competence does not, exceptionally, depend on the previous exercise of an internal power (as in the *AETR* case), but flows directly from the exercise of the external competence.

the Commission, which could obviously arrive at different conclusions and therefore, if the Member States decided to conclude the agreement, could challenge that decision on the ground of infringement of Community competence. But who, on what basis and with what powers could have lawfully established that competence would remain a genuine mystery. It could not have been the Member States, which do not have such a power; nor could it have been the Commission or the Council, each acting on its own account, because while they do indeed participate, on their own, in the exercise of that competence, they do not have a monopoly on its establishment; nor, I would say, could it be the Court, because while in such cases it may well be called upon to rule on the lawfulness of the acts or omissions of the competent institutions, it cannot substitute its own discretionary assessment for that which those institutions did or did not carry out.

52. To adopt the Commission's view, therefore, would mean introducing serious elements of uncertainty and confusion into the system, because the assessment of the necessity for an agreement would remain entrusted to a mechanism that is highly ambiguous, as well as essentially unilateral and arbitrary, and without there being anything in the case-law considered above to serve as authority for deriving such a conclusion. It seems to me, on the contrary, that it must be inferred both from that case-law and, in particular, from the logic of the system that there can be no recognition of the 'necessity' for an agreement unless there has been a specific assessment by the competent institutions and the procedures prescribed, according to the case, have been followed only after that formal and specific assessment has taken place can the Community's competence be deemed exclusive. More specifically, it is my view that the necessity for an agreement must be determined in accordance with the procedure laid down for the exercise of the parallel internal competence, where such competence is already provided for, or, if that is not the case, in accordance with the procedure laid down in Article 235 of the Treaty.

53. To return to the parallelism I have mentioned above with specific respect to Article 235, I would point out that that article does not confine itself to requiring a measure to be 'necessary' if Community competence is to be justified, but lays down precise conditions and procedures for the determination of that necessity and, hence, whether it is capable of founding such competence. I consider that the same approach is also indicated here. Besides, it seems obvious to me that if the Treaty has conferred a discretionary power on certain institutions and prescribed the procedures for its exercise, it follows that neither the power nor the procedures can be disregarded and, in particular, that no other entity can take the place of those institutions in the exercise of that power. It may be debated, possibly even before the Court, whether in a specific case the assessment of the 'necessity' for an agreement was properly carried out (or omitted), but there can certainly be no escaping the fact that the institutions empowered to carry out the assessment and the procedures to be followed are those specified in the Treaty. Otherwise, I would repeat, there is a risk of introducing (or, what is worse, of imputing

to the Court the intention of introducing) elements of uncertainty, even arbitrariness, into the division of powers between Community and Member States, and of distorting the procedures and the inter-institutional balances established by the Treaty.

54. It must therefore be concluded from the foregoing that unless and until the 'necessity' for an agreement has been duly and specifically recognised by the competent institutions and in accordance with the prescribed procedures, there can be no exclusive Community competence; consequently, the Member States remain free to assume international obligations in the relevant field, albeit, as we shall also see later, subject to their duty to cooperate in good faith with the Community institutions in accordance with Article 5 of the Treaty.

55. To return now to the present proceedings, it appears to me to be beyond doubt, in the light of what I have said up to now, that in the cases under consideration here the Community has not exercised an external competence justified by the 'necessity', in the sense contemplated in Opinion 1/76, of concluding an air transport agreement with the United States. As we have seen, despite the many proposals to that effect put forward by the Commission, the Council gave no indication of sharing its view as to the 'necessity' for such an agreement. Initially, in fact, it actually refused the Commission the negotiating mandate it sought, and only in June 1996, that is to say, after the conclusion of the disputed agreements, did it grant a restricted mandate, although the Community did not in any event reach the point of concluding an agreement with the United States. Given therefore the absence of a positive outcome of the procedures prescribed for the assessment of the 'necessity' of concluding the disputed agreements, it cannot be maintained, in the light of what I have said earlier, that an exclusive Community competence in the sense contemplated in Opinion 1/76 has been established in this matter.

56. Nor is it of any avail to argue, as the Commission has done, that in other cases the Council deemed it 'necessary' to conclude particular air transport agreements with third countries.[27] Leaving aside the possible differences between the various specific situations and the different considerations which may have guided the Council in those cases, the argument could easily be turned around and the very fact that the Council has behaved differently in this instance could be seen as a negative assessment of the 'necessity' of the agreement with the United States.

57. Of course, as I have already mentioned, one could take the view that the Council's assessment was unlawful. But in that case, as several Member States have pointed out in these proceedings, the relevant Council decision should be challenged or, if the conditions for doing so are satisfied, an action for failure to act should be brought against that institution. In the absence of any steps of that nature, the Council's

27 — The Commission refers specifically to the agreements mentioned in paragraph 15 above.

decisions (or, as the case may be, its inaction) must be presumed lawful; in any event, their validity cannot be challenged indirectly and by means of inappropriate procedures. It is therefore against the Council that the Commission ought to have brought proceedings, on the ground that the Council did not deem 'necessary' the conclusion of an agreement with the United States and thus did not bring about exclusive Community competence in that matter. But for this very reason, the Commission has no basis now for taking action against the Member States for infringement of a Community competence which in fact has never been established.

58. In the light of those considerations, it cannot in my view be held that, in the matter in point here, the Community had exclusive competence, in the sense contemplated in Opinion 1/76, to conclude air transport agreements with the United States of America and that therefore the defendant Member States infringed that competence.

B — *Infringement of an exclusive Community competence in the sense contemplated in the* AETR *judgment*

Arguments of the parties

59. The other line of argument developed by the Commission in order to demonstrate that the Community's exclusive external competence has been infringed in the cases in point here is based on the *AETR* judgment, mentioned above, and relies in particular on the existence of Community legislation governing matters covered by the disputed agreements.

60. After recalling the Court's statement in *AETR* that 'each time the Community... 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 with third countries which affect those rules',[28] the Commission submits that this is precisely the situation that arises here. It argues that the Community has adopted a complete set of common rules designed to realise the internal market in the air transport sector, regulating, in particular, access to intra-Community routes and establishing the mechanisms necessary for preventing impairment of competition. These rules, according to the Commission, do not concern Community air carriers only but also apply — at least in part — to third-country carriers. The conclusion by Member States of bilateral agreements on the 'open skies' model is therefore liable to have an adverse effect on the functioning of the internal market in respect of the part of it covered by those common rules and, consequently, constitutes an infringement of Community competence in the sense contemplated in the *AETR* judgment. In response to the Member States' objection

28 — Paragraph 17.

that the disputed agreements are not in breach of any specific provision of secondary law, the Commission states that, even if that were the case, Community competence in this matter is exclusive and is therefore infringed by the mere fact of the conclusion by Member States of an agreement concerning matters governed by the common rules.

61. For their part, the defendant Member States reply in substance, albeit with some differences among them which I will mention in due course:

— that the Commission has failed to specify, as it ought to have done, the precise provisions of Community law with which the disputed agreements are said to be in conflict;

— that Article 84(2) of the Treaty confers a wide discretion on the Council to decide 'whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport'; and that in the exercise of that discretion the Council deliberately refrained from adopting any specific measures on access to Community markets by third-country carriers and access to non-Community markets by Member-State carriers. These matters therefore remain within the competence of Member States and cannot be brought within the sphere of Community competence by implication;

— that the Community legislation does not provide for complete harmonisation of the air transport sector and thus there are still many matters, besides access to Community markets for third country carriers, not yet regulated at Community level;

— that for this reason too there can be no conflict between the disputed agreements and the Community legislation in the field of air transport;

— that in any event the disputed agreements do not substantially change the earlier bilateral agreements which were entered into before the adoption of the provisions of secondary law relied upon by the Commission and in many cases even before the entry into force of the Treaty or the accession of the Member States concerned, with the result that the provisions of those agreements, even if they were in conflict with Community legislation, would in any case be covered by the exception in the first paragraph of Article 234 of the Treaty.

Assessment

62. Leaving aside for the moment the last of these issues, that of the possible application of Article 234 of the Treaty, which I will deal with below (paragraph 109 et seq.), in examining the complaint now under consideration it is necessary first to analyse the scope and significance of the *AETR* judgment. Only after such an analysis will it be possible to determine whether and to what extent the disputed agreements may affect, in the sense contemplated in that judgment, the common rules adopted by the Community legislature.

(a) *General considerations*

63. As may be recalled, the *AETR* judgment marked a watershed in the definition of the Community's external competence. In particular, as I have mentioned a number of times already, it established the principle that such competence arises not only in the situations expressly contemplated by the Treaty but may also be implied from the internal powers conferred on the Community, since '[w]ith regard to the implementation of the provisions of the Treaty the system of internal Community measures may not... be separated from that of external relations'. [29]

64. Going on to apply that principle, particularly in view of the need to safeguard the unity of the common market and the uniform application of Community law, the Court also stated that once the Community has actually exercised its internal power by adopting common rules, its parallel external competence becomes exclusive, with the result that the Member States lose their freedom 'to undertake obligations with third countries which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system'. [30] The purpose of this, I would repeat, is to prevent, for the sake of 'the defence of the common interests of the Community', the Community's unity of action being compromised by potential divergences between the internal measures and those subsequently adopted externally. If the Member States could reserve to themselves 'a concurrent power, so as to ensure that their own interests were separately satisfied in external relations' and 'adopt positions which differ from those which the Community intends to adopt' this would 'distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest'. [31]

65. The meaning and scope of that case-law were subsequently confirmed and

29 — Paragraph 19.

30 — Paragraphs 17 and 18.

31 — Opinion 1/75 [1975] ECR 1355.

further clarified in a number of opinions of the Court. Of these, I would recall in particular Opinion 1/94, in which it was stated that 'even in the field of transport, the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the *AETR* judgment (paragraphs 17 and 18), the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive'. [32]

66. For the purposes of the present cases, it should be pointed out in particular that it is always made clear in those opinions that, following the adoption of common rules, the Member States lose the freedom to undertake with third countries '*obligations... which affect*' those rules or, in the different formulation used in the *AETR* judgment, to '*assume obligations which might affect those rules or alter their scope*'. And it is specifically on the way in which international obligations must 'affect' the common rules, in the sense contemplated in the *AETR* judgment, that the argument between the parties to the present cases has centred. On the one hand, the Member States argue that that judgment merely establishes that they are prohibited them from assuming international obligations which in some way conflict, even potentially, with the common rules. The Commission, on the other hand, argues that the prohibition applies irrespective of any conflict between the common rules and the international obligations, it being sufficient for the latter to concern the same sphere as that covered by the former.

67. For my part, I concur with the Commission that the *AETR* judgment is not confined to precluding the Member States from undertaking international obligations that are in conflict with common rules, especially as such conduct would in itself constitute a separate breach of Community law, which could be held unlawful even without regard to *AETR*. What the *AETR* judgment requires of Member States, and in clear terms, is not to assume obligations which may even merely 'affect' the common rules. And there are other important precedents to the same effect, and in even more unequivocal terms, if that were possible. Of these, I will mention only Opinion 2/91, which is cited also by the Commission, where the Court affirmed that the Community had exclusive competence to assume the obligations contained in certain provisions of an ILO Convention, [33] for the simple reason that those provisions concerned an area which was already covered to a large extent by Community directives, although 'there [was] no contradiction

32 — Paragraph 77.

33 — Convention N° 170 of the International Labour Organisation concerning safety in the use of chemicals at work.

between these provisions of the Convention and those of the directives'. [34]

68. That said, it remains, however, to be ascertained when and under what conditions an agreement concluded by Member States is liable to 'affect' the common rules. The *AETR* judgment again provides the starting point. In that case, as we have seen, the Court held that the Community had exclusive competence to conclude the European Agreement concerning the work of crews of vehicles engaged in International Road Transport (AETR) merely by virtue of the fact that 'the subject-matter of the AETR *falls within the scope of Regulation No 543/69*'. [35] The reason for this is, precisely, because the conclusion by the Member States of an agreement concerning a matter already regulated at Community level could of itself 'affect' Regulation No 543/69.

69. The same approach has been followed in subsequent rulings of the Court. I have pointed out a little earlier, for example, that in Opinion 2/91 the Court held that the Community had exclusive competence to undertake the obligations contained in certain provisions of an ILO convention because these were *concerned with an area which is already covered to a large extent by Community rules* and, for this reason, were 'of such a kind as to affect the Community rules laid down in those directives'. [36] Likewise, in Opinion 1/94, the Court confirmed that '[w]henever 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 exclusive external competence *in the spheres covered by those acts*. The same applies in any event, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation of the rules governing access to a self-employed activity, 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'. [37] Similarly, in Opinion 2/92, in order to ascertain whether the Community enjoyed exclusive competence to participate in the Third Revised Decision of the Council of the OECD on national treatment, the Court simply examined '*whether the matters covered by the Third Decision are already the subject of internal legislation* containing provisions on the treatment to be accorded to foreign-controlled undertakings, or empowering the institutions to negotiate with non-member countries, or effecting complete harmonisation of the rules governing the right to take up an activity as a self-employed person'. [38]

70. In these precedents, as may readily be observed, the Court did not stop to exam-

34 — Paragraph 25.

35 — Paragraph 30; emphasis added. The full title of the regulation is Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport (OJ, English Special Edition 1969 (I), p. 49).

36 — Paragraph 26.

37 — Paragraphs 95 and 96; emphasis added.

38 — Paragraph 33; emphasis added.

ine whether there were specific reasons for which the assumption of the international obligations could in fact impinge in some form on the Community provisions. For the Member States to be precluded from undertaking obligations of this kind, the Court deemed it sufficient, to use its own expressions, that the obligations '[fall] within the scope of' the Community rules, that they are 'concerned with an area which is already covered to a large extent by Community rules', that they are 'in the spheres covered by those acts' or that 'the matters covered by the [agreements] are already the subject of internal legislation'. All this is so, I would repeat, simply '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 [on the same matters]' (Opinion 1/94), and irrespective of the content of the agreements to be negotiated and of any conflicts that might ensue as between them and the common rules.

71. It must therefore be concluded that, in principle, in matters covered by common rules, the Member States may not under any circumstances conclude international agreements, even if these are entirely consistent with the common rules, since 'any steps taken outside the framework of the Community institutions' would be 'incompatible with the unity of the common market and the uniform application of Community law'. [39] I appreciate that some may find — and have found — this conclusion unduly rigid and even over-formalistic; but I am unable to see any way to limit its implications, in any reasonable and credible manner, without undermining the coherence of the principles and of the system and, in particular, the fundamental requirement of the unity and uniformity of the common action which, as we have seen, the Court has made the cornerstone of its case-law on the matter.

72. To remain consistent with this approach, however, further consequences should logically be inferred from that case-law. The first is that Member States may not conclude international agreements, in matters covered by common rules, even if the texts of the agreements reproduce the common rules verbatim or incorporate them by reference. The conclusion of such agreements could prejudice the uniform application of Community law in two distinct respects. First, because the 'reception' of the common rules into the agreements would be no guarantee, as the Commission also points out, that the rules would then in fact be uniformly applied and, especially, that any amendments which might be adopted internally would be fully and promptly transposed into the agreements. Secondly, because in any case such 'reception' would have the effect of distorting the nature and legal regime of the common rules, and entail a real and serious

39 — *AETR* judgment, paragraph 31.

risk that they would be removed from review by the Court under the Treaty. [40]

73. But the authorities cited entail a further consequence, which is of particular relevance for present purposes. It must be considered that the Member States could not undertake international obligations in matters governed by common rules even in order to eliminate conflicts between those rules and agreements concluded by them before the rules were adopted. Not even the requirement to ensure the full and correct application of Community law could justify unilateral action by Member States, since such action might well also 'affect' the common rules, compromising the unity of the common market and the uniform application of Community law.

74. In such cases, that requirement must in principle be fulfilled by the Community itself, in which exclusive competence in the matter has been vested following the adoption of the common rules and which thus has sole authority to negotiate and conclude the agreements designed to bring into line with those rules the agreements previously concluded by the Member States. If it transpired that the Community was unable, for internal or external reasons, to conclude such agreements directly, it would then be necessary, in accordance with the principles laid down in Article 5 of the Treaty, for its institutions and the Member States to cooperate with a view to enabling the latter to amend the existing agreements in a manner consistent and in accordance with the Community's interest. [41] For this purpose, I consider that the Member States should first approach the Community institutions to obtain, if they can, authorisation to negotiate the necessary amendments themselves, possibly on the basis of agreed Community positions and procedures. In the event of persistent difficulties, they should continue to look to the Community in order to achieve the solution most apt to ensure the greatest possible adherence to the abovementioned principles, again working in close collaboration with the Community institutions and adopting, if necessary, concerted action *vis-à-vis* the other parties to the negotiations. In any event, as the Council itself observed in its 1993 conclusions, they should take into consideration their obligations under Community law and keep themselves informed of the interests of the other Member States. Obviously, the Community institutions should in their turn offer the Member States full cooperation in the search for appropriate solutions, including providing

40 — On this point, it is perhaps worth recalling the cases, some years ago, in which the Court condemned the practice, then current in a number of Member States, of giving effect to Community regulations by reproducing their entire content in internal measures. The Court explained that 'Member States must not adopt or allow national institutions with a legislative power to adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned' (Case 94/77 *Zerbone* [1978] ECR 99, paragraph 26; to the same effect, see also, *inter alia*, Case 34/73 *Variola* [1973] ECR 981).

41 — On this point, I would recall for example that in the well-known case of *Kramer* (Joined Cases 3/76, 4/76 and 6/76 [1976] ECR 1279), the Court held that the Member States had a 'transitional' authority to undertake international obligations in an area which in principle fell within Community competence but in which the Community had not yet fully exercised its functions, on condition, however, that the Member States fully observed the principle of cooperation in good faith laid down in Article 5 of the Treaty and proceeded by common action within the framework of the international organisations. The Court has also had occasion to make it clear that the duty to cooperate in good faith also applies, for example, if the Community cannot itself conclude an international convention directly but has to exercise its external competence 'through the medium of the Member States acting jointly in the Community's interest' (Opinion 2/91, cited above, paragraphs 5 and 37).

assistance, where possible, in the negotiations.

75. That said, I must also point out that between the situations mentioned so far, which may be regarded as extreme, of agreements which are clearly in conflict with common rules (and are thus unlawful in any case) and agreements which cover the same subject-matter as that governed by common rules (and are thus clearly unlawful on the basis of the *AETR* judgment), there is a considerable area in between, consisting of agreements which, while they do not fit either of those situations, may also fall within the scope of that judgment in so far as they are liable to 'affect' the common rules. Without claiming to undertake here the difficult task of defining this area, I will simply mention, by way of example, agreements which concern aspects which are contiguous, so to speak, to those governed by the common rules, or agreements which, while they concern a matter which is to a large extent covered by common rules, relate however to aspects not (or not yet) regulated by those rules. In such instances, clearly, the question whether or not the agreement 'affects' the common rules must be assessed in the light of the particular circumstances of each case; in other words, a specific assessment is required in each case to determine if the agreement conflicts in some respect with the common rules or if it could otherwise in any way impinge on their correct application or alter their scope.

76. For present purposes, such an assessment is required, in particular, in cases in which the Community measures adopted internally are limited to regulating a given activity when it is carried on by Community nationals within the Community, while international agreements govern the same activity when carried on by Community nationals in third countries or by third-country nationals within the Community. In those cases, the agreements concern situations different from those regulated at Community level and it cannot therefore be assumed that they automatically 'affect' the common rules. However, given the obvious relatedness of the subject-matter, careful analysis is required to ascertain if their provisions could impinge on the correct application of the common rules or alter their scope or even conflict with them. If such is the case, it must obviously be concluded that the agreements are liable to 'affect' the common rules within the meaning of the *AETR* judgment.

77. I must point out, however, that in order to establish that the common rules are 'affected' it is not enough to cite general effects of an economic nature which the agreements could have on the functioning of the internal market; what is required instead is to specify in detail the aspects of the Community legislation which could be prejudiced by the agreements. A case in point, with specific reference to the 'open skies' agreements, is provided by Opinion 1/94 in which, with regard to Community rules in that sector which did not extend to external relations, the issue was precisely whether Member States were competent to conclude agreements liable to affect those rules. The Commission maintained that Member-State competence had to be pre-

cluded by virtue of the mere fact that 'the Member States' continuing freedom to conduct an external policy based on bilateral agreements with non-member countries will inevitably lead to distortions in the flow of services and will progressively undermine the internal market'. [42] But that reasoning was not deemed a sufficient ground for precluding Member States from concluding agreements in the relevant area. According to the Court, the general risk of distortions which was complained of by the Commission did not suffice for that purpose since such distortions could easily be avoided by other means. In particular, the Court noted, 'there is nothing in the Treaty which prevents the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings'. [43]

(b) *Specific assessments of the question whether the disputed agreements affect the Community legislation*

78. That having been said, I will now consider the Community legislation which the Commission claims the disputed agreements 'affect', with a view to ascertaining — on the basis of the principles set out above — whether that is in fact the case and whether the agreements were therefore entered into in violation of an exclusive competence.

79. But I still need to make two brief preliminary points. First, it is, I think, very important to point out that I will deal exclusively with the problems raised by the amendments made by the disputed agreements. One could, in theory, for reasons I will discuss in due course (paragraph 110 et seq.), also consider the possibility of the legislation being 'affected' by the provisions of the earlier agreements which were not amended by the subsequent agreements, but we will see that no problem actually arises in relation to those provisions, notwithstanding the differences of opinion.

80. Lastly, I must point out that these actions were brought by the Commission to obtain a declaration that various Member States had failed to fulfil Treaty obligations. According to settled case-law, '[i]n proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation

42 — Opinion 1/94, paragraph 78, where it is pointed out, by way of example, that 'travellers will choose to fly from airports in Member States which have concluded an "open skies" type of bilateral agreement with a non-member country and its airline, enabling them to offer the best quality/price ratio for transport'.

43 — Paragraph 79.

has not been fulfilled and to place before the Court the information needed to enable it to determine whether the obligation has not been fulfilled.'[44] It will therefore be necessary to ascertain, where appropriate, whether the Commission has adduced sufficient evidence to establish the alleged infringements of the Community's external competence.

(i) Whether Regulations Nos 2407/92 and 2408/92 are affected

81. In the first place, the Commission submits that the disputed agreements are 'incompatible' with Regulation No 2407/92 on licensing of air carriers and Regulation No 2408/92 on access for Community air carriers to intra-Community air routes. According to the Commission, those regulations lay down exhaustively the conditions for access to intra-Community routes, thus with regard to all air carriers, whether Community carriers or not. If I understand rightly, the 'incompatibility' arises from the fact that the disputed agreements provide for an exchange of fifth freedom rights which, especially by virtue of the cumulative effect of the seven agreements, would enable United States carriers not satisfying the requirements of Regulation No 2407/92 also to operate on intra-Community routes. On this ground, therefore, the Commission contends, the conclusion of the disputed agreements 'affects' the two Community regulations.

82. It seems to me, however, that this argument is based on a misreading of the two regulations. As pointed out by the defendant governments, by adopting those regulations the Council was simply deciding — pursuant to Article 84(2) of the Treaty — to secure access to intra-Community routes for Community air carriers, without concerning itself with third-country carriers. Regulation No 2408/92 provides that 'Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community' (Article 3(1)), having defined 'Community air carrier' as meaning 'an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92' (Article 2(b)). Thus there is nothing in Regulation No 2408/92 from which it may be inferred that it also aims to regulate (still less to prohibit) the granting of traffic rights within the Community to non-Community carriers, in other words, carriers not in possession of an operating licence within the meaning of Regulation No 2407/92. The right of Member States to grant access to routes within the Community to non-Community air carriers is therefore not in any way curtailed by Regulation No 2408/92, nor indeed by Regulation No 2407/92, which merely lays down the requirements for the granting and maintenance of operating licences by Member States in relation to air carriers established in the Community.

44 — Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 55.

83. It is evident from the foregoing that the alleged conflict between the disputed agreements and Regulations Nos 2407/92 and 2408/92 cannot even be identified, given that the former apply to different situations. Nevertheless, it still has to be asked, in the light of what is said above, whether the obligations assumed by the Member States under the disputed agreements might not equally 'affect' the two regulations, in the sense of impinging on their correct application or altering their scope. However, apart from the arguments which I will shortly consider relating to distortions of competition and discrimination allegedly arising from the agreements, it has to be said that the Commission has failed to adduce any evidence, as it ought to have done, to show that this is the case here. It is therefore not proved, so far as this first aspect is concerned, that the agreements may affect, in the sense contemplated in the *AETR* judgment, the provisions of Regulations Nos 2407/92 and 2408/92.

84. I also note, given that the Commission broached the point fleetingly, that the outcome might have been different if the agreements in question contained provisions concerning the requirements for the granting and maintenance of the operating licences in relation to air carriers established in the Community, on the ground that those requirements are laid down at Community level by Article 4 of Regulation No 2407/92, '[w]ithout prejudice to agreements and conventions to which the Community is a contracting party'. But since the disputed agreements contain no provision of that nature, it seems to me that neither from this different angle can it be said that the agreements affect the provisions of Regulation No 2407/92.

(ii) Whether the normal functioning of the common market is affected

85. Secondly, as mentioned above, the Commission submits that under the disputed agreements particular advantages have been conferred on the contracting Member States (especially in relation to traffic rights), which will inevitably lead to distortions of competition and to discrimination and thereby undermine the very notion of an internal market. According to the Commission, furthermore, the competitive balance of the internal market will be upset by the fact that the disputed agreements give access to routes within the Community to United States carriers who are not subject to all the rules imposed on Community carriers.

86. I would observe at once, however, that the Commission bases these complaints on very general arguments, without explaining in a precise and detailed manner what the alleged discrimination and distortions of competition might be and which Community obligations the United States carriers would escape by virtue of the disputed agreements. Therefore the applications

could be dismissed, in respect of this point, already on the ground that the Commission has failed to discharge the burden of proof.

87. But apart from this, it seems to me that ultimately the Commission is merely repeating here arguments already put before the Court, and rejected, in Opinion 1/94. There too, as I have recalled, in order to demonstrate the Community's exclusive competence to conclude the GATS, the Commission maintained, on the basis of an example, that 'the Member States' continuing freedom to conduct an external policy based on bilateral agreements with non-member countries will inevitably lead to distortions in the flow of services and will progressively undermine the internal market'. Thus, it argued, 'travellers will choose to fly from airports in Member States which have concluded an "open skies" type of bilateral agreement with a non-member country and its airline, enabling them to offer the best quality/price ratio for transport'. But, as I have observed above, this argument was rejected by the Court, in the following terms: 'suffice it to say that there is nothing in the Treaty which prevents the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings'. [45] The fact is that, in the absence of Community legislation governing relations in a given area with third countries, the disparities which could hypothetically result from the conclusion of different international agreements by Member States in that area and the economic consequences that might ensue for the internal market do not *in themselves* suffice to preclude the right of Member States to enter into such agreements.

88. It seems to me, therefore, that this argument of the Commission must also be rejected.

(iii) Whether Regulation No 2409/92 is affected

89. The Commission further submits that the changes effected by the disputed agreements also concern the fares and rates that may be charged on intra-Community routes, and thus a matter which had in the meantime come within the exclusive competence of the Community by virtue of the fact that even before the agreements were concluded that matter had been the subject of specific provisions of internal legislation which also concerned third-country carriers. More specifically, the applicant points out that Regulation No 2409/92 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; and that, while it does not cover the fares and rates of non-Community carriers (Article 1(2)(a)), it nevertheless provides,

45 — Paragraph 79.

in Article 1(3), that '[o]nly Community carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products', thus imposing, albeit indirectly, a corresponding prohibition on third-country carriers.

90. The defendant governments reply, essentially, that the provisions of the disputed agreements are not in conflict with Article 1(3) of Regulation No 2409/92; in any case, some of them argue, precisely in order to remove any doubt in that regard, clauses were inserted into the agreements with the United States requiring the contracting parties to comply with that provision in relation to fares on intra-Community sections.

91. For my part, I would first observe that by explicitly restricting to Community carriers the right to introduce 'lower fares than the ones existing for identical products' within the Community, Article 1(3) of Regulation No 2409/92 indirectly but unequivocally excludes that right for non-Community carriers, who are thus prohibited from introducing such fares. The Commission is therefore right in maintaining that this constitutes a significant restriction on the freedom of third-country carriers to set fares within the Community, a restriction deriving from the supervening enactment of Community legislation extending into areas traditionally regulated by bilateral air transport agreements.

92. Thus according to the approach I have outlined above, the introduction of such legislation gives rise to exclusive Community competence in the matters covered by it. As recalled above, it was held in Opinion 1/94 that '[w]henever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries..., it acquires exclusive external competence in the spheres covered by those acts'.[46] So while a complete set of rules has not been adopted at Community level in respect of the fares which third-country carriers may charge, the restriction imposed on the freedom of those carriers as regards pricing should in my view — to draw the strict inferences demanded, as we have seen, by the *AETR* judgment — have the effect of bringing these questions within the external competence of the Community. As a result, following the adoption of Regulation No 2409/92 the Member States could no longer assume international obligations in relation to the airfares which could be charged within the Community by non-Community carriers without thereby 'affecting' the scope of that regulation.

46 — Paragraph 95. In the same vein, as noted previously, it was held in Opinion 2/92 that the Community has exclusive external competence in matters which are 'already the subject of internal legislation containing provisions on the treatment to be accorded to foreign-controlled undertakings' (paragraph 33).

93. In the event this is precisely what occurred, however, since all the disputed agreements amended to that effect, in accordance with criteria which are to a large extent uniform, the pricing rules contained in the earlier bilateral agreements. The amendments varied in extent and were effected by means of different techniques (for example, in some instances the existing provisions were replaced while in others they were simply amended), but in all cases the disputed agreements contain specific provisions on the pricing rules applicable (including on Community routes) to carriers designated by the United States, and thus with the consequence, as I have said, that they infringe the Community's external competence, at least so far as this aspect is concerned.

94. Nor does it seem to me that this conclusion can be undermined by the fact that, as observed by Finland and Belgium in particular, some of the disputed agreements effected only minor amendments to the pricing rules previously in force. Without its being necessary here to 'quantify' those amendments, I believe that, in terms of principle, what matters is not whether they are major or minor: this may go to the seriousness of the infringement of Community competence but has no bearing on the question whether or not such an infringement has occurred.

95. Nor does it seem to me of decisive importance that, as pointed out by various defendant governments, some of the amendments effected by the disputed agreements were in fact intended to preserve the application of Regulation No 2409/92, by preventing air carriers designated by the parties from setting fares contrary to that regulation (in the case of the agreements concluded by Denmark, Sweden, Finland and Austria) or contrary also to subsequent Community regulations 'not more restrictive' than the existing one (as was provided for in the agreement concluded by Germany). As the Commission has pointed out, clauses of the first kind do not guarantee that Regulation No 2409/92 will always be applied in the version currently in force and thus do not enable any subsequent amendments to be preserved, while clauses of the second type (inserted by Germany) meet this objection only in part, since they preserve the application of only those regulations subsequent to Regulation No 2409/92 which are not 'more restrictive' than that regulation.

96. But even leaving aside these considerations, I must reiterate that the infringement in question is constituted by the mere fact that the previous bilateral agreements were amended in respect of matters which have now been brought within the Community's external competence following the adoption of common rules internally. Not even the need to ensure the full and correct application of the common rules (Regulation No 2409/92 in this instance) could justify, as I have said earlier (see paragraph 73 above), autonomous action by the Member States outside the framework of the Community institutions, since any such action will in any event potentially 'affect' those rules, thereby prejudicing the unity of the common market and the uniform application of Community

law. If then, as is the case here, the conflict between the earlier agreements and Regulation No 2409/92 could not be remedied, for the reasons referred to above, by means of an agreement concluded by the Community, the defendant States should have worked to that end in concert and in close cooperation with the Community institutions. In other words, as I have already remarked (paragraph 74 above), they should have first approached those institutions to try to obtain authorisation to negotiate the necessary amendments with the United States of America and, at all events, they should have made every effort to seek, in conjunction with the institutions, the solution most in keeping with the Community interest. The documents before the Court show, however, that not only did the defendant Member States not take any such steps but that, on the contrary, they negotiated and concluded the disputed agreements in complete autonomy, each Member State for itself, and without involving the Community institutions in any way. This was so in spite of repeated reminders from the Commission which, as we have seen (paragraph 19 above), had called upon them to seek an agreed position on the points in issue and had expressed its own doubts as to the compatibility with Community law of the agreements proposed by the United States authorities. In those circumstances, therefore, not even the worthy intention of eliminating any inconsistencies with Regulation No 2409/92 could justify the conclusion of the disputed agreements.

97. It follows from the foregoing that after Regulation No 2409/92 had been adopted, the Member States no longer had power to amend, outside the framework of the common institutions, the provisions of the agreements then in force relating to the pricing rules applicable (also on Community routes) to carriers designated by the United States of America, and that, therefore, the alleged infringement of the Community's external competence is established so far as this aspect is concerned.

(iv) Whether Regulation No 2299/89 is affected

98. Fourthly, the Commission submits that the disputed agreements affect the provisions of Regulation No 2299/89 on a code of conduct for computerised reservation systems ('CRSs'), a regulation which applies also to third-country operators provided that the countries in question offer Community nationals treatment equivalent to that provided under the Community legislation.

99. The defendant Member States reply, essentially, that the disputed agreements are not contrary to the Community legislation on CRSs and that, in any event, appropriate steps were taken during the course of negotiations to ensure compatibility between them.

100. Once more, however, I must point out that the adoption at Community level of provisions such as those under consideration — which apply also to non-Commu-

nity operators, subject to exceptions based on the principle of reciprocity — is sufficient to confer on the Community exclusive external competence in the matters governed by those provisions. Given, then, that all the disputed agreements amended the earlier agreements by inserting specific annexes setting out the rules applicable to CRSs, it follows that they are capable of 'affecting' the provisions of Regulation No 2299/89, in the sense contemplated in the *AETR* judgment.

101. A number of the defendant Member States (Denmark, Sweden, Finland, Austria and Germany) have argued, however, that precisely in order to obviate the problems which annexes concerning the CRSs could have entailed in relation to Community competence, they had formulated appropriate declarations in 'memoranda' drawn up in the course of the negotiations leading to the disputed agreements in order to illustrate the course they took. Those declarations make clear, *inter alia*, that the States in question would comply with the provisions of the annexes concerning the CRSs only to the extent that these did not conflict with the Community code of conduct for CRSs then in effect or, in more general terms, with the Community legislation on CRSs. In this way, according to the States in question, any possibility of interference between the disputed agreements and the Community rules was eliminated at source. The Commission, for its part, disputes that conclusion, pointing out that while the declarations in question may perhaps have political significance they are devoid of any legal force.

102. Apart from the doubts as to the nature of those memoranda, whose legal force and formal relationship with the agreements to which they refer are to say the least uncertain, I can limit myself on this point to recalling that the Court has had occasion a number of times to rule on the force of declarations recorded in minutes of negotiating sessions, in particular those preceding Council deliberations or the conclusion of international agreements. It has repeatedly made clear in that respect that 'neither individual statements of position nor joint declarations of the Member States may be used for the purpose of interpreting a provision where... their content is not reflected in its wording and therefore has no legal significance'. [47] Since in the present cases, as it happens, the declarations relied upon by the Member States are not reflected in the wording of the disputed agreements, it seems to me that their legal force, even as mere aids to interpretation, is at best doubtful.

103. But even if it were conceded that those declarations had legal force, they still could not remove the alleged infringement of Community competence. For one thing, the

47 — Case C-233/97 *KappAhl Oy* [1998] ECR I-8069, paragraph 23, in which the Court had to consider declarations made during the course of the negotiations leading to the adoption of the Act of Accession of Austria, Finland and Sweden to the Communities. As regards declarations recorded in minutes of Council deliberations see, of the many cases in point, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18, and Case C-329/95 *VAG Sverige* [1997] ECR I-2675, paragraph 23.

obligation of the Member States not to contravene the Community rules on CRSs *in force at the time* clearly does not enable possible conflicts in the event of those rules being amended to be eliminated.[48] But above all, I would point out, in accordance with what is stated in the *AETR* judgment (paragraph 71 above), that following the adoption of the Community provisions on CRSs Member States no longer had power to assume international obligations in that area, even international obligations consistent with those provisions.

104. If follows from the foregoing, in my opinion, that the provisions of the disputed agreements concerning CRSs are capable of affecting, within the meaning of the *AETR* judgment, the application of Regulation No 2299/89, as amended by Regulation No 3089/93, and were therefore negotiated in violation of the Community's external competence.

(v) Whether Regulation No 95/93 is affected

105. Fifthly, in five of the seven applications (those concerning Denmark, Sweden, Finland, Belgium and Luxembourg), the Commission complains that the disputed agreements are capable of 'affecting' the application of Regulation No 95/93, which establishes common rules for the allocation of slots at Community airports and which applies to non-Community carriers also, subject to some exceptions based on the principle of reciprocity. According to the Commission, while the disputed agreements contain no clauses relating specifically to the allocation of slots, they do include a kind of general clause on fair competition, which requires the contracting parties to maintain fair and equal conditions of competition.[49] Such a provision, the Commission argues, also implies an obligation to guarantee to the other party's designated carriers access to the necessary airport facilities, such as, specifically, slots, on non-discriminatory terms. The Commission does not, however, produce anything in support of that interpretation, other than a report of the United States administration[50] according to which clauses of this kind normally also cover the allocation of slots.

106. The defendant Member States, for their part, reply that the clause also featured in the earlier agreements and that in any event it does not refer to the allocation of slots.

48 — In this connection, the Commission cites its proposal to amend Regulation No 2299/89 (COM(97) 246 def. of 9 July 1997, OJ 1997 C 269, p. 67) which, subsequent to the commencement of the present actions, led to the adoption of Council Regulation (EC) No 323/1999 of 8 February 1999 amending Regulation (EEC) No 2299/89 on a code of conduct for computerised reservation systems (CRSs) (OJ 1999 L 40, p. 1).

49 — The clause requires each party to allow a fair and equal opportunity for the designated airlines of both parties to compete in providing and marketing the air transport services covered by the agreements.

50 — Report to Congress in 1994 by the US General Accounting Office on US Airlines Problems in Doing Business Abroad.

107. It seems to me too that the clause in question was not introduced by the disputed agreements but had already appeared in the earlier agreements; only the agreements concluded in 1995 by Denmark, Finland and Sweden made slight changes, essentially of a drafting nature, to the clause in question. On this ground alone, it could therefore be concluded that the disputed agreements did not infringe Community competence, at least in the cases where they did not modify the clause. But apart from this, it seems to me important to point out that the Commission has by no means shown that the clause also applies to the allocation of slots. The clause is, admittedly, worded in very general terms and lends itself to various interpretations, which may in principle include the one suggested by the Commission. However, in the light of the position taken by the contracting Member States, which flatly reject that interpretation, and in the absence of any official statement by the United States Government on the matter, it seems to me that, to discharge completely the burden of proof incumbent on it, the Commission would have had to adduce specific evidence in support of its argument, rather than simply citing a general document, the report of the US General Accounting Office, which, what is more, does not even specifically refer to the agreements concluded with the European countries.

108. I must therefore conclude that it has not been established that the disputed agreements are capable of affecting Regulation No 95/93, in the sense contemplated in the *AETR* judgment.

(c) *The applicability of Article 234 of the Treaty and the question of the nature of the disputed agreements*

109. Before concluding on this point, I still have to examine the defence based on the first paragraph of Article 234 of the Treaty which a number of Member States have raised in response to the Commission's complaints. As mentioned earlier, various defendant governments have argued that the disputed agreements merely amended bilateral agreements they had concluded with the United States of America before the entry into force of the Treaty.[51] The agreements currently in effect are, therefore, according to those governments, *at least* in respect of the parts not amended by successive agreements, covered by the first paragraph of Article 234 of the Treaty, which provides that '[t]he rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.

110. This is in fact an argument which recurs a number of times in these proceedings, because it is linked to a more general issue which has been the subject of much

51 — I would recall that for the new Member States the entry into force of the Treaty dates from their accession to the Community.

debate between the parties and which also features in other complaints raised by the Commission, although, as we will see, it does not arise in the same terms in each instance. I am referring specifically to the question whether, as the defendant Member States maintain, the bilateral agreements previously in force ('the old agreements') were amended only marginally and in any event in non-essential respects by the disputed agreements, and therefore survived; or whether instead, as the Commission sees it, the amendments were so radical and far-reaching as to transform them effectively into 'new' agreements, whose content is in practice the same as that of the 'old' agreements as amended by the disputed agreements. Starting from these positions, the parties debated the issue at length during the course of the proceedings, the Member States arguing that the Commission's complaints should be assessed *at most* in respect only of the amendments made by the disputed agreements to the 'old' agreements, excluding those provisions which remained unamended, while the Commission maintained that the 'new' agreements should be considered in their entirety, including therefore the provisions of the 'old' agreements that were not amended by the disputed agreements.

111. Let me say at once that the conclusions I arrived at in the examination I carried out a little earlier in fact make it possible to transcend in large part the grounds of the conflict between the two opposing positions because, as we have seen (and as we will see also in respect of the next complaint), it follows from those conclusions that the area of potential incompatibility with Community law is confined to the amendments introduced by the disputed agreements. This has opened the way to solutions which may also avoid the more radical formulations of the issue dividing the parties. May I add that this result is all the more appreciable as I admit that it is not easy to take a firm and definitive stance on this issue and to determine, on the basis of the summary indications provided by the parties, whether or not the status and scope of the amendments effected by the disputed agreements changed the subject-matter and essential content of the 'old' agreements to the point of completely altering their nature. Having said that, however, I must also admit that I am highly puzzled by the Commission's argument, both because it is contradicted by significant indications to the contrary and because it is not supported by reasoning capable of justifying such radical implications. Not only does it not take any account of the fact that from a formal point of view the disputed agreements amended but did not replace the bilateral agreements previously in force, but in particular it seems to me that it disregards the parties' intentions, which in fact should form the main point of reference in a matter such as this. It is clear from the exchange of diplomatic notes by which the disputed agreements were concluded that the intention of the contracting parties was not to replace the 'old' agreements *in toto* (as happened in fact in the case of the United Kingdom), but merely to amend a number of their provisions, albeit important ones. The fact that the disputed agreements specifically refer to the provisions of the 'old' agreements amended by them constitutes clear evidence, to my mind, of the parties' intention that the latter agreements

should survive in all other respects. Moreover, as mentioned above, the Commission has put forward nothing to show that the parties intended to terminate the 'old' agreements, even by implication,[52] and to replace them altogether by entirely new agreements. And all this does not even take account of the negative implications of the Commission's argument in terms of the certainty of international relations and respect for the rights of the contracting parties.

112. Having said that, however, I must also say that, if the radical implications of the Commission's argument are excluded, as I believe they should be, and it is accepted accordingly that the 'old' agreements have survived, the more radical implications of the opposing argument must also be excluded; it must, in other words, be excluded that the subsequent amendments enjoy the same status as the agreements themselves. If an amendment proved to be incompatible with Community law, it would still constitute a supervening infringement, which could not be concealed (as some Member States have tried to argue in ambiguous terms) behind the formal screen of the 'old agreement'. In other words, while it is true that the amendments in question did not completely transform the 'old' agreements into 'new' ones, it is also the case that if they were incompatible with Community law they could not be justified by reference to the continuance of the 'old' agreements into which they were incorporated.

113. To return now to the question of the application of the first paragraph of Article 234, I must say that I have some difficulty, in the light of the foregoing, in seeing the actual relevance of that provision to the present complaint of infringement of the Community's external competence. If one looks at the provisions of the 'old' agreements that were not amended, there can be no doubt that they predate Community competence and cannot therefore have been negotiated in violation of that competence. They may well give rise, in substantive terms, to an issue of compatibility with specific provisions of the Treaty (for example, Article 52) or with provisions of secondary law (for example, the regulations on air transport), and in that case, as we will see, the question of the application of Article 234 will certainly arise. But in terms of competence, by contrast, the issue of compatibility with Community law cannot arise, for the obvious reason that supervening external competence of the Community in matters previously regulated by agreements of the Member States does not suffice in itself to render those agreements incompatible with the rules and principles governing the division of powers.

52 — I would recall that, with respect to the termination of a treaty implied by the conclusion of a later treaty, Article 59(1) of the Vienna Convention on the Law of Treaties provides:
'1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time'.

Nor, clearly, can the *AETR* judgment be of relevance in this respect, since it concerns only agreements concluded following the exercise of an internal power. It seems to me, therefore, that there is no basis for bringing the first paragraph of Article 234 into play in this connection.

114. If, on the other hand, regard is had to the amendments effected by the disputed agreements, it is clear that they were introduced after the entry into force of the Treaty in the case of all the defendant Member States, since those agreements were concluded in 1995 and 1996. So here, too, the first paragraph of Article 234 of the Treaty is of no relevance, since it concerns only agreements concluded 'before the entry into force of the Treaty'. Nor, on the other hand, as I have explained earlier, could there be claimed for those amendments the status of the 'old' agreements into which they were later incorporated, in an attempt thereby to attract the protection of that provision to cover the possible incompatibility of those amendments.

115. In the light of the foregoing considerations, finally, I do not regard as well founded the complaints raised by the Commission in the alternative, alleging — on the basis of the second paragraph of Article 234 or Article 5 of the Treaty, as the case may be — that the defendant Member States did not do everything in their power to cure the incompatibility between the supervening Community competence and the agreements concluded by them before the entry into force of the Treaty or the adoption of Community legislation in the sphere of air transport. This is because, as I have just said, I do not consider the premiss on which the complaint is based to be correct, that is to say, that adoption of internal rules in the sphere of air transport could of itself have brought about the incompatibility of the 'old' agreements (or, more precisely, the provisions of the 'old' agreements not amended by the disputed agreements) with the rules and principles governing the division of powers. That, moreover, the position here is different from that in the case of the other complaints (see paragraph 144 below) is borne out by the fact that, if the conclusion that I have just proposed were rejected, it would still have to be shown how the Member States could have infringed the second paragraph of Article 234 in a situation where the alleged incompatibility arose solely as a result of a supervening Community competence. In that case, by definition, the Member States could not (and indeed should not) have taken any action and the only possible remedy would be for the Member States' agreements to be replaced with an agreement concluded by the Community itself. But if that did not happen, there is nothing the Member States could do, short of resorting (within the limits permitted by international law, obviously) to the extreme remedy of denouncing the earlier agreements, at the risk, however, of creating a genuine legal vacuum just in order to remedy the Community institutions' failure to act.

(d) *Conclusions*

116. In the light of all the foregoing considerations, I must conclude that, in accord-

ance with the *AETR* judgment, the defendant Member States had no power to assume international obligations concerning the prices that third-country carriers are authorised to charge on intra-Community routes or concerning computerised reservation systems (CRSs). On the other hand, I do not consider that it has been proved that they had no power to assume the other obligations contained in the disputed agreements.

117. Accordingly, I take the view that the Court should declare that, by inserting in the disputed agreements provisions concerning the prices which may be charged by air carriers designated by the United States of America on intra-Community routes and concerning computerised reservation systems (CRSs), Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany have failed to fulfil their obligations under Article 5 of the Treaty and Regulations Nos 2409/92 and 2299/89.

contain what is called a 'nationality clause', which in practice enables each party to refuse the rights provided for under the agreements to carriers designated by the other contracting State but not in the ownership or under the control of nationals of that State. More specifically, the clause empowers each contracting State to designate the airlines which it intends to have the right to operate the air transport services provided for in the agreements in question. The other contracting State is required to grant those airlines the necessary permissions or authorisations when certain conditions are satisfied, and in particular, so far as concerns us here, the condition that the substantial ownership and effective control of the airlines be vested in the contracting State designating them and/or in natural or legal persons having the nationality of that State. It is provided, however, that if, after the requisite permissions or authorisations have been granted to an airline designated by the other party, the above condition is no longer satisfied, each contracting State may revoke, suspend or limit the permissions or authorisations in question.

2. The infringement relating to the right of establishment

118. The Commission's second complaint, this time against all the defendant Member States, concerns infringement of Article 52 of the Treaty, which, need it be said, prohibits any restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. The infringement, according to the Commission, lies in the fact that the agreements in force with the United States

119. In examining this complaint, I will begin by considering whether the clause in question is compatible with Article 52 of the Treaty and then, if that is not the case, whether it can be justified, as a number of the defendant governments have argued, under the exception provided for in Article 56 of the EC Treaty (now Article 46 EC). As an alternative point, it will in any event be necessary also to ascertain whether the first paragraph of Article 234 of the Treaty is applicable here.

A — *The compatibility of the 'nationality clause' with Article 52 of the Treaty*

Arguments of the parties

120. In the Commission's view, the right given to each party to withhold, revoke, suspend or limit the requisite permissions or authorisations in respect of airlines which are not owned or controlled by the other contracting State or by nationals of that State (the 'nationality clause') is incompatible with Article 52 of the Treaty. This is because an airline owned or controlled by a non-contracting Member State (or by nationals of a non-contracting Member State) and established in one of the defendant Member States would not, as a result of the nationality clause, receive the same treatment as that accorded to national companies and would thereby suffer discrimination contrary to Community law.

121. According to the defendant governments, on the other hand, even assuming the discrimination complained of by the Commission really existed, it could be practised only by the United States. This is because, given the way the nationality clause operates, as described above, it does not restrict in any way the right of contracting Member States to designate airlines from other Member States, but enables the United States of America (in accordance with the Chicago Convention) to withhold, revoke, suspend or limit the permissions or authorisations in respect of such airlines.

122. The defendant governments also argue that in any event, in the circumstances in point here, Article 52 is not applicable *ratione loci* (to adopt a term used by the German Government), since the relevant economic activities are pursued on transatlantic routes and thus outside the Community. Indeed some of them maintain that Article 52 does not apply *ratione materiae* either since the nationality clause relates only to the freedom to provide services, which in the sphere of air transport is protected only within the limits of the provisions of secondary law adopted pursuant to Article 84 of the Treaty. The German Government, finally, claims that a clause which is inserted in its agreement with the United States, and which I will be discussing shortly, has the effect of eliminating, with respect to that agreement, the alleged discriminatory effects of the nationality clause.

Assessment

123. Of the positions set out above, the Commission's is to be preferred, in my view. It seems clear to me that by reason of the clause in question the defendant

Member States, contrary to the requirements of Article 52 of the Treaty, do not accord to airlines owned or controlled by other Member States or by nationals of other Member States who are established in their territory the same treatment as that accorded to their own nationals. Only the latter, and not the former, have the right, if all the relevant conditions are met, to obtain in all cases from the United States authorities the permissions or authorisations required to operate the air transport services provided for under the bilateral agreements. It is therefore undeniable that this situation involves a case of discrimination based on nationality and, moreover, that it results not from any conduct on the part of the United States, but directly from the bilateral agreements.

124. Nor is it possible to dispute that conclusion, as the defendant governments seek to do, by contending that in the present cases Article 52 of the Treaty is not applicable either *ratione loci* or *ratione materiae*. As regards the former aspect, it is easy enough to refute that contention by observing that at least part of transatlantic air transport takes place in the airports and in the skies of the Community. But irrespective of that, it must be pointed out that by virtue of Article 52 of the Treaty Member States are required to accord national treatment to the companies of other Member States established in their territory and this is so whether they propose to operate air services solely within the Member State in question or to other Member States, or whether they propose to operate such services also, or exclusively, to third countries. To take a few simple examples, a Member State could not, without being in breach of Article 52, allow only its 'national' companies, and not those established in its territory but controlled by nationals of other Member States, to provide consultancy services to Japanese companies, to market products in Canada, to organise holidays in the Caribbean countries or to provide express courier services to Australia, and so forth. In the same way, therefore, Member States cannot discriminate against an airline established in their territory but owned or controlled by nationals of other Member States, in respect of access to transatlantic routes.

125. As to the alleged inapplicability *ratione materiae* of Article 52, I would point out that the Commission does not accuse the defendant Member States of preventing the airlines of other Member States from operating, under the freedom to provide services, on the routes linking their territory to the United States. What the Commission does accuse the defendant Member States of is not according national treatment to airlines established in their territory but owned or controlled by nationals of other Member States. In the light of that approach, it is therefore clear that it is not the Treaty provisions on freedom to provide services that apply here, but those on the right of establishment.

126. Before concluding on this point, I must still deal briefly with the German Government's argument that the incompatibility of the nationality clause with Article 52 of the Treaty is eliminated by a special provision inserted in 1996 as Article 3(3) of the Germany-US Agreement of 1955. If I understand this clause properly, and indeed it does not at all make for easy reading, [53] it substantially restricts the right of the United States administration to withhold or revoke the permissions needed by airlines which are designated by other Member States under the terms of a bilateral agreement between them and the United States and in which German natural or legal persons hold less than 50% of the share capital. If that is the case, it seems clear to me that this clause does not remove the right of the United States to withhold or revoke the relevant permissions needed by airlines designated by the German authorities which, although established in Germany, are owned or controlled by nationals of other Member States; in other words, it does not eliminate the discrimination contrary to Article 52 of the Treaty. The provision invoked by the German authorities therefore cannot cure the illegality of the nationality clause incorporated in the current Germany-US Agreement.

B — *Application of the derogation under Article 56 of the Treaty*

127. Now that it is established that the nationality clause is contrary to Article 52 of the Treaty, I must examine whether, as argued by a number of the defendant governments (United Kingdom, Denmark and Germany), the clause may be covered by the derogation under Article 56 of the Treaty, according to which the rules on the right of establishment are not to prejudice national provisions justified on grounds of public policy, public security or public health. In particular, those governments maintain that they should have the right, where necessary, to withhold or revoke on grounds of public policy the relevant authorisations needed by airlines designated by the United States but not owned or controlled by United States nationals; which would of course mean having to grant the corresponding right to the United States.

53 — Article 3(3) of the Germany-US Agreement of 1955, as amended by the 1996 agreement, provides:
'Where nationals of either contracting party hold an ownership interest of less than 50 percent in an airline incorporated and having its principal place of business in a third state, each contracting party waives its right to withhold or revoke operating permission from that airline under the applicable article(s) of the relevant bilateral air services arrangements between that contracting party and the third state solely on the basis of that ownership interest or on the basis that the ownership interest constitutes control or effective control, provided that, with respect to an ownership interest of less than 50 percent, the third state permits airlines of both contracting parties to invest in airlines incorporated and having their principal place of business in that third state on an equal basis, and provided further that the relevant bilateral air services arrangements between each contracting party and that third state are "Open Skies" agreements or the equivalents thereof. For purposes of this provision: (a) the air services arrangements between Germany and other members of the European Union are deemed equivalents of Open Skies agreements; and (b) the current European Union legislation governing investment in European Union airlines is deemed to permit airlines of both contracting parties to invest in airlines incorporated and having their principal place of business in European Union states on an equal basis with respect to ownership interest of less than 50 percent'.

128. I must say, however, that I do not find this argument convincing. First, I would point out that all the agreements under consideration already contain appropriate provisions on aviation security which seem to address the same public-policy requirements as those now relied upon by the parties as justification for the nationality clause. Furthermore, as the Commission has pointed out, the clause does not limit the parties' 'right of refusal' to cases of actual threat to a public-policy interest, so that it cannot be excluded that the right in question will in fact be exercised for purely economic considerations, which, according to settled case-law, cannot constitute grounds for the application of the derogation in question. [54]

129. But even were one to disregard all this, I believe that the clause still could not be justified on the basis of Article 56. According to the settled case-law of the Court on the matter, '[r]ecourse to this justification presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society', [55] and 'the measures taken by virtue of [Article 56] must not be disproportionate to the intended objective. As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard'. [56] It follows, in particular, that Article 56 cannot serve as a basis for justification of derogating measures adopted by Member States where the protection of the public interest which those measure seek to assure can be secured by less restrictive means. [57]

130. In the present proceedings, however, the defendant governments have not shown that the same result could not be achieved by other means: for example, as the Commission appears to suggest, by placing Community carriers on the same footing as national carriers, thus allowing the United States to exercise the right of refusal only with respect to airlines owned or controlled by nationals of non-Community countries. A clause drafted in those terms would certainly have been compatible with Community law, as, for that matter, various defendant governments have openly acknowledged by stating that they had proposed to the United States authorities, for precisely that reason, an amendment of the nationality clause along those lines. In their defence, however, they claim that they were unable to achieve the desired result because of the flat refusal they received from the United States authorities.

54 — See, *ex multis*, Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 34.

55 — Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 46. To the same effect, see, *ex multis*, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35.

56 — Case 352/85 *Bond van Adverteerders*, cited above, paragraph 36. On the need for a restrictive interpretation of the provision, see also, *ex multis*, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 21 and 23.

57 — See Case C-114/97 *Commission* v *Spain*, cited above, paragraph 47. See also, by analogy, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

131. On this last point, I can limit myself to two observations. The first is that the points to which I have just drawn attention provide confirmation that less restrictive solutions could indeed have been envisaged in the circumstances. The second is that the Member States have not shown that they did everything necessary in order to secure an amendment of the clause in question along the lines mentioned or, in any event, along lines more in accordance with Community law. I do not deny the difficulties that they would have encountered in this regard, but I can only point out that the documents before the Court show that they did not do everything necessary in order to overcome those difficulties. To take just one example, it may be imagined that if they had at least acted in concert *vis-à-vis* the United States Government, they would certainly have stood a better chance of succeeding in their aim.

132. In conclusion, I consider that the nationality clause is contrary to the right of establishment and cannot be justified on the basis of Article 56 of the Treaty.

C — *Application of the first paragraph of Article 234 of the Treaty*

133. Having said that, it still needs to be determined whether the clause in question is protected, as a number of the defendant governments argue, by the first paragraph of Article 234. In other words, it has to be ascertained whether, as those governments claim, the clause pertains to agreements concluded before the entry into force of the Treaty (the 'old agreements'), and is therefore covered by the first paragraph of Article 234; or whether, as the Commission maintains, the making of significant amendments to those agreements in 1995 and 1996, with a view to bringing them into line with the 'open skies' model, must be regarded as equivalent to the conclusion of 'new agreements' (in practice, the same as the 'old agreements' as amended by the disputed agreements), with the result that the clause in question is no longer covered by the first paragraph of Article 234.

134. I should add at once that, put in those terms, the question arises only in the cases concerning Denmark, Sweden, Finland, Austria and Germany, because those States had already concluded agreements (the 'old agreements') incorporating the clause in question before the entry into force of the Treaty. In the agreements concluded subsequently with the United States in 1995 and 1996 (the disputed agreements), this clause was not amended save to incorporate minor drafting alterations — and in some cases not even that. However, the question arises — in different terms — in the actions brought against Belgium and Luxembourg, since the 'old agreements' between these States and the United States date from 1980 and 1986 respectively. Even if it were conceded, therefore, that the nationality clause did not pertain to 'new agreements' arising from the conclusion of the disputed agreements, it would still have its origin in agreements concluded after the entry into force of the Treaty, with regard to which a question of the application of the first paragraph of Article 234 cannot even arise. Separate consideration will, however, be given to the

case of the United Kingdom because of the special features of the so-called Bermuda II Agreement (the disputed agreement in that case), which I will discuss below.

135. Limiting myself therefore to the cases mentioned, I must point out, in the first place, that this is the same question, as to whether the agreements in point are 'old' or 'new', as that which I have already examined elsewhere (paragraph 109 et seq. above). Since I expressed my views on that question in general terms, I can therefore only refer to what I have said earlier. I will add only that, in this instance too, it was clearly the parties' intention not to replace the old agreements *in toto* (unlike what occurred, as I will shortly discuss, in the case of the United Kingdom), but merely to amend a number of their provisions, albeit important ones. The very fact that the nationality clause was not renegotiated at any stage following the conclusion of the 'old agreements', and that the contracting States therefore did not any longer manifest their own intention in that regard, should, indeed, call for the conclusion that the clause still has its basis in those agreements. I would observe, moreover, that a number of Member States have claimed that they tried to renegotiate the clause but were met with a firm refusal on the part of the United States authorities, which, they submit, demonstrates the intention of those authorities to maintain unchanged the position as it existed prior to the entry into force of the EC Treaty.

136. Having said that, however, I must also add that it is my impression that the whole discussion concerning this point rests on an assumption which is not altogether correct: that is, that the nationality clause was not renegotiated by the contracting parties when they concluded the disputed agreements. It seems to me that while it is true that in the formal sense the clause was not amended by those agreements (apart from some drafting changes in some cases), it is also the case that, following their conclusion, the content of the clause has none the less been profoundly altered.

137. As I have already stated, the clause enables each party to designate the airlines to which it intends to grant the right to operate air transport services. In particular, the airlines so designated acquire the right, subject to certain conditions being satisfied, to obtain the authorisations necessary to operate all the air transport services provided for under the agreements. Consequently, the content of the authorisations depends strictly on the kind of services that the holders of the authorisations can be permitted to operate under other provisions of the agreements; any change in those provisions, to which reference is made by implication, also changes the scope of any authorisations granted and hence the scope of the clause itself.

138. That scope was in fact extended following and as a consequence of the complete liberalisation of the fifth freedom routes effected by the disputed agreements: the airlines of the contracting Member States, if designated by them, obtained the right to serve such routes in the United States, while the United States authorities were empowered to refuse access to those same routes to airlines of non-contracting Member States. In this way, the parties implicitly agreed to extend the scope of the clause in question, by modifying the rights and obligations flowing from it. If they had not intended it to be automatically extended in this way, they could have revised the terms of the clause, for example by limiting the number of airlines to be designated or authorised to fly on particular routes. By doing otherwise, they implicitly assented to this extension. It follows that the disputed agreements modified, albeit indirectly, the content of the nationality clause contained in the 'old' agreements. It also follows, given that the agreements were concluded in 1995 and 1996, in other words after the entry into force of the Treaty, that the first paragraph of Article 234 of the Treaty can no longer be applicable to them.

139. A partially different approach is, however, as I have said, called for in the case of the action brought against the United Kingdom. As noted earlier, in 1995 that State concluded an agreement with the United States of America which made amendments to the earlier bilateral agreement of 1977 which were of such a minor nature that even the Commission considered that it could not be characterised as a 'new agreement'. This latter agreement (known as the Bermuda II Agreement), which is the disputed agreement in the proceedings against the United Kingdom, in its turn entirely replaced the Bermuda I Agreement of 1944 (the 'old agreement'). By concluding Bermuda II, the parties thus manifested a new and explicit intention with respect to the entire agreement, including the nationality clause which already featured, with the same content, in the 'old agreement'. By virtue of this new manifestation of intention, there is no doubt that the clause in question was incorporated into Bermuda II: in other words, into an agreement which was concluded after the Member State's accession to the Community.

140. To conclude on this point, I consider that the nationality clause contained in the current agreements between the defendant Member States and the United States of America is not covered by the first paragraph of Article 234 of the Treaty.

3. Breach of the obligations laid down in the second paragraph of Article 234 of the Treaty

141. Lastly, by way of an alternative complaint, in the event of the complaints examined hitherto being rejected, the Commission contends that the Member States are in breach of their obligations under the second paragraph of Article 234 of the Treaty. I have already discussed this matter in relation to the complaint of infringement of Community competence (paragraph 115 above). I will therefore confine myself here

to considering it in relation to infringement of Article 52 of the Treaty, and I too will deal with it very much in the alternative, in view of the conclusions I have reached earlier on this point.

142. In the event, therefore, that the Court should decide that the nationality clause contained in the current agreements between the United States and Denmark, Sweden, Finland, Austria and Germany is covered by the first paragraph of Article 234 of the Treaty, the Commission asks the Court to declare that those defendant Member States have infringed the second paragraph of that article, by not having done everything in their power to eliminate the incompatibility found to exist between that clause and the right of establishment.

143. I would recall that under the second paragraph of Article 234, to the extent that agreements concluded before the entry into force of the Treaty are incompatible with the Treaty, 'the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude'. And I would also recall that the Court has recently given quite a strict interpretation of that provision, holding that the requirement to bring agreements predating the entry into force of the Treaty into line with Community law means that Member States have even to go so far as denouncing such agreements if the contracting third states do not intend to renegotiate them. [58]

144. As mentioned above, the defendant Member States maintain that they attempted to renegotiate the clause in question with the United States authorities, with a view to eliminating its alleged incompatibility with Community law, but were met with a firm refusal by those authorities. I must object, however, even without embarking on a reconstruction of the negotiations that took place with the United States, that such an attempt cannot be regarded as sufficient to constitute proper performance of their obligations under the second paragraph of Article 234 of the Treaty. For that, the Member States concerned must show that they made every effort to remove the incompatibility; and it does not seem to me that they have shown that they did so in this instance. It is, in particular, not in dispute that, notwithstanding the specific provision to that effect in the second paragraph of Article 234, they did not adopt a common attitude *vis-à-vis* the United States, nor did they take steps to assist each other with a view to bringing the other contracting parties to agree to an amendment of the nationality clause so as to bring it into line with Community law. Furthermore, it does not appear that in the course of the negotiations the Member States concerned informed the United States of America that, if the nationality clause were not amended in the sense just indicated, they might ultimately find themselves in a situation in which it would be necessary to denounce the agreements.

58 — Joined Cases C-62/98 and C-84/98 *Commission* v *Portugal* [2000] ECR I-5171 and I-5215.

145. In the light of those considerations, I therefore take the view that Denmark, Sweden, Finland, Austria and Germany have failed to fulfil their obligations under the second paragraph of Article 234 of the Treaty.

Concluding observations

146. In the light of all the above assessments of the various heads of complaint, it follows, to summarise:

— that in the proceedings against Germany, the Commission's action is inadmissible in so far as it concerns the transitional regime of 1994;

— that Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany have infringed the rules on the division of powers between the Community and the Member States by inserting in the disputed agreements specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs). Those Member States have thereby failed to fulfil their obligations under Article 5 of the Treaty and under Regulations Nos 2409/92 and 2299/89;

— that it has not been proved that other provisions of the disputed agreements were negotiated in breach of the rules on the division of powers. Specifically, it has not been established that the abovementioned States have failed to fulfil their obligations under Regulations Nos 2407/92, 2408/92 and 95/93, as claimed in the Commission's applications;

— that all the defendant Member States have infringed Article 52 of the Treaty by adopting or maintaining in force the clause known as the nationality clause;

— that, in the alternative, as regards the agreements concluded by Denmark, Sweden, Finland, Austria and Germany, in the event of the Court deciding that the said clause can be justified under the first paragraph of Article 234 of the Treaty, those States, by failing to take all appropriate steps to eliminate the incompatibility of that clause with Article 52, have failed to fulfil their obligations under the second paragraph of Article 234.

IV — Costs

147. 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. Under Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs if the parties are successful on some heads and unsuccessful on others, or where the circumstances are exceptional.

148. In view of the conclusions I have reached in the preceding pages, in particular with reference to the Commission's and the defendant States' failure on some heads, and in view also of the special circumstances of the case and the complexity of the issues raised in these proceedings, I consider that it is appropriate for the parties to bear their own costs.

149. As to the Netherlands, an intervener in all the cases, it too should bear its own costs, in accordance with Article 69(4).

V — Conclusion

150. For all of the reasons set out above, I propose that the Court should give judgment in the following terms.

(i) In Case C-466/98, I propose that the Court declare:

— that, by inserting the nationality clause in the Bermuda II Agreement of 1977, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— that the United Kingdom of Great Britain and Northern Ireland and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.

(ii) In Case C-467/98, I propose that the Court declare:

— that, by inserting in the air transport agreement concluded with the United States of America in 1995 specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs), the Kingdom of Denmark has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and under Regulations Nos 2409/92 and 2299/89;

— that, by maintaining in force the nationality clause contained in the earlier agreement with the United States of America, the Kingdom of Denmark has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— in the alternative, if it is decided that the first paragraph of Article 234 of the Treaty is applicable, that the Kingdom of Denmark has failed to fulfil its obligations under the second paragraph of that article by having failed to take all appropriate steps to eliminate the incompatibility between the earlier agreement with the United States of America and Article 52 of the Treaty;

— that the application is dismissed in all other respects;

— that the Kingdom of Denmark and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.

(iii) In Case C-468/98, I propose that the Court declare:

— that, by inserting in the air transport agreement concluded with the United States of America in 1995 specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs), the Kingdom of Sweden has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and under Regulations Nos 2409/92 and 2299/89;

— that, by maintaining in force the nationality clause contained in the earlier agreement with the United States of America, the Kingdom of Sweden has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— in the alternative, if it is decided that the first paragraph of Article 234 of the Treaty is applicable, that the Kingdom of Sweden has failed to fulfil its obligations under the second paragraph of that article by having failed to take all appropriate steps to eliminate the incompatibility between the earlier agreement with the United States of America and Article 52 of the Treaty;

— that the application is dismissed in all other respects;

— that the Kingdom of Sweden and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.

(iv) In Case C-469/98, I propose that the Court declare:

— that, by inserting in the air transport agreement concluded with the United States of America in 1995 specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs), the Republic of Finland has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and under Regulations Nos 2409/92 and 2299/89;

— that, by maintaining in force the nationality clause included in the earlier agreement with the United States of America, the Republic of Finland has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— in the alternative, if it is decided that the first paragraph of Article 234 of the Treaty is applicable, that the Republic of Finland has failed to fulfil its

obligations under the second paragraph of that article by having failed to take all appropriate steps to eliminate the incompatibility between the earlier agreement with the United States of America and Article 52 of the Treaty;

— that the application is dismissed in all other respects;

— that the Republic of Finland and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.

(v) In Case C-471/98, I propose that the Court declare:

— that, by inserting in the air transport agreement concluded with the United States of America in 1995 specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs), the Kingdom of Belgium has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and under Regulations Nos 2409/92 and 2299/89;

— that, by maintaining in force the nationality clause contained in the earlier agreement with the United States of America, the Kingdom of Belgium has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— that the application is dismissed in all other respects;

— that the Kingdom of Belgium and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.

(vi) In Case C-472/98, I propose that the Court declare:

— that, by inserting in the air transport agreement concluded with the United States of America in 1995 specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and under Regulations Nos 2409/92 and 2299/89;

— that, by maintaining in force the nationality clause contained in the earlier agreement with the United States of America, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— that the application is dismissed in all other respects;

— that the Grand Duchy of Luxembourg and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.

(vii) In Case C-475/98, I propose that the Court declare:

— that, by inserting in the air transport agreement concluded with the United States of America in 1995 specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs), the Republic of Austria has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and under Regulations Nos 2409/92 and 2299/89;

— that, by maintaining in force the nationality clause contained in the earlier agreement with the United States of America, the Republic of Austria has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— in the alternative, if it is decided that the first paragraph of Article 234 of the Treaty is applicable, that the Republic of Austria has failed to fulfil its obligations under the second paragraph of that article by having failed to take all appropriate steps to eliminate the incompatibility between the earlier agreement with the United States of America and Article 52 of the Treaty;

— that the application is dismissed in all other respects;

— that the Republic of Austria and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.

(viii) In Case C-476/98, I propose that the Court declare:

— that the action is inadmissible in so far as it concerns the transitional regime of 1994;

— that, by inserting in the air transport agreement concluded with the United States of America in 1996 specific provisions concerning the fares that air carriers designated by the United States of America are allowed to charge on intra-Community routes and concerning computerised reservation systems (CRSs), the Federal Republic of Germany has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and under Regulations Nos 2409/92 and 2299/89;

— that, by maintaining in force the nationality clause contained in the earlier agreement with the United States of America, the Federal Republic of Germany has failed to fulfil its obligations under Article 52 of the EC Treaty (now Article 43 EC);

— in the alternative, if it is decided that the first paragraph of Article 234 of the Treaty is applicable, that the Federal Republic of Germany has failed to fulfil its obligations under the second paragraph of that article by having failed to take all appropriate steps to eliminate the incompatibility between the earlier agreement with the United States of America and Article 52 of the Treaty;

— that the application is dismissed in all other respects;

— that the Federal Republic of Germany and the Commission shall bear their own costs;

— that the Kingdom of the Netherlands shall bear its own costs.