JUDGMENT OF THE COURT

5 November 2002 *

In Case C-467/98,

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

applicant,

v

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Danish.

supported by

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

intervener,

APPLICATION for:

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

— in the alternative, in relation to the remaining provisions of the agreement of 1944/1954, a declaration that, in so far as the 1995 agreement cannot be regarded as having radically amended and thus replaced the agreements previously concluded, the Kingdom of Denmark has, by not rescinding those provisions of the said previously-concluded agreements which are incom-

patible with the EC Treaty, especially Article 52 thereof, and with secondary law, or by failing to take all necessary legal steps to that end, failed to comply with its obligations under Article 234 of the EC Treaty (now, after amendment, Article 307 EC),

THE COURT,

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

Advocate General: A. Tizzano,

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

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 May 2001, at which the Commission was represented by F. Benyon and H.P. Hartvig, the Kingdom of Denmark by J. Molde, and the Kingdom of the Netherlands by J. van Bakel, H.G. Sevenster and J. van Haersolte, acting as Agents,

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

gives the following

Judgment

1 By application lodged at the Court Registry on 18 December 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for:

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

— in the alternative, in relation to the remaining provisions of the agreement of 1944/1954, a declaration that, in so far as the 1995 agreement cannot be regarded as having radically amended and thus replaced the agreements previously concluded, the Kingdom of Denmark has, by not rescinding those provisions of the said previously-concluded agreements which are incompatible with the EC Treaty, especially Article 52 thereof, and with secondary law, or by failing to take all necessary legal steps to that end, failed to comply with its obligations under Article 234 of the EC Treaty (now, after amendment, Article 307 EC).

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

Legal background

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

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

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

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

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

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

7 Regulation No 2408/92, as its title indicates, concerns access for Community air carriers to intra-Community air routes. According to the definition given in Article 2(b) of that regulation, a Community air carrier is an air carrier with a valid operating licence granted in accordance with Regulation No 2407/92. Article 3(1) of Regulation No 2408/92 provides that Community air carriers are to be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community. Article 3(2), however, introduces the possibility for Member States, until 1 April 1997, to make an exception to that provision in relation to the exercise of cabotage rights.

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

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

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

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

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

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

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

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

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

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

'1. The obligations of a system vendor under Articles 3 and 4 to 6 shall not apply in respect of a parent carrier of a third country to the extent that its CRS outside the territory of the Community does not offer Community air carriers equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.

2. The obligations of parent or participating carriers under Articles 3a, 4 and 8 shall not apply in respect of a CRS controlled by (an) air carrier(s) of one or more third country (countries) to the extent that outside the territory of the

Community the parent or participating carrier(s) is (are) not accorded equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.'

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

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

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

or

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

or

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

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

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

Background to the dispute

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

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

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

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

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

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

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

— negotiations at Community level with third countries could be conducted only if the Council deemed such an approach to be in accordance with the

common interest, on the basis that they were likely to produce a better result for the Member States as a whole than the traditional system of bilateral agreements.

19 In April 1995, the Commission raised the matter once more, recommending the adoption by the Council of a decision authorising it to negotiate an air transport agreement with the United States of America. Following that latest request, in June 1996 the Council gave the Commission a limited mandate to negotiate with that country, in liaison with a special committee appointed by the Council, in relation to the following matters: competition rules; ownership and control of air carriers; CRSs; code-sharing; dispute resolution; leasing; environmental clauses and transitional measures. In the event of a request from the United States to that effect, authorisation was granted to extend the negotiations to State aid and other measures to avert bankruptcy of air carriers, slot allocation at airports, economic and technical fitness of air carriers, security and safety clauses, safeguard clauses and any other matter relating to the regulation of the sector. On the other hand, it was explicitly stated that the mandate did not cover negotiations concerning market access (including code-sharing and leasing in so far as they related to traffic rights), capacity, carrier designation and pricing.

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

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

22 By contrast, as the documents before the Court show, the Community concluded a civil aviation agreement with the Kingdom of Norway and the Kingdom of Sweden in 1992, approved by Council Decision 92/384/EEC of 22 June 1992 (OJ 1992 L 200, p. 20), has reached an agreement in principle in that field with the Swiss Confederation, and, at the time when this action was brought, was negotiating with 12 European countries an agreement on the creation of a 'common European airspace'.

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

23 A bilateral air transport agreement, known as a '"Bermuda" type agreement', was concluded between the Kingdom of Denmark and the United States of America on 16 December 1944 and amended in 1954, 1958 and 1966 with the aim of liberalising international air traffic ('the 1944 Agreement').

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

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

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

27 During the negotiations held on 24 to 26 April 1995, representatives of the Danish and American Governments reached a consensus on the amendment of the 1944 Agreement. That consensus was subsequently confirmed by an exchange of diplomatic notes.

28 The following amendments were thus made to the 1944 Agreement in 1995. In the body of the text of that agreement, Articles 1 (Grant of Rights), 2 bis (Designation and Authorisation), 3 (Definitions), 4 (Safety), 5 (Application of Laws), 6 (Revocation of Authority), 7 (User Charges), 8 (Aviation Security), 9 (Pricing), 10 (Fair Competition), 11 (Commercial Opportunities), 12 (Customs Duties and Charges), 13 (Intermodal Services), 14 (Consultations) and 15 (Settlement of Disputes) were amended or added in order to make the agreement comply with the American 'open skies' model agreement. In addition, Annexes I and II to the 1944 Agreement, containing lists of routes and opportunities for using them, were amended to bring them into line with the American 'open skies' model agreement (in relation, for example, to routes, operational flexibility, charter flights, etc.). Finally, an Annex III, concerning the principles relating to the CRSs, was added.

29 Article 2 of the 1944 Agreement provides that '[e]ach of the air services so described shall be placed in operation as soon as the contracting party to whom the rights have been granted by Article 1 to designate an airline or airlines for the route concerned has authorized an airline for such route' and that 'the contracting party granting the rights shall, subject to Article 6 [of that agreement], be bound to give the appropriate operating permission to the airline or airlines concerned'. Article 6 of the 1944 Agreement provides that each contracting party reserves the right to withhold or revoke a certificate or permit to an airline of the other party in any case where it considers it insufficiently established that a substantial part of the ownership and effective control are vested in nationals of one of the parties ('the clause on the ownership and control of airlines').

The pre-litigation procedure

30 Having learned that the negotiations aimed at amending the 1944 Agreement had been successful, the Commission sent the Danish Government a letter of formal notice on 6 June 1995, in which it stated, essentially, that, since Community air transport legislation had established a comprehensive system of rules designed to establish an internal market in that sector, Member States no longer had the competence to conclude bilateral agreements such as that which the Kingdom of Denmark had just concluded with the United States of America. Furthermore, it considered that such an agreement was contrary to primary and secondary Community law.

31 The Danish Government having challenged, in its reply of 6 July 1995, the Commission's view on the matter, the Commission sent the Kingdom of Denmark a reasoned opinion on 16 March 1998, in which it concluded that the bilateral commitments resulting from the amendments made in 1995 to the 1944 Agreement infringed Community law and called upon that Member State to comply with the reasoned opinion within two months from its notification.

32 Finding the Danish Government's reply of 16 July 1998 unsatisfactory, the Commission brought the present action.

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

33 The formulation of the Commission's principal and alternative claims shows that, in its view, examination of the substance of one or other of those claims necessarily presupposes that the Court will have taken a position on a preliminary issue, namely whether the amendments made in 1995 had the effect of transforming the pre-existing 1944 Agreement into a new 'open skies' agreement incorporating the provisions of the 1944 Agreement as successively amended. If such an effect did in fact take place, so the Commission argues, the Court should rule only on the principal claim and review the new agreement for its compatibility with the relevant Community provisions in force in 1995. If the opposite were the case, there would, according to the Commission, be no need to rule on the principal claim and the Court should then rule on the alternative claim and review the provisions in the 1944 Agreement for their compatibility with, in particular, Article 234 of the Treaty.

34 Analysing the amendments made to the 1944 Agreement in 1995 point by point, the Danish Government disputes that they transformed that agreement into a new agreement. In that connection, it submits that, given the amendments made to the 1944 Agreement up to 1966, that agreement already contained all the essential elements of an 'open skies' agreement before 1995. The amendments made in 1995 do not modify, or do not modify substantially, the provisions of the 1944 Agreement. They do not, in principle, grant new rights to American airlines and, accordingly, do not create a new relationship between the Kingdom of Denmark and the United States of America.

35 The Commission, however, contends that, in view of the extent of the amendments made in 1995, those provisions of the 1944 Agreement which were not amended in 1995 cannot be regarded as an independent agreement. The amendments therefore transformed the 1944 Agreement into a new 'open skies' type agreement.

36 It must be noted in that regard that an examination of the substance of the Commission's principal claim does not necessarily require the Court to take a view on the question whether the amendments made in 1995 transformed the pre-existing 1944 Agreement into a new agreement.

37 It is clear from the file and from the oral argument before the Court that the amendments made in 1995, described in paragraph 28 of the present judgment, had the effect of totally liberalising air transport between the United States of America and the Kingdom of Denmark by ensuring free access to all routes between all points situated within those two States, without limitation of capacity or frequency, without restriction as to intermediate points and those situated behind or beyond ('behind, between and beyond rights') and with all desired combinations of aircraft ('change of gauge'). That total freedom has been complemented by provisions concerning opportunities for the airlines concerned to conclude code-sharing agreements and by provisions furthering competition or non-discrimination, in relation to CRSs for example.

38 It follows that the amendments made in 1995 to the 1944 Agreement have had the effect of creating the framework of a more intensive cooperation between the United States of America and the Kingdom of Denmark, which entails new and significant international commitments for the latter.

39 It must be pointed out, moreover, that the amendments made in 1995 provide proof of a renegotiation of the 1944 Agreement in its entirety. It follows that,

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

40 The finding in the preceding paragraph applies, in particular, to access to intra-Community routes granted to airlines designated by the United States of America. Even if, as the Danish Government maintains, that access originates in commitments entered into in 1966, it is clear from Part 1 of Annex I to the 1944 Agreement, concerning the list of routes, as amended in 1995, that access for carriers designated by the United States of America to intra-Community routes was, at the very least, reconfirmed in 1995 in the context of the exchange of traffic rights agreed by the two States.

41 The same is true of the clause relating to ownership and control of the airlines, the wording of which, as set out in paragraph 29 above, was already included in the 1944 Agreement. Furthermore, it must be regarded as undisputed that, as the Advocate General rightly pointed out in paragraphs 136 to 138 of his Opinion, the amendments made to the 1944 Agreement in its entirety in 1995 affect the scope of the provisions, such as that clause, which were not formally modified by the amendments or were modified only to a limited extent.

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

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

Infringement of the external competence of the Community

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

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

Arguments of the parties

45 The Commission submits that, according to Opinion 1/76, subsequently clarified by Opinion 1/94 of 15 November 1994 ([1994] ECR I-5267) and Opinion 2/92 of 24 March 1995 ([1995] ECR I-521), the Community has exclusive competence

to conclude an international agreement, even in the absence of Community provisions in the area concerned, where the conclusion of such an agreement is necessary in order to attain the objectives of the Treaty in that area, such objectives being incapable of being attained merely by introducing autonomous common rules.

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

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

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

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

50 The Danish Government submits that Opinion 1/76 is innovative in that it confers on the Community external competence in sectors in which it has not yet adopted internal rules, subject to the condition that the participation of the Community in an international agreement is necessary in order to attain a Treaty objective. According to the Danish Government, the conclusion by the Community of an air transport agreement with the United States of America is not necessary within the meaning of Opinion 1/76.

51 The Danish Government claims further that the external competence which may be vested in the Community pursuant to Opinion 1/76 only becomes exclusive once the Community has actually exercised that competence in order to conclude an international agreement. That interpretation is supported by Opinions 1/94 and 2/92. In the present case, since the Community has not yet concluded an air transport agreement with the United States of America, the Member States cannot, on the basis of Opinion 1/76, be prevented from concluding such an agreement with that country.

52 Referring to Article 84(2) of the Treaty, the Danish Government adds that, in the air transport sector, there are no provisions conferring on the Community institutions competence to negotiate with non-member countries, still less exclusive competence. It observes that, on the contrary, the Council, in its

Conclusions of 15 March 1993, clearly adopted the view that the Member States continue to be entitled to negotiate air transport agreements with non-member countries. In that regard and contrary to the Commission's view on the matter, the examples referred to in paragraph 22 above in no way show that the Council conceded that an exclusive external competence of the Community in relation to air transport was necessary.

53 The Danish Government contends that the economic consequences for competition cited by the Commission do not justify an exclusive external competence of the Community.

Findings of the Court

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

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

56 It is true that the Court has held that the Community's competence to enter into international commitments may arise not only from express conferment by the Treaty but also by implication from provisions of the Treaty. Such implied external competence exists not only whenever the internal competence has already been used in order to adopt measures for implementing common policies,

but also if the internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, the competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4).

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

58 That is not the case here.

59 There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to the United States of America, or to prevent them prescribing the approach to be taken by the Member States in their external dealings, so as to mitigate any discrimination or distortions of competition which might result from the implementation of the commitments entered into by certain Member States with the United States of America under 'open skies' agreements (see, to that effect, Opinion 1/94, paragraph 79). It has therefore not been established that, by reason of such discrimination or distortions of competition, the aims of the Treaty in the area of air transport cannot be achieved by establishing autonomous rules.

60 In 1992, moreover, the Council was able to adopt the 'third package', which, according to the Commission, achieved the internal market in air transport based on the freedom to provide services, without its having appeared necessary at the

time to have recourse, in order to do that, to the conclusion by the Community of an air transport agreement with the United States of America. On the contrary, the documents before the Court show that the Council, which the Treaty entrusts with the task of deciding whether it is appropriate to take action in the field of air transport and to define the extent of Community intervention in that area, did not consider it necessary to conduct negotiations with the United States of America at Community level (see paragraph 18 above). It was not until June 1996, and therefore subsequent to the exercise of the internal competence, that the Council authorised the Commission to negotiate an air transport agreement with the United States of America by granting it for that purpose a restricted mandate, while taking care to make it clear, in its joint declaration with the Commission of 1996, that the system of bilateral agreements with that country would be maintained until the conclusion of a new agreement binding the Community (see paragraphs 19 and 20 above).

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

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

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

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

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

Arguments of the parties

65 The Commission claims that, with the legislative framework established by the 'third package' of air transport liberalisation measures, the Community legislature established a complete set of common rules which enabled the internal market in air transport based on the freedom to provide services to be created. In the context of those common rules, the Community determined the conditions governing the functioning of the internal market, in particular in relation to the rules on access to that market, in the form of traffic rights on routes between and within Member States. In addition, a large number of those measures include provisions relating to third-country carriers or to countries in which and from which those carriers operate. To that set of rules there should also be added Regulations Nos 2299/89 and 95/93, as examples of measures prescribing for Member States the approach to be taken in relation to non-member countries.

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

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

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

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

70 Even if the absence of some common rules on certain matters relating to the commitments in question were to lead the Court to find that there was no exclusive Community competence in relation to those matters, the Kingdom of Denmark could not on its own, that is to say, without the participation of the Community, enter into the disputed commitments.

71 According to the Danish Government, it is clear from the 'third package' of measures liberalising air transport, namely Regulations Nos 2407/92, 2408/92

and 2409/92, that those measures concerned the internal market. However, it does not result from the 'third package' that the internal market cannot be distinguished from the external market. That is so, in particular, because the case since the traffic attributable to Community airlines is, for the most part, situated within the common market and the large majority of airlines established in the European Community guarantee only routes within the common market. The Danish Government claims further that the numerous bilateral air transport agreements concluded between Member States and non-member countries have not yet constituted an obstacle to the establishment of a properly functioning internal market in air transport.

72 An exclusive external competence of the Community can result from only three possible sources: first, complete Community harmonisation in the sector concerned; second, the adoption of Community rules on the status of persons and companies originating in non-member countries or, third, the adoption of Community rules conferring on the Community institutions competence to conclude treaties with non-member countries.

73 The Danish Government disputes that the bilateral commitments resulting from the amendments made in 1995 affect the Community legislation within the meaning of the *AETR* judgment. It considers, first, that no complete set of common rules has been established in the air transport sector. Further, it maintains that the commitments are not contrary to the Community provisions adopted in that sector. Finally, it claims that those provisions do not confer on the Community competence to conclude agreements with non-member countries.

74 In particular, Regulations Nos 2407/92, 2408/92 and 2409/92, which make up the 'third package', cover neither the air transport services between the Community and non-member countries nor the traffic rights of airlines from non-member countries. The disputed commitments do not therefore affect the

body of rules introduced by the 'third package'. The Danish Government contends that the provisions in certain regulations relied upon by the Commission are unaffected by the commitments at issue. Likewise unaffected are the provisions of the regulations relating to slots and to CRSs.

Findings of the Court

75 It must be recalled that, as has already been found in paragraphs 54 and 55 above, whilst Article 84(2) of the Treaty does not establish an external Community competence in the field of air transport, it does make provision for a power for the Community to take action in that area, albeit one that is dependent on there being a prior decision by the Council.

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

77 The Court has already held, in paragraphs 16 to 18 and 22 of the *AETR* judgment, that the Community's competence to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that, in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.

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

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

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

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

82 According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (*AETR* judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held

that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).

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

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

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

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

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

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

89 That argument must be rejected.

90 As is clear from the title and Article 3(1) of Regulation No 2408/92, that regulation is concerned with access to intra-Community air routes for Community air carriers alone, these being defined by Article 2(b) of that regulation as air carriers with a valid operating licence granted by a Member State in accordance with Regulation No 2407/92. That latter regulation, as may be seen from Articles 1(1) and 4 thereof, defines the criteria for the granting by Member States of operating licences to air carriers established in the Community which, without prejudice to agreements and conventions to which the Community is a contracting party, are owned directly or through majority ownership by Member States and/or nationals of Member States and are at all times effectively controlled by such States or such nationals, and also the criteria for the maintenance in force of those licences.

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

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

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

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

95 However, as has been pointed out in paragraph 85 above, that kind of situation does not affect the common rules and is therefore not capable of establishing an external competence of the Community.

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

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

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

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

100 It is clear from the documents before the Court that a commitment of that type was entered into by the Kingdom of Denmark by virtue of the amendments made in 1995 to Article 9 of the 1944 Agreement, which was rewritten. By proceeding in that way, that Member State thus infringed the Community's exclusive external competence resulting from Article 1(3) of Regulation No 2409/92.

101 That finding cannot be called into question by the fact that, in respect of the air transport to which Regulation No 2409/92 applies, the abovementioned Article 9 requires that regulation to be complied with. However praiseworthy that initiative by the Kingdom of Denmark, designed to preserve the application of Regulation No 2409/92, may have been, the fact remains that the failure of that Member State to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with Community law.

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

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

104 It is not in dispute that the amendments made in 1995 to the 1944 Agreement added thereto an Annex III concerning the principles relating to CRSs, including those applying to CRSs offered for use or used in the territory of the Kingdom of Denmark. By acting in that way, the Kingdom of Denmark infringed the exclusive external competence of the Community arising from Regulation No 2299/89.

105 The finding in the previous paragraph cannot be called into question by the fact that it is stated in the memorandum of consultations of 26 April 1995, which was appended to the agreement containing the agreed amendments, that Annex III may be applied only to the extent that the provisions thereof do not conflict with the Community provisions concerned. The failure of the Kingdom of Denmark to

fulfil its obligations results from the very fact that it entered into the international commitments on CRSs referred to in the previous paragraph.

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

107 However, as the Advocate General rightly pointed out in paragraph 107 of his Opinion, the Commission has not succeeded in establishing that, as it maintains, the clause relating to fair competition in Article 10 of the 1944 Agreement, as amended in 1995, also falls to be applied to the allocation of slots.

108 As the Commission stated in its application, the said Article 10 contains in point (a) a general provision guaranteeing the same competition opportunities for the air carriers of both contracting parties. The general terms in which such a clause is formulated do not, in the absence of relevant evidence clearly establishing the intention of both parties, permit the inference that the Kingdom of Denmark entered into a commitment in relation to the allocation of slots. In support of its assertion, the Commission relied solely on a report of the American administrative authority according to which clauses of that type normally also cover the allocation of slots.

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

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

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

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

Infringement of Article 52 of the Treaty

Arguments of the parties

113 The Commission submits that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty because the Kingdom of Denmark does not accord to the nationals of other Member States, and in particular to airlines and

undertakings of those Member States established in the Kingdom of Denmark, the treatment reserved for Danish nationals.

114 The terms 'law' and 'conditions' in Article 52 of the Treaty, on which the Danish Government relies, are not decisive. Those terms must be understood as also covering the rights and obligations arising from international agreements concluded by the Kingdom of Denmark with non-member countries.

115 The argument that a provision such as the clause on the ownership and control of airlines is traditionally included in bilateral agreements and is based on reciprocity is not convincing since it fails to recognise that such clauses may be negotiated in order to take account of a specific situation resulting from Community law. In any event, the Danish Government cannot shift its responsibility under Article 52 of the Treaty to the United States of America.

116 The Danish Government cannot validly rely on Article 56 of the Treaty (now, after amendment, Article 46 EC) in order to evade its obligations under Article 52 of the Treaty. It does not specify the nature of the overriding requirements which would justify application of Article 56 in the present case. The inclusion in bilateral agreements of a clause such as that on the ownership and control of airlines would seem rather to be justified by economic considerations which are not covered by Article 56 of the Treaty and which have to do with the fact that the parties to the agreement refuse to extend the commercial benefits to airlines belonging to nationals of countries with which no 'open skies' agreement has been concluded.

117 The Danish Government claims that Article 52 of the Treaty does not apply to the situations governed by the clause on the ownership and control of airlines since they relate to traffic rights granted by the American authorities for flights to American airports.

118 It also maintains that, in accordance with the terms of Article 52 of the Treaty, freedom of establishment merely includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings 'under the conditions laid down for its own nationals by the law of the country in which such establishment is effected'. According to the Danish Government, the reference to 'law' suggests that the Member State of establishment has competence to grant the rights deemed to be of importance for the effective exercise of the right of establishment. That is not the case here. The actual application of the clause on the ownership and control of airlines is clearly outside the area of competence of the Danish authorities. In addition, the Danish Government contends that 'conditions'

within the meaning of Article 52 of the Treaty cannot be extended in such a way as to include any advantage from which the nationals of the Member State of establishment may benefit in non-member countries by virtue of previously-concluded bilateral agreements.

119 A clause such as that on the ownership and control of airlines is perfectly customary in bilateral agreements concluded in the air transport sector and is based on reciprocity since the American authorities wish to reserve the right to refuse to grant traffic rights to airlines established in countries which do not grant American airlines equivalent rights in their territory.

120 The abovementioned clause does not result in any restriction of the freedom of establishment in the Kingdom of Denmark for nationals of other Member States. In addition, the Kingdom of Denmark has no influence on any recourse to that clause by the American authorities.

121 The Danish Government submits, alternatively, that the exception referred to in Article 56 is applicable in the present case. On the basis of the considerations set out in that article, the Danish Government claims that it will always reserve the right to refuse in certain cases to grant traffic rights to companies designated by the United States of America but owned by nationals of non-member countries. According to the Danish Government, it must be conceded as a reality inherent in negotiation policy that provisions containing exceptions authorising, in certain cases, the refusal to grant licences to specific airlines are inevitable in bilateral air transport agreements and that, by virtue of Article 56 of the Treaty, a provision such as that in the clause on the ownership and control of airlines is therefore compatible with Article 52 of the Treaty.

Findings of the Court

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

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

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

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

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

126 Articles 52 and 58 of the Treaty thus guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State (see Case C-307/97 *Saint-Gobain* v *Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, paragraph 35), both as regards access to an occupational activity on first establishment and as regards the exercise of that activity by the person established in the host Member State.

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

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

licences or authorisations in respect of an airline designated by the Kingdom of Denmark but of which a substantial part of the ownership and effective control is not vested in that Member State or in Danish or American nationals.

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

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

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

132 Contrary to what the Kingdom of Denmark maintains, the direct source of that discrimination is not the possible conduct of the United States of America but the clause on the ownership and control of airlines, which specifically acknowledges the right of the United States of America to act in that way.

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

134 With regard to that finding, it is irrelevant that clauses of that type are traditionally incorporated in bilateral air transport agreements and that they are intended to preserve the right of a non-member country to grant traffic rights in its airspace only on the basis of reciprocity. In this case, the failure to fulfil obligations with which the Kingdom of Denmark is charged results from the fact that, when renegotiating the 1944 Agreement, it maintained in force a clause which infringed the rights of Community airlines arising from Article 52 of the Treaty.

135 As for the Danish Government's arguments seeking to justify the clause on the ownership and control of airlines, it should be recalled that, according to settled case-law, recourse to justification on grounds of public policy and public safety under Article 56 of the Treaty presupposes the need to maintain a discriminatory measure in order to deal with a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see, to that effect, Case 30/77 *R* v *Bouchereau* [1977] ECR I-1999, paragraph 35; Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 46; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 21). It follows that there must be a direct link between that threat, which must, moreover, be current, and the discriminatory measure adopted to deal with it (see, to that effect, Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085, paragraph 36; and *Calfa*, paragraph 24).

136 In this case, the clause concerning the ownership and control of airlines does not limit the power to refuse or withdraw licences or authorisations in respect of an airline designated by the other party solely to the case where that airline

represents a threat to the public policy or public security of the party granting those licences and authorisations.

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

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

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

140 Having regard to the whole of the foregoing considerations, it must be held that, by entering into or maintaining in force, despite the renegotiation of the 1944 Agreement, international commitments with the United States of America

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

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

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

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

Costs

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

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

On those grounds,

THE COURT

hereby:

1. Declares that, by entering into or maintaining in force, despite the renegotiation of the air transport agreement between the Kingdom of Denmark and the United States of America of 16 December 1944, international commitments with the United States of America

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

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

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

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

2. Dismisses the remainder of the application;

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

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

Puissochet Schintgen Gulmann

Edward La Pergola Jann

Skouris Macken Colneric

von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 5 November 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President