JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
12 December 2006 *

In Case T-155/04,

SELEX Sistemi Integrati SpA, formerly Alenia Marconi Systems SpA, established in Rome (Italy), represented by F. Sciaudone, lawyer,

applicant,

v

Commission of the European Communities, represented initially by P. Oliver and L. Visaggio, and subsequently by A. Bouquet, L. Visaggio and F. Amato, acting as Agents,

defendant,

supported by

Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol) (European Organisation for the Safety of Air Navigation), represented by F. Montag and T. Wessely, lawyers,

intervener,

* Language of the case: Italian.

APPLICATION for annulment or amendment of the Commission's decision of 12 February 2004 rejecting the applicant's complaint concerning an alleged infringement by Eurocontrol of the provisions of the EC Treaty in the field of competition,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, A.W.H. Meij and I. Pelikánová, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2006,

gives the following

Judgment

Legal context

1. *Legal bases of Eurocontrol*

1 The European Organisation for the Safety of Air Navigation (Eurocontrol), a regionally-oriented international organisation, was established by various European

States, both members and non-member countries of the Community, under the International Convention on Cooperation for the Safety of Air Navigation of 13 December 1960, which has been modified on several occasions then revised and consolidated by the Protocol of 27 June 1997 ('the Convention'), with the aim of strengthening cooperation between the Contracting States in the field of air navigation and developing joint activities between them in order to achieve the harmonisation and integration necessary for the creation of a uniform system of Air traffic management ('ATM'). While the Convention is not yet formally in force, since it has not been ratified by all the Contracting Parties, its provisions have been applied on a provisional basis since 1998 in accordance with a decision of the Permanent Commission of Eurocontrol adopted in December 1997. Italy joined Eurocontrol on 1 April 1996. In 2002, the Community and its Member States signed a protocol — which has not yet entered into force — on the accession of the European Community to Eurocontrol. The Community decided to approve that protocol by Council Decision 2004/636/EC of 29 April 2004 on the conclusion by the European Community of the Protocol on the accession of the European Community to Eurocontrol (OJ 2004 L 304, p.209). Since 2003, certain provisions of that protocol have been implemented on a provisional basis, while awaiting ratification by all Contracting Parties.

2. *Community law*

2 In Council Directive 93/65/EEC of 19 July 1993 on the definition and use of compatible technical specifications for the procurement of air-traffic-management equipment and systems (OJ 1993 L 187, p. 52), amended by Commission Directive 97/15/EC of 25 March 1997 adopting Eurocontrol standards (OJ 1997 L 95, p. 16), the Council provided for the adoption of technical specifications at Community level in the field of ATM on the basis of corresponding technical specifications defined by Eurocontrol.

3 Articles 1 to 5 of Directive 93/65 are worded as follows:

'Article 1

This Directive shall apply to the definition and use of compatible technical specifications for the procurement of air-traffic-management equipment and systems, in particular:

— communications systems,

— surveillance systems,

— systems providing automated assistance to air-traffic control, and

— navigation systems.

Article 2

For the purposes of this Directive:

(a) technical specification shall mean the technical requirements included, in particular, in the tender documents defining the characteristics of a piece of work, a material, a product or a supply, and making it possible to describe a

piece of work, a material, a product or a supply objectively in a manner such that it fulfils the use for which it is intended by the contracting entity. Such technical prescriptions may include quality, performance, safety and dimensions, as well as requirements applicable to the material, product or supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling;

(b) standard shall mean a technical specification approved by a recognized standardization body for repeated or continuous application, compliance with which is not in principle compulsory;

(c) Eurocontrol standard shall mean the mandatory elements of Eurocontrol specifications for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as essential for the implementation of an integrated air traffic services (ATS) system (the mandatory elements shall form part of a Eurocontrol standard document).

Article 3

1. The Commission shall, in accordance with the procedure laid down in Article 6, identify and adopt the Eurocontrol standards and subsequent Eurocontrol amendments to those Eurocontrol standards, in particular those relating to the areas listed in Annex I, that shall be made mandatory under Community law. The Commission shall publish the references of all technical specifications thus made mandatory in the *Official Journal of the European Communities.*

2. To ensure that Annex I, which lists Eurocontrol standards to be produced, is as complete as possible, the Commission, following the procedure laid down in Article 6 and in consultation with Eurocontrol, may, where appropriate, amend Annex I in accordance with amendments made by Eurocontrol.

...

Article 4

In order to complement, where necessary, the process of implementing Eurocontrol standards the Commission may give standardization mandates to European standardization bodies in accordance with Directive 83/189/EEC and in consultation with Eurocontrol.

Article 5

1. Without prejudice to Directives 77/62/EEC and 90/531/EEC the Member States shall take whatever steps are necessary to ensure that in the general documents or specifications relating to each contract the awarding civil entities defined in Annex II refer to the specifications adopted in accordance with this Directive when purchasing air-navigation equipment.

2. To ensure that Annex II is as complete as possible, the Member States shall notify the Commission of any changes made to their lists. The Commission shall amend Annex II in accordance with the procedure laid down in Article 6.'

Facts and pre-litigation procedure

1. *Eurocontrol's role and activities*

4 To achieve its aim of developing a uniform system of air traffic management in Europe, Eurocontrol develops, coordinates and plans the implementation of pan-European strategies and their associated action plans involving national authorities, air navigation service providers, civil and military airspace users, airports, industry, professional organisations and relevant European institutions. The present case is concerned with only three areas of Eurocontrol's activities.

5 The first area of activities with which the present case is concerned is the activity of regulation, standardisation and validation. In the framework of its objectives set out under the Convention, the Member States of Eurocontrol agreed inter alia to adopt and implement 'common standards and specifications' in the sector of air navigation. The task of defining those standards and specifications is entrusted to Eurocontrol. Specifically, the standards and technical specifications are drawn up by the Agency, the executive organ of Eurocontrol under the authority of the organisation's Council, made up of representatives of the Member States of Eurocontrol (the directors of the civil aviation administration of each Member State of the organisation), which must decide on the adoption of the technical standards produced in this way. Eurocontrol carries out its standardisation activities inter alia within the framework of the Eatchip (European ATC (air traffic control) Harmonisation and Implementation Programme) programme, which was set up in 1990 by the European Conference on Civil Aviation (ECCA) with a view to harmonising, then integrating definitively, the ATM systems in the Member States of the ECCA.

6 Until now, three standards produced by Eurocontrol have been adopted by the Commission as EC technical specifications for the purposes of Directive 93/65 [see Directive 97/15 and Commission Regulation (EC) No 2082/2000 of 6 September 2000 adopting Eurocontrol standards and amending Directive 97/15/EC (OJ 1997 L 254, p. 1), as amended by Commission Regulation (EC) No 980/2002 of 4 June 2002 (OJ 2002 L 150, p.38)]:

— the Eurocontrol standard on On-line Data Exchange (OLDI);

— the Eurocontrol standard on ATS Data Exchange Presentation (ADEXP);

— the Eurocontrol standard entitled 'Flight Data Exchange Interface Control Document' (FDE-ICD).

7 The second area of activities with which the present case is concerned is Eurocontrol's research and development tasks, which consist, first, of coordinating national policies on research and development in the field of air navigation, and, secondly, of spearheading joint study and development actions for new technologies in this sector. It is in this way that Eurocontrol acquires and has developed prototypes of ATM equipment and systems, for example radar control systems, with a view inter alia to being able to define and validate new standards and technical specifications. One of the systems developed in this way is the ARTAS radar system, for which Thomson-CSF (now Thales) won the development contract following a tendering procedure. Within the framework of this field of activities, Eurocontrol created a regime for intellectual property rights for prototypes developed by undertakings with which it has concluded research contracts, in particular in

relation to software. The accessibility, therefore, of those intellectual property rights to other competing undertakings, and in particular the fact of not being charged for such access, depends mainly on whether the contracting parties specially developed the software under a particular research contract entered into with Eurocontrol or whether pre-existing products are being reused.

8 The third and final area of activities with which this case is concerned is the assistance provided, on request, to administrations of Member States of Eurocontrol, particularly in the field of planning, specification and creation of ATM services and systems. In that context, Eurocontrol can, inter alia, be called upon to assist national air traffic control authorities to establish tendering procedures for the supply of ATM equipment and systems.

2. Pre-litigation procedure

9 The applicant, SELEX Sistemi Integrati SpA (formerly Alenia Marconi Systems SpA), has been operating in the sector of air traffic management systems since 1961. On 28 October 1997, it lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), in which it drew the Commission's attention to certain alleged infringements of the competition rules by Eurocontrol in carrying out its standardisation tasks in relation to ATM equipment and systems ('the complaint').

10 The complaint contained the following objections:

— the regime of intellectual property rights governing contracts, concluded by Eurocontrol, for the development and acquisition of new hardware systems and sub-systems and software for applications in the field of ATM is such as to create factual monopolies in the production of systems which are subsequently standardised by Eurocontrol;

— this situation is all the more serious because Eurocontrol has failed to implement measures to ensure compliance with the principles of transparency, openness and non-discrimination in the context of the acquisition of prototypes of systems and sub-systems used to define standards;

— in addition, it is apparent from the current system that undertakings supplying prototypes used for the purposes of standardisation are in a particularly advantageous position as compared with their competitors in the context of calls for tender organised by national authorities seeking to acquire ATM equipment.

11 The applicant supplemented the complaint by letters of 15 May and 29 September 1998.

12 By a letter of 3 November 1998 signed by the Directors General of the Directorate, General (DG) for Competition and the DG for Transport ('the letter of 3 November 1998'), the Commission invited Eurocontrol to submit its observations on the complaint. That letter was accompanied by a brief analysis made by Commission

staff highlighting the problems which could result from the activities of Eurocontrol criticised in the complaint, in particular in relation to the functioning of the internal market for ATM products, systems and services. The Commission explained, however, that that analysis was without prejudice to the application of the Community competition rules in the instant case. On 12 November 1998, the Commission informed the applicant of the existence and content of the letter of 3 November 1998.

13 On 2 July 1999 Eurocontrol responded in writing to the Commission's invitation with a two-page letter and 12 pages of observations on both the complaint and the Commission's analysis. Those observations were sent by the Commission to the applicant on 12 August 1999, which commented on them in its letters of 14 February and 28 March 2000.

14 By letter of 15 June 2000, the Commission informed the applicant that, in its view, the facts criticised in the complaint did not fall within the scope of Article 82 EC and that, in any case, they did not warrant the conclusion that that article had been infringed. By letters of 15 January 2001 and 2 August 2002, the applicant maintained its position. By letter of 25 September 2003, in accordance with Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18), the Commission informed the applicant that it did not consider the reasoning set out in the complaint adequate for it to be upheld. By letter of 14 November 2003, the applicant again replied, stating that its opinion was unchanged.

15 By letter of 12 February 2004, the Commission rejected the complaint ('the contested decision') confirming, in essence, the findings it expressed previously in its letter of 25 September 2003. In the contested decision, the Commission took the view, in particular, that:

— the Community competition rules in principle apply to international organisations such as Eurocontrol, provided that the activities specifically referred to can be described as economic activities;

— the activities of Eurocontrol which are the subject of the complaint are not of an economic nature, and, consequently, Eurocontrol cannot be considered to be an undertaking within the meaning of Article 82 EC, and, in any event, even if those activities were considered to be activities of an undertaking, they would not be contrary to Article 82 EC;

— the activity of technical standardisation is in the public interest and is performed by Eurocontrol without remuneration, without a view to profit or private ends, and does not seek to impose fees or rules on the supply of services to users, which precludes the possibility of its being economic;

— with regard to the acquisition of prototypes and the management of intellectual property rights, the complaint does not refer to any specific fact which could constitute an abuse of a dominant position;

— as regards the regime of intellectual property rights, Eurocontrol makes available to interested undertakings, without charge, the intellectual property rights which it has acquired in the framework of its research and development activities; even if the management of intellectual property rights were to be regarded as an economic activity, the fact that those undertakings which participated in the research and development activities have a technical advantage which they can assert in the context of calls for tender cannot amount to an abuse of a dominant position for which Eurocontrol is liable;

— the assistance activities which Eurocontrol provides on request to the national administrations cannot constitute economic activities since they are provided without remuneration; moreover, in the context of those activities, Eurocontrol does not have any decision-making power, since such power belongs to the national administrations alone.

Procedure before the Court of First Instance and forms of order sought

16 The applicant brought the present action by an application lodged at the Registry of the Court of First Instance on 23 April 2004.

17 By a document dated 1 September 2004, lodged at the Registry of the Court of First Instance on 2 September 2004, Eurocontrol sought leave to intervene in support of the form of order sought by the Commission.

18 By order of 25 October 2004 the President of the Second Chamber of the Court of First Instance, in accordance with Article 116(6) of the Rules of Procedure of the Court of First Instance, granted Eurocontrol leave to intervene in support of the form of order sought by the Commission by making its submissions at the hearing.

19 By document lodged on the 25 February 2005, the applicant requested that the Commission be invited, as a measure of organisation of procedure, to lodge the letter of 3 November 1998, every other document produced by its staff during the administrative procedure, technical analyses, any correspondence between its staff and Eurocontrol and any documents produced by Eurocontrol.

20 By letter of 11 March 2005, lodged on 18 March 2005, the Commission produced the letter of 3 November 1998. Stating that it did not have any other document which would be appropriate to place on the file of the present case and that the applicant's request was general and not supported by reasoning, it refused however, to accede to the remainder of the applicant's request.

21 By decision of 5 April 2005, the President of the Second Chamber of the Court of First Instance invited the intervener to make written submissions on the basis of Article 64(3)(b) of the Rules of Procedure.

22 By document lodged at the Registry on 27 April 2005, the applicant made an application for witnesses to be heard and documents to be produced by the Commission and introduced three new pleas in law alleging, respectively, manifest error of assessment of facts and law, breach of the obligations of diligence and impartiality and misuse of power resulting from a breach of the applicant's right to information and breach of the adversarial principle.

23 The Commission lodged its statement in intervention on 16 June 2005.

24 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry. However, it decided to put questions to the parties to be answered at the hearing.

25 The parties presented oral argument and replied to the Court's questions at the hearing on 31 January 2006. Following the observations made by the Court, the applicant also made some amendments to its initial arguments.

26 Following those amendments, the applicant claims that the Court should:

— annul and/or amend the contested decision;

— order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *The admissibility of the applicant's application for the annulment and/or amendment of the contested decision*

28 The applicant does not explain whether its application for amendment is to be regarded as application in the alternative. In any event, it is settled case-law that the

Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them; rather, it is for the administration concerned to adopt the necessary measures to implement a judgment given in proceedings for annulment (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 53).

29 Accordingly, the applicant's first form of order sought must be rejected as being inadmissible in so far as it seeks amendment of the contested decision.

2. *The admissibility of the applicant's new pleas in law*

Observations of the parties

30 By document lodged at the Registry of the Court of First Instance on 27 April 2005, the applicant introduced three new pleas alleging, respectively, manifest error of assessment of fact and law, breach of the obligations of diligence and impartiality and misuse of power resulting from a breach of the applicant's right to information and of the adversarial principle.

31 The applicant's justification for introducing new pleas in law after the end of the written procedure is that new facts came to light in the course of the procedure within the meaning of Article 48 of the Rules of Procedure. According to the applicant, the Commission's lodging of the letter of 3 November 1998, as an annex to its submissions of 11 March 2005, constitutes such a new fact. It submits, in the

document lodged on 27 April 2005, that it was only by reading the defence, to which the letter from the director of Eurocontrol of 2 July 1999 was annexed, that it became aware of the fact that the letter of 3 November 1998 was not merely a cover note accompanying the dispatch of the complaint but that it also contained an analysis of the complaint signed by two Commission Director Generals.

32 The Commission claims that those new pleas in law should be rejected as being inadmissible. The applicant had sufficient knowledge of the dispatch, content and signatories of the letter of 3 November 1998 by reading the letter of 12 November 1998.

Findings of the Court

33 Under the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. It should therefore be considered whether this is the case here.

34 In this respect, it should be pointed out that the letter of 12 November 1998 (see paragraph 12 above) informed the applicant that the Director Generals of DG Competition and DG Transport, after assessing the legal and economic aspects raised in the complaint, had sent Eurocontrol a letter inviting it to submit its comments, that it had drawn Eurocontrol's attention to certain aspects of its standardisation policy and that Eurocontrol had, in particular, been invited to define, in conjunction with Commission staff, a neutral and consistent approach to its relationships with undertakings. The letter ended with the statement that the applicant would be kept informed of Eurocontrol's reply and the development of discussions between Commission staff and Eurocontrol.

35 It should be pointed out that a mere cover note accompanying the dispatch of a complaint is not, as a rule, signed by a Director General of the Commission, and even less so, by two Director Generals. In addition, the information provided to the applicant that the Commission had drawn Eurocontrol's attention to certain aspects of its standardisation policy and had informed it of its intention to hold joint discussions with it allow the inference to be made that the letter of 3 November 1998 probably contained substantive considerations pertaining to the assessment of the complaint. This was also confirmed by Eurocontrol's observations of 2 July 1999 on the complaint, which were sent to the applicant by letter of 12 August 1999. In the introduction to the observations, it is clearly stated that the complaint was 'followed by a brief analysis made by the Commission, setting out the broad logic of a preliminary study of the legal aspects and commenting on the activities of Eurocontrol which seemed to the Commission to be open to criticism and needing to be aligned with Community practice'.

36 In that context, it is apparent that the letter from the director of Eurocontrol of 2 July 1999 did not contain more information on the existence of the note containing the analysis signed by the two Commission Director Generals than the Commission's letter of 12 November 1998 or Eurocontrol's observations on the complaint.

37 As regards the two passages of the letter from the director of Eurocontrol of 2 July 1999 specifically referred to by the applicant, which sets out the comments made by Commission staff on some of the key activities of Eurocontrol and a proposal for a joint discussion with the Commission on those subjects in the course of assessing the complaint, clearly those passages do not contain any information which was not already to be found in the letter of 12 November 1998 or in Eurocontrol's observations on the complaint, as the latter documents also described Eurocontrol's activities which appeared to the Commission to be 'open to criticism'.

38 The applicant was therefore able to ascertain, from reading the Commission's letter of 12 November 1998 and Eurocontrol's observations on the complaint which were sent to it on 12 August 1999, that an analysis of Eurocontrol's conduct to which

objection was taken was attached to the letter of 3 November 1998. Consequently, in the light of the Commission's letter of 12 November 1998, the applicant is not justified in submitting that it was only a reading of the letter from the Director of Eurocontrol of 2 July 1999, annexed to the defence, that enabled it to ascertain that the letter of 3 November 1998 was not a mere cover note accompanying the despatch of the complaint, but also contained an analysis of that complaint, signed by two Commission Director Generals. Thus it cannot rely on the letter of 2 July 1999 as a fact which only came to light in the course of the procedure.

39 In addition, the letter of 3 November 1998 does not have the meaning that the applicant seeks to give it. Nowhere does the Commission find that Eurocontrol's activities are economic activities and that, therefore, the Community competition rules apply to those activities. That letter clearly states, moreover, that the attached analysis was made 'without prejudice to the application of the Community competition rules ...', which explains why the Commission also assesses the possible effects of Eurocontrol's activities, albeit not economic, on competition between undertakings active in the sector of ATM equipment.

40 It follows that the new pleas in law must also be rejected as being inadmissible.

3. *The admissibility of the intervener's plea that it has immunity under public international law*

41 The intervener, which supports the Commission, contends, as does the Commission, that the action should be dismissed. In support of its arguments, it raises two pleas alleging, respectively, that the rules of the European Union do not apply to

Eurocontrol by virtue of its immunity under public international law and that Eurocontrol is not an undertaking within the meaning of Article 82 EC. It must be stated that the first of those pleas in law was not raised by the Commission.

42 In this respect, it should be pointed out that whilst the fourth paragraph of Article 40 of the EC Statute of the Court of Justice, applicable to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and Article 116(3) of the Rules of Procedure of the Court of First Instance do not preclude the intervener from advancing arguments which are new or which differ from those of the party he supports, lest his intervention be limited to restating the arguments advanced in the application, it cannot be held that those provisions permit him to alter or distort the context of the dispute defined in the application by raising new pleas in law (see, to that effect, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 18; Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 22; Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 32; Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 21; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 75; Joined Cases T-125/96 and T-152/96 *Boehringer* v *Council and Commission* [1999] ECR II-3427, paragraph 183; Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, paragraph 382; and Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, paragraph 417).

43 Therefore, since an intervener must, under Article 116(3) of the Rules of Procedure, accept the case as he finds it at the time of his intervention and since, under the fourth paragraph of Article 40 of the EC Statute of the Court of Justice, the submissions made in an application to intervene are to be limited to supporting the submissions of one of the main parties, Eurocontrol, as an intervener, does not have standing to raise the present plea based on its immunity under public international law.

44 Consequently, the first plea raised by Eurocontrol must be rejected as inadmissible.

4. *The application for annulment*

45 In support of its application for annulment, in its application the applicant raises three pleas in law based on, respectively, manifest error of assessment as to the applicability of the Community competition rules to Eurocontrol, manifest error of assessment as to the existence of a possible infringement of the Community competition rules and breach of essential procedural requirements.

46 In the light of the applicant's arguments, it is apparent, however, that despite referring generally to the 'Community competition rules', the first two pleas in law in fact refer only to Article 82 EC. Therefore the first two pleas in law will only be examined in the light of that article.

47 Moreover, regarding those two pleas in law, it should be pointed out that where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission (see, by analogy, Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraphs 49 to 51, and the case-law cited, and Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 43).

48 In the present case, Article 82 EC, which the applicant wishes the Commission to apply, prohibits abuse by an undertaking of a dominant position on the market. In addition to the requirement of a possible effect on trade between Member States,

that provision lays down two cumulative criteria relating to, first, the existence of a dominant position of the undertaking concerned, and, secondly, abuse of that dominant position. As noted above (paragraph 15), the Commission took the view that, first, Eurocontrol was not an undertaking, and, secondly, in any event, the conduct complained of was not contrary to Article 82 EC. The Commission therefore based the contested decision on the double finding that neither criterion referred to above was met in the present case, each of those findings being sufficient to support the operative part of the contested decision.

49 It follows that annulment of the contested decision presupposes that the applicant's first two pleas in law be upheld, the first of which takes issue with the decision's lawfulness in relation to the first criterion while the second refers to the decision's lawfulness with regard to the second criterion.

The first plea in law based on manifest error of assessment in relation to the applicability of Article 82 EC to Eurocontrol

50 The application of Article 82 EC in the present case presupposes that Eurocontrol be regarded as an undertaking for the purposes of Community competition law. According to settled case-law, the concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and any activity consisting in offering goods and services on a given market is an economic activity (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération française des sociétés d'assurances and Others* [1995] ECR I-4013, paragraph 14; Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74).

51 The applicant submits that Eurocontrol's activities at issue in the present case, that is, standardisation, research and development and assistance to the national administrations, are economic activities and that Eurocontrol must therefore be regarded as an undertaking within the meaning of Article 82 EC. The Commission, for its part, refers to Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, in which the Court of Justice found, in paragraphs 30 and 31:

'30 Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.

31 Accordingly, an international organisation such as Eurocontrol does not constitute an undertaking subject to the provisions of Articles [82 EC] and [86 EC].'

52 The operative part of that judgment, however, merely states that 'Articles [82 EC] and [86 EC] are to be interpreted as meaning that an international organisation such as Eurocontrol does not constitute an undertaking within the meaning of those articles'.

53 The Commission concludes from this that the Court excluded the possibility of regarding Eurocontrol, in all circumstances and in respect of all of its activities, as an undertaking for the purposes of Community competition law.

54 However, in arriving at this finding, the Court based its reasoning exclusively on a review, in the light of the concept of an economic activity, of Eurocontrol's activities at issue in the case between SAT Fluggesellschaft mbH and Eurocontrol, namely the creation and collection of route charges on behalf of the Contracting States from users of air navigation services. While the Court referred, in paragraph 22 of the judgment, to some of the activities at issue in the present case, it did not, however, consider whether they were economic activities within the meaning of the case-law. However, since the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority (Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraphs 14 and 15, and Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 108), the various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic (see, to that effect, *Aéroports de Paris* v *Commission*, paragraph 109). In light of the limited scope of the Court's examination, it is thus apparent that, despite the general nature of the wording in paragraph 31 and its operative part, the judgment in *SAT Fluggesellschaft*, does not preclude Eurocontrol from being regarded as an undertaking within the meaning of Article 82 EC in relation to its other activities.

55 It must therefore be assessed whether, in relation to each of Eurocontrol's activities called into question by the applicant, first, they are separable from its activities falling within its public remit, and, secondly, they are economic activities within the meaning of the case-law referred to in paragraph 50 above.

Eurocontrol's activity of technical standardisation

— Arguments of the parties

56 The applicant submits that Eurocontrol's activity of standardisation is an economic activity. That activity of technical standardisation has no objective link with the task

of managing air space and therefore does not reflect the powers of a public authority in the sphere of air traffic control. The Commission's findings to the contrary in the contested decision — based on the fact that that activity is not remunerated, is in the public interest and non-profit-making and does not seek to impose fees or rules on supplying services to users — is at odds with established case-law. In addition, the Commission has already accepted in previous earlier practice that activities analogous to those set out in the complaint, such as, for example, those of the European Telecommunications Standards Institute (ETSI) and a European association of national rail companies, constitute economic activities. Those two cases were considered by the Commission to fall within the scope of the competition rules.

57 The applicant argues that the economic nature of the activity of standardisation can be inferred from the economic nature of the acquisition of prototypes, which is a precondition to standardisation. Those activities which are aimed ultimately at producing standards and therefore, more generally, standardisation, constitutes, taken together, a specific economic activity. Eurocontrol operates on the market as the sole acquirer of prototypes of ATM systems.

58 According to the Commission, Eurocontrol performs its standardisation activity as an international organisation on behalf of the Contracting States, without an interest of its own which is distinct and independent from that of those States, and it pursues a public service objective of maintaining and improving the safety of air navigation. By taking all those elements as a whole it may be said that, in the exercise of its activity of technical standardisation, Eurocontrol cannot be regarded as an undertaking for the purposes of applying Article 82 EC. Eurocontrol's regulatory activities are not only inseparable from the tasks entrusted to it as an international organisation, but in fact go to the very heart of those tasks.

— Findings of the Court

59 In relation to Eurocontrol's standardisation activities, the distinction must first be made between, on the one hand, the preparation or production of standards, a task which is undertaken by the Agency of Eurocontrol as the executive organ, and, on the other, their adoption by the Council of Eurocontrol. In relation to the latter task, it is clearly a legislative activity. The Council of Eurocontrol is made up of directors of the civil aviation administration of each Member State of the organisation, appointed by their respective States for the purpose of adopting technical specifications which will be binding in all those States, an activity which directly concerns the exercise by those States of their powers of public authority. Eurocontrol's role is thus akin to that of a minister who, at national level, prepares legislative or regulatory measures which are then adopted by the government. This activity therefore falls within the public tasks of Eurocontrol.

60 Conversely, in relation to the preparation or production of technical standards by Eurocontrol, it should be pointed out that that activity can, contrary to the assertions of the Commission, be separated from its tasks of managing air space and developing air safety. The arguments advanced by the Commission to prove that Eurocontrol's standardisation activities relate to that organisation's public service mission in fact refer only to the adoption of those standards and not to the production of them. In particular, this concerns the argument that it is essential to adopt, at international level, standards and technical specifications relating to ATM systems in order to ensure that the transfer of control of flights between national control bodies is reliable. Indeed, the need to adopt standards at an international level does not necessarily mean that the body which sets those standards must also be the same as that which subsequently adopts them. In that respect, the Commission has not established in the present case that those two activities must necessarily be carried out by one and the same entity rather than by two different entities.

61 However, Eurocontrol's activity of producing standards cannot be deemed to be an economic activity. It is clear from established case-law that any activity consisting in offering goods and services on a given market is an economic activity (see *Aéroports de Paris* v *Commission*, paragraph 107, and the case-law cited in paragraph 50 above). In this case, the applicant has not shown that there is a market for 'technical standardisation services in the sector of ATM equipment'. The only purchasers of such services can be States in their capacity as air traffic control authorities. However, they chose to develop those standards themselves in the context of international cooperation through Eurocontrol. Since the standards developed are subsequently adopted by the Council of Eurocontrol, the results of the development activity stay within the organisation itself and are not offered on a given market. In the field of standardisation, Eurocontrol, for its Member States, is therefore only a forum for concerted action which those States established in order to coordinate the technical standards of their ATM systems. It cannot therefore be considered that, in this area, Eurocontrol 'offers them goods and services.'

62 In the present case, the applicant has thus still failed to show that the activity at issue consisted of offering goods or services on a given market, as is required by the case-law referred to in the previous paragraph.

63 As regards the applicant's argument that the activity of standardisation should be assessed separately from that of acquiring prototypes necessary for producing technical standards and then it can be inferred from the economic nature of the activity of acquiring prototypes that the activity of standardisation is also economic, clearly that argument cannot be upheld.

64 The applicant does not give reasons as to why the classification of the activity of acquiring prototypes as an economic activity, supposing this is the case, would

necessarily lead to the same classification for the activity of standardisation. While it is not disputed by the parties that Eurocontrol acquires goods and services on the market, this does not mean that the activities for which those goods and services are acquired are economic activities.

65 In addition, it must be stated that an approach consisting of inferring from the nature of the upstream activity (the acquisition of prototypes) the nature of the downstream activity (standardisation), as proposed by the applicant, is at odds with the case-law of the Court of First Instance. According to the criteria laid down in the settled case-law of the Community judicature, cited above, economic activity consists of the offer of goods and services on a given market and not the acquisition of such goods and services. In that regard, it has been held that it is not the business of purchasing, as such, which is the characteristic feature of an economic activity and that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity (Case T-319/99 *FENIN* v *Commission* [2003] ECR II-357, paragraph 36). In the context of the present case, this means that the fact that the standardisation activity is not an economic activity implies that the acquisition of prototypes in the context of that standardisation is also not an economic activity, despite the fact that Eurocontrol is acting in the capacity of a buyer on the market for ATM equipment.

66 In that regard, the Court rejects the applicant's argument that reasoning of the Court of First Instance in the case of *FENIN* v *Commission*, cannot be transposed to the present case or that its application cannot be absolute.

67 To the extent that the applicant submits, first, that the situation in the case of *FENIN* v *Commission* is very different from that in the present case, it must be

pointed out that the Court of First instance considered in that case, generally, that an organisation which purchases goods not for the purpose of offering goods and services as part of an economic activity but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market (*FENIN* v *Commission*, paragraph 37). The general wording of that sentence, and in particular the fact that it expressly refers to a social activity only as an example, permits the approach adopted in that judgment to be transposed to any organisation purchasing goods for non-economic activities. As set out above, this is precisely the case with Eurocontrol.

68 Even though the applicant submits, secondly, that the application of that case-law, namely that the nature of the purchasing activity must be determined by whether or not the subsequent use of the purchased goods amounts to an economic activity, cannot disregard the effects that the purchasing activity may have on the market concerned, in particular where, as is in the present case, the acquirer is in a monopsony situation at European level, it must be stated that that argument is based on a flawed interpretation of the case of *FENIN* v *Commission*. The Court held in that case that whilst an entity purchasing a product to be used for the purposes of a non-economic activity 'may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC' (*FENIN* v *Commission*, paragraph 37).

69 Accordingly, it must be held that the Commission has not committed a manifest error of assessment in taking the view that Eurocontrol's technical standardisation activities were not economic activities within the meaning of Community case-law and that the competition rules of the Treaty therefore did not apply to them.

The research and development activity, in particular the acquisition of prototypes and the regime of intellectual property rights

— Arguments of the parties

70 According to the applicant, it is clear from a close reading of the contested decision that the Commission does not dispute the fact that the activity of acquiring prototypes and the intellectual property regime is an economic activity. Classification as such is not expressly excluded in the decision and the Commission examined in great detail whether there was an abuse of a dominant position, unlike in relation to the activities of standardisation and assistance to the national administrations, in respect of which it did not examine in great detail the infringements complained of by the applicant.

71 The Commission disputes that, in the contested decision, it accepted that Eurocontrol's activity of research and development was economic.

72 In the present case, the acquisition of prototypes of ATM systems and the related regime of intellectual property rights, as provided for in the purchase contracts, fall directly within the scope of Eurocontrol's standardisation activity. Those prototypes are in fact used by the organisation for producing and validating standards and technical specifications, that is, in the context of an activity which is not an economic activity.

— Findings of the Court

73 As regards Eurocontrol's research and development activity, the applicant calls into question the acquisition of prototypes of ATM systems by Eurocontrol and its management of intellectual property rights in this field.

74 The only argument which the applicant advances in relation to the economic nature of the management of intellectual property rights is its assertion that, in the contested decision, the Commission does not dispute the economic nature of that activity — an assertion which the Commission challenges and which has no basis in the contested decision. Indeed, as is clear from recital 32 in the preamble to that decision, the Commission considered whether there could be a breach Article 82 EC in relation to that activity only as an alternative and for the sake of completeness.

75 Moreover, it is apparent that Eurocontrol's acquisition of prototypes in the context of its activities of research and development and the related management of intellectual property rights are not capable of making the organisation's research and development activity an economic one, since the acquisition does not involve the offer of goods and services on a given market.

76 The acquisition of prototypes is indeed only an activity which is subsidiary to their development. As the intervener has pointed out, such development is not carried out by Eurocontrol itself, but by undertakings in the relevant sector to which the organisation grants public subsidy incentives. Eurocontrol thus distributes public funds with a view to promoting research and development in the sphere of ATM equipment. In order to ensure that the results of the research which it subsidises is made available to the sector concerned, the subsidy contracts provide for Eurocontrol to acquire ownership of the prototype and the intellectual property

rights resulting from the research which it financed. The acquisition of those rights by Eurocontrol is therefore not an end in itself and does not allow it to exploit those rights for commercial purposes, but is merely one element in the legal relationship between the body granting the subsidy and the undertaking receiving it.

77 In that context, it should be pointed out that, in the context of the management of intellectual property rights established by Eurocontrol, the intellectual property rights which it owns in the results of the research and development activities referred to above are made available to interested undertakings at no cost. Admittedly, when assessing whether a given activity is an economic activity, the absence of remuneration is only one indication among several others and cannot by itself exclude the possibility that the activity in question economic in nature. However, in the present case, the fact that the licences for the property rights acquired by Eurocontrol in the context of the development of the prototypes are granted at no cost adds to the fact that this activity is ancillary to the promotion of technical development, forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims, which excludes the possibility that the activity in question is economic in nature (see, by analogy, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 63).

78 Such management of intellect property rights can thus in no way be compared to the activity of organisations governed by private law which manage, at national level, the rights of composers or authors and which are authorised by the holders of those rights to collect fees payable by third parties for the representation of those works. Those organisations pursue an economic activity since, first, they offer authors, for remuneration, a management service in respect of those rights, and, secondly, they act in relation to third parties who exploit the works in question for commercial

ends as the central organisation for the collection of fees payable, as the authors' agents. However, this is not the case here.

79 In this regard, the Court must reject the applicant's assertion made at the hearing, based on an internal Eurocontrol document headed 'ARTAS Intellectual Property Rights and Industrial Policy' of 23 April 1997, which it submitted as an annex to the application, which states that the licences are not free of charge and the granting of those licences depends on the agreement of the contracting undertaking which developed the prototype for the ARTAS system, Thomson-CSF (now, Thales). It is apparent from the document referred to that the licence fees for use of the ARTAS system was one ECU, which is equivalent to no charge at all. In addition, it is evident from that document that, in return for that fee, the undertaking concerned obtains full access to the parts of the system developed in the context of the development project financed by Eurocontrol ('the foreground software'), for which Eurocontrol holds the intellectual property rights. In relation to those parts of the ARTAS system developed by Thomson CSF in the context of earlier projects and reused in that system ('the background software'), a regime of disclosure of information is provided for, which distinguishes between two categories of information, that is, transferable information and confidential information. While the former may be divulged to Thomson-CSF's competitors, for the purposes of developing ARTAS-type systems following signature of a licence agreement with Eurocontrol, the latter may not — without the consent of Thomson-CSF — be divulged to Thomson-CSF's competitors. Clearly, the document in question shows the contrary of what the applicant claims, namely that the licences for the ARTAS system are free of charge, that all the components of that system developed in the context of the project financed by Eurocontrol are disclosed to undertakings competing with Thomson-CSF, without the latter being able to object to such disclosure, and that even a part of the components developed previously by Thomson-CSF can be made available to competing undertakings. On this point, the applicant's argument should therefore be rejected.

80 It is also appropriate to reject the applicant's criticisms relating to, first, Eurocontrol's allegedly arbitrary and non-transparent distinction between 'fore-

ground software' and 'background software', and, secondly, the fact that that distinction is, ultimately, purely theoretical, because competitors, being unaware of certain data ('source codes') of the inaccessible parts, they are prevented from using the accessible parts of the software developed. While those facts, supposing they are established, appear to be capable of having an effect on competition in the sector of ATM equipment, they are not, however, capable of proving that the regime of intellectual property rights implemented by Eurocontrol is economic in nature.

81 Moreover, the applicant's allegation — that Eurocontrol, in relation to the rights held by the contracting undertaking, requires disclosure, in the form of 'code-machine packets' together with all the documentation enabling it to be applied, only of the background software, while the so-called 'OTS' software remains confidential — essentially criticises Eurocontrol's failure to require undertakings which have obtained research contracts to make available to their competitors the source codes of their own products which have been reused in the context of research projects awarded by Eurocontrol. It should be pointed out that, irrespective of whether such an obligation can be lawfully imposed on contracting undertakings, the fact that Eurocontrol makes such a distinction, in the context of its regime of intellectual property rights, does not satisfy the test of an economic activity under the case-law cited in paragraph 50 above, that is, of engaging in an activity consisting in offering goods and services on a given market.

82 It follows that the Commission did not make a manifest error of assessment by taking the view that the research and development activities financed by Eurocontrol were not economic activities and the competition rules of the Treaty were therefore not applicable to them.

Assistance to the national administrations

— Arguments of the parties

83 The applicant submits that the technical assistance for the national administrations which Eurocontrol performs by drafting contract documents of public tenders or by taking part in the selection procedure of undertakings participating in public tenders is an intrinsically economic activity. Similarly, it is an activity which is remunerated, since Eurocontrol receives finance from its Member States which serves to finance its assistance, as is the case with its other activities.

84 The Commission and the intervener take the view that the activity of assisting the national administrations responsible for air navigation control, in particular tendering procedures in relation to the acquisition of ATM systems and equipment, falls within the organisation's tasks as set out under the Convention. That activity allows Contracting States, by having recourse to the organisation's particular technical competence, to perform, as appropriate, the functions of control and management of air traffic which they carry out in the exercise of their sovereignty. In performing that activity, Eurocontrol therefore pursues the public interest objective, laid down by the Convention, of maintaining and improving air traffic safety.

85 The Commission and the intervener further contend that the activity in question is not remunerated. The contributions paid to Eurocontrol by its Member States are intended to ensure the general functioning of the organisation and have no bearing on those States' possible requests for assistance. In making a parallel with the case-law of the Court relating to national systems of social security and health, the Commission refers by way of example to the situation in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 18, in which the fact that

there was no relation between the contributions paid by the policyholders into the sickness fund and the benefits paid out by that fund led the Court to find that the activities performed by the latter were not economic activities.

— Findings of the Court

86 First of all, it should be pointed out that the activity of assisting the national administrations is separable from Eurocontrol's tasks of air space management and development of air safety. Although the assistance may serve the public interest by maintaining and improving the safety of air navigation, that relationship is only a very indirect one, since the assistance provided by Eurocontrol only covers technical specifications in the implementation of tendering procedures for ATM equipment and therefore only impacts on the safety of air navigation by means of those tendering procedures. Such an indirect relationship does not imply that there is a necessary link between the two activities. In that respect, the Court recalls that Eurocontrol only offers assistance in that field on the request of the national administrations. The activity of assistance is therefore in no way an activity which is essential or even indispensable to ensuring the safety of air navigation.

87 Next, it should be recalled that any activity consisting in offering goods and services on a given market is an economic activity (see the case-law cited in paragraph 50 above). In relation to the assistance to the national administrations in the form of advice given at the time of drafting the contract documents for calls for tender or during the selection procedure of undertakings participating in those calls for

tender, this is precisely a case of an offer of services on the market for advice, a market on which private undertakings specialised in this area could also very well offer their services.

88 In that regard, the Court of First Instance has held that the fact that an activity may be exercised by a private undertaking is a further indication that the activity in question may be described as a business activity (*Aéroports de Paris* v *Commission*, paragraph 124, upheld in Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 82).

89 In addition, it should be pointed out that the Court has held, on several occasions, that the fact that activities are normally entrusted to public offices cannot affect the economic nature of such activities, since they have not always been, and are not necessarily, carried out by public entities (see, to that effect, *Höfner and Elser*, at paragraph 22, and *Job Centre*, at paragraph 22). In the circumstances under consideration in this case, this means that the fact that the services in question are not at the current time offered by private undertakings does not prevent their being described as an economic activity, since it is possible for them to be carried out by private entities.

90 Since the Commission contends that the assistance which Eurocontrol provides to the national administrations is not remunerated as such, it should be stated that that fact may be a pointer, but is not in itself decisive, as is shown for example in the situation in the case of *Höfner and Elser*, in which employment procurement services of the German Federal Office for Employment were provided free of charge to employees and workers, who in turn financed the overall expenditure of that office through fixed contributions, regardless of whether or not they actually used its employment procurement services. The fact that Eurocontrol is financed, as an institution, by the contributions of its Member States and that it supplies its assistance services free of charge to national administrations requesting them indicates that its financial structures are of a similar nature to those in question in that case.

91 Similarly, the fact that the assistance is given in pursuit of a public service objective may be an indication that it is a non-economic activity, but this does not prevent an activity consisting, as is the case here, in offering services on a given market from being considered to be an economic activity. Therefore, bodies managing statutory social security systems, being non-profit-making and engaging in activity of a social character which is subject to State rules that include solidarity requirements in particular, have been considered to be undertakings engaging in economic activity (see, to that effect, Case C-244/94 *Fédération française des sociétés d'assurance and Others*, paragraph 22, and Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 84 to 87).

92 It follows from the foregoing that the activity whereby Eurocontrol provides assistance to the national administrations is an economic activity and that, consequently, Eurocontrol, in the exercise of that activity, is an undertaking within the meaning of Article 82 EC.

93 To that extent, the applicant's first plea in law should be upheld, and the remainder rejected.

94 However, as pointed out in paragraphs 47 to 49 above, that finding can only lead to the annulment of the contested decision if the second plea in law should also be upheld, since the contested decision is also based on the Commission's finding that, even if Eurocontrol's activities are considered to be economic activities, they are not contrary to Article 82 EC.

The second plea in law alleging manifest error of assessment as regards the existence of a breach of Article 82 EC by Eurocontrol

95 In the light of the foregoing, the second plea in law should be examined only in so far as the first plea in law has been upheld, that is, in relation to Eurocontrol's assistance to the national administrations.

Arguments of the parties

96 The applicant submits, in that regard, that the contested decision is vitiated by a manifest error of assessment insofar as the Commission failed to examine in detail the abusive conduct alleged to exist in connection with the assistance to the national administrations. In particular, the applicant criticises Eurocontrol's abusive conduct in failing to observe the principles of equal treatment, transparency and non-discrimination when invitations to tender were launched by the national bodies for the acquisition of ATM equipment, when Eurocontrol should be applying the rules on tendering procedures laid down by Community law, or, at the very least, the general principles of equal treatment and transparency.

97 There is confusion between, on the one hand, the role played by Eurocontrol in proposing projects and selecting undertakings conceiving prototypes, and, on the

other, its role as a consultant to national administrations. This confusion and the problems arising from it were identified by the Commission itself in a report on the application of Directive 93/65.

98 By virtue of the assistance offered by Eurocontrol to national administrations when launching tendering procedures, optional rules in reality become binding on the awarding authorities. This was the case in particular in the two procedures from the award of public contracts in Spain and the Netherlands. The applicant takes the view that the undertaking which took part in the procedure and was awarded the contract to conceive a prototype for standardised ATM equipment has an unlawful advantage on two counts: first, at the time of the arbitrary selection which resulted in its being awarded the contract for the conception of the prototype, and, secondly, because it can subsequently be selected in the context of national tendering procedures.

99 The applicant also relies on the letter of 3 November 1998 (see paragraph 12 above). According to the applicant, that letter provides evidence that the Commission itself was persuaded that Eurocontrol had committed an abuse of a dominant position, since the pleas for annulment set out in the application are confirmed on every point by the doubts and observations expressed in that letter. The Commission thus openly admitted that the role played by Eurocontrol was open to criticism and that there had been distortions of competition, as alleged by the applicant. The letter of 3 November 1998 shows, in particular, very clearly that the Commission staff considered that Eurocontrol's activities which were the subject of the complaint were economic activities, that they were, for this reason, subject to the Community competition rules and that the distortions of competition resulting from Eurocontrol's conduct were proven and serious.

100 The Commission points out that, in paragraph 34 of the contested decision and contrary to what the applicant asserts, it did carry out an in-depth assessment, in the alternative, of the conduct criticised by the applicant in relation to the assistance provided by Eurocontrol to the national administrations. However, its conclusion from that assessment was that the activity in question did not infringe the competition rules.

101 As regards the letter of 3 November 1998, the Commission takes the view that the conclusions which the applicant draws from it are the result of misreading the content of that letter.

Findings of the Court

102 It should be pointed out that the arguments raised by the applicant in relation to this plea in law in fact concern two different situations. The first relates to the award of contracts by Eurocontrol itself for its own supply needs linked to the activities which were considered above not to be economic in nature. Since that situation does not concern the assistance provided by Eurocontrol to the national administrations, it should be dismissed in the context of examining the second plea in law, which is limited to the activity consisting of assistance.

103 The second situation concerns the award of contracts by the national administrations, to which Eurocontrol contributes as an adviser when the contract documents are drafted or during the selection procedure.

104 In relation to that situation, it should be pointed out, first of all, as the Commission correctly does, that the national administrations alone have the power to award contracts and are thus authorised to take decisions and, therefore, they are responsible for compliance with the relevant provisions on tendering procedures. Eurocontrol's contribution as an adviser is neither mandatory nor even systematic. It contributes only when expressly requested to do so by the relevant administrations under Article 2(2)(a) of the Convention. The applicant emphasised the fact that Eurocontrol, when an administration calls on its advisory services, may in principle be able to influence the choices exercised by that administration in the context of a tendering procedure. However, the applicant failed to prove that in a specific case Eurocontrol had in fact influenced the decision to award a contract to a tenderer, and that Eurocontrol had done so on the basis of considerations other than those seeking the best technical solution at the best price.

105 Certainly, it should be recalled that, according to the first paragraph of Article 82 EC, the finding of an abuse of a dominant position by an undertaking presupposes, first, that the undertaking in question has a dominant position on a given market, and, secondly, that it abuses that dominant position within the common market or in a substantial part of it.

106 The applicant did not express any view, either in its written pleadings before the Court of First Instance or at the hearing, on the questions of the definition of the relevant market and Eurocontrol's dominance on that market, which might be the market for advice given in relation to the tendering procedures for the supply of ATM equipment or even that for technical advice in general.

107 As regards the concept of an abuse, the Court observes that established case-law shows that an 'abuse' is an objective concept referring to the conduct of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the

degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 69, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 111).

108 It should be stated that in the present case the applicant has not shown that Eurocontrol's conduct, in the context of its activity of advising national administrations, satisfied these criteria. In particular, it has not indicated the methods 'different from those governing normal competition in products or services on the basis of the transactions of commercial operators' to which Eurocontrol had recourse. Since Eurocontrol is not carrying out any activity on the market for supply of ATM equipment and it does not have any financial or economic interest in that market, it seems that there can be no relationship of competition between it and the applicant or any other undertaking active in the sector. In particular, it is not apparent that Eurocontrol could have derived any competitive advantage from the fact of being able to influence, by dint of its advisory services offered to the national administrations, the administrations' choice as to their suppliers of ATM equipment in favour of certain undertakings.

109 The applicant has therefore failed to prove that the Commission committed a manifest error of assessment as regards the existence of a breach of Article 82 EC by Eurocontrol.

110 That finding is not invalidated by the letter of 3 November 1998.

111 The applicant's claims that the letter proves that the Commission itself was persuaded that Eurocontrol had committed an abuse of a dominant position (see

paragraph 99 above) are not borne out by the letter of 3 November 1998. As pointed out above (paragraph 39), nowhere does the Commission state that Eurocontrol's activities are economic activities and that, therefore, the Community competition rules apply to them. On the contrary, the letter expressly states that, in examining the possible effects of Eurocontrol's activities, albeit not economic, on competition between undertakings active in the sector of ATM equipment, the attached analysis was made 'without prejudice to the application of the Community competition rules ...'.

112 The fact that the Commission, while disputing the applicability of competition law in the present case, nevertheless made a certain number of critical observations in its letter regarding certain activities of Eurocontrol, far from showing that the Commission was itself persuaded of the unlawfulness of Eurocontrol's behaviour in respect of the competition rules, rather provides evidence of the Commission's desire to make Eurocontrol aware of the impact which its activities, although falling outside the scope of those rules, could still have on competition between undertakings operating in the relevant sector, with a view to encouraging it, as far as possible, to minimise the undesirable effects. Conversely, that letter does not serve to support the applicant's claims.

113 It follows from the foregoing that the second plea must be rejected.

The third plea in law alleging breach of essential procedural requirements

114 In referring to certain decisions of the Community judicature on the obligation to investigate complaints and on the obligation to state reasons for decisions, the

applicant submits that in the present case, the Commission failed to fulfil these obligations. The contested decision is not properly reasoned and the Commission 'may have' infringed the rights of defence during the pre-litigation procedure.

The complaint alleging failure to provide reasoning

— Arguments of the parties

115 In relation to the description of Eurocontrol's activities which are the subject of the complaint, the applicant submits that the Commission did not properly examine the question of whether those activities were economic in nature. Instead of merely stating that the activity of regulation does not result in any remuneration, that the production of standards amounts to both an activity in the public interest and a non-profit-making private activity and that the assistance takes the form of mere technical support which is not remunerated and only offered to national administrations requesting it, the Commission should have analysed fully the relevant case-law in order to arrive at the result applicable in this case. Referring to the reasoning in the contested decision in relation to certain points, the applicant submits that the Commission's analysis occupies only a few lines, whilst the applicant submitted a large body of evidence and a number of arguments in support of its complaint. Similarly, the wording of the contested decision does not state why the Commission thought it necessary to exclude the possibility of abusive conduct on the part of Eurocontrol in the present case.

116 The Commission points out that, according to settled case-law, in stating the reasons for the decisions which it takes in order to enforce the competition rules, it is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request.

— Findings of the Court

117 According to established case-law, the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it in order to defend their rights and to enable the competent court to exercise its power of review. The requirement to state reasons must be assessed in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraphs 164 and 165, and the case-law cited).

118 In particular, in stating the reasons for the decision rejecting a complaint alleging breach of the competition rules, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (Case T-5/97 *Industrie des poudres sphériques* v *Commission* [2000] ECR II-3755, paragraph 199, and the case-law cited, and *FENIN* v *Commission*, paragraph 58).

119 In the present case, it is evident that the Commission has fulfilled its obligation to state reasons. As it correctly contends, the principal reason for rejecting the complaint is clearly stated in paragraphs 28 and 29 of the contested decision, namely that the activities of Eurocontrol called into question are not economic activities within the meaning of the case-law of the Court of Justice. The Commission refers in particular to its letter of 15 June 2000 (see paragraph 14 above), in which it had already in essence expressed — and stated the reasons for — that opinion. In paragraphs 30 to 34 of the contested decision, the Commission set out, in respect of

each of the activities called into question, the specific reasons for its analysis. With regard to the activities of development and acquisition of prototypes, the regime of intellectual property rights and the assistance provided to the national administrations, it also explained in the alternative why, even if it were to consider those activities as being economic in nature, it took the view that there was no infringement of competition law.

120 In this regard, it should be recalled that the lack of, or an inadequate, statement of reasons constitutes a plea of infringement of an essential procedural requirement, which, as such, is different from a plea that the grounds of the decision are inaccurate, the latter plea being a matter to be reviewed by the Court when it examines the substance of that decision (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47). The fact that the Court of First Instance has not supported some of the Commission's findings in the contested decision thus does not preclude the obligation to state reasons from being considered to be fulfilled in the present case.

121 It follows that the argument alleging lack of reasoning must be rejected.

The complaint alleging breach of the rights of the defence

— Arguments of the parties

122 The applicant submits that, in the light of the information currently available and the documentation annexed to the contested decision, it was not properly informed of the Commission's activities during the investigation of the complaint. In particular, the Commission failed to mention the comments, letters and analyses, of which there were probably many, on the basis of which it formed its own judgement. This amounts to a breach of the general principle that administrative procedures should be transparent.

123 The Commission points out that this complaint is based on the assumption that when it adopted the contested decision it must have relied on a large number of documents of which the applicant was not aware. The Commission contends that it specifically mentioned, in its letter of 25 September 2003 (see paragraph 14 above), the documents on which it based its assessment, documents of which the applicant was fully aware and on which it could have submitted comments. The documents in question contained all the essential elements which the Commission took into account in investigating the complaint. It therefore submits that there was no infringement of the rights of the defence, it being mere speculation by the applicant.

— Findings of the Court

124 It should be observed, first of all, that the applicant does not in any way substantiate its claims as to the supposed existence of a large number of documents of which it was unaware. Indeed, although it cannot be asked of the applicant to identify the documents in question, since its very argument is that those documents were not sent to it by the Commission, it clearly does not submit any evidence which, at the very least, could lead to the belief that such documents exist and that they were decisive in drawing up the contested decision. The only document which was not mentioned in the Commission's letter of 25 September 2003 and which was specifically identified by the applicant, namely the letter of 3 November 1998, was subsequently produced by the Commission. As pointed out above, however, not only did that letter not reveal any circumstances which could have significantly influenced the outcome of the present case (see paragraphs 36 to 39 above), but, moreover, the applicant was aware of both the existence of that letter and the substance of its content.

125 In the application, the applicant submits that it 'clearly came' to the conclusion that it was not properly informed about the Commission's activities during its investigation 'on the basis of the documents annexed to the Commission decision'.

However, the contested decision does not refer to annexes. The applicant does not explain which annexes are relevant or what evidence in the documents which it failed to specify would have enabled it to draw that conclusion. The applicant's argument that the Commission used a large number of documents which were not sent to it is thus not substantiated.

126 In addition, the Commission contends that there are no documents relevant to the present case other than those referred to in the annex to the letter of 25 September 2003. That contention seems to be supported by the Commission's legal analysis, based on the *SAT Fluggesellschaft*, that Eurocontrol's activities at issue here were not, as a whole, economic in nature and that, in any event, the conduct of which Eurocontrol is accused did not amount to an infringement of the Community competition rules. Indeed, the documents on which it relied in the contested decision are by themselves capable of supporting that assessment and it was therefore not necessary, contrary to what the applicant claims, to carry out technical analyses or in-depth examinations as to the possible effects of Eurocontrol's actions on competition in this sector.

127 It follows that the plea in law alleging infringement of the rights of the defence must be rejected.

128 The third plea must therefore be rejected.

129 It follows from all the foregoing that the applicant's application for annulment must be dismissed.

5. *The requests for measures of inquiry*

Arguments of the parties

130 The applicant submitted requests for measures of inquiry in the document lodged on 27 April 2005. The first request is for the Commission to produce every document drafted by its staff in relation to the present case and every document which it received from Eurocontrol in relation to the complaint, as well as a copy of the technical analyses which, according to the applicant, were carried out by internal or external staff. The second request is, first, for the former Commission Director Generals of DG Competition and DG Transport, and the former Director General of Eurocontrol, to be heard as witnesses on the content of the letter of 3 November 1998 and the analysis annexed to it, and, secondly, for the Commission to produce the documents which were exchanged between it and Eurocontrol following the letter of 3 November 1998.

131 The Commission objects to the applicant's requests, and contends that hearing the persons referred to by the applicant is unlikely to uncover any information helpful to the appraisal of the contested decision and that there are no relevant documents other than those enumerated in the letter of 25 September 2003.

Findings of the Court

132 Having regard to all the circumstances set out above, the Court has been able to determine the matter on the basis of the submissions, pleas in law and arguments presented during the written and oral procedure and in the light of the documents produced.

133 In those circumstances, the requests for measures of inquiry submitted by the applicant must be rejected.

Costs

134 Under Article 87(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. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

135 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear its own costs. In this case, the intervener is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. **Orders SELEX Sistemi Integrati SpA to bear its own costs and pay those incurred by the Commission;**

3. **Orders the European Organisation for the Safety of Air Navigation to bear its own costs.**

Pirrung Meij Pelikánová

Delivered in open court in Luxembourg on 12 December 2006.

E. Coulon J. Pirrung

Registrar President

Table of contents