Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

18 March 2014*

(Reference for a preliminary ruling — Article 18 TFEU — Prohibition of any discrimination on the ground of nationality — Commercial flights from a third State to a Member State — Legislation of a Member State providing that European Union air carriers not having an operating licence issued by that State must obtain an authorisation for each flight from a third State)

In Case C-628/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Braunschweig (Germany), made by decision of 24 November 2011, received at the Court on 7 December 2011, in the criminal proceedings against

International Jet Management GmbH,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, L. Bay Larsen, E. Juhász, A. Borg Barthet, C.G. Fernlund, J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas (Rapporteur), G. Arestis, A. Arabadjiev, C. Toader, E. Jarašiūnas and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 19 February 2013,after considering the observations submitted on behalf of:

— International Jet Management GmbH, by J. Janezic and P. Ehlers, Rechtsanwälte,

— the German Government, by A. Wiedmann and T. Henze, acting as Agents,

— the Spanish Government, by S. Martínez-Lage Sobredo, acting as Agent,

— the French Government, by G. de Bergues and M. Perrot, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and by W. Ferrante, avvocato dello Stato,

— the Austrian Government, by C. Pesendorfer and G. Eberhard, acting as Agents,

— the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

— the Finnish Government, by J. Heliskoski, acting as Agent,

* Language of the case: German.

— the European Commission, by K. Simonsson, F. Bulst and T. van Rijn, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18 TFEU.

2 The request has been made in criminal proceedings brought against International Jet Management GmbH ('International Jet Management'), an airline company with its seat in Austria, for having operated private flights from Moscow (Russia) and Ankara (Turkey) to Germany without having the authorisation, required by the legislation of that Member State, to enter German airspace.

Legal context

EU law

Regulation (EC) No 261/2004

3 Article 3(1) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1) provides as follows:

'This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.'

Regulation (EC) No 785/2004

4 Pursuant to Article 2(1) of Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators (OJ 2004 L 138, p. 1), that regulation applies to all air carriers and to all aircraft operators flying within, into, out of, or over the territory of a Member State to which the Treaty applies.

5 Article 5(2) and (4) of that regulation is worded as follows:

'2. For the purpose of this Article "Member State concerned" shall mean the Member State which has granted the operating licence to the Community air carrier or the Member State where the aircraft of the aircraft operator is registered. For non-Community air carriers and aircraft operators using aircraft registered outside the Community, "Member State concerned" shall mean the Member State to or from which the flights are operated.

...

4. With regard to Community air carriers and aircraft operators using aircraft registered in the Community, the deposit of evidence of insurance in the Member State referred to in paragraph 2 is sufficient for all Member States, without prejudice to the application of Article 8(6).'

Regulation (EC) No 847/2004

6 Under Article 2 of Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries (OJ 2004 L 157, p. 7):

'Insofar as air carriers and other interested parties are to be involved in the negotiations referred to in Article 1, Member States shall treat equally all Community air carriers with an establishment on their respective territories to which the Treaty applies.'

7 Article 3 of that regulation provides as follows:

'A Member State shall not enter into any new arrangement with a third country, which reduces the number of Community air carriers which may, in accordance with existing arrangements, be designated to provide services between its territory and that country, neither in respect of the entire air transport market between the two parties nor on the basis of specific city pairs.'

8 Article 5 of that regulation states:

'Where a Member State concludes an agreement, or amendments to an agreement or its Annexes, that provide for limitations on the use of traffic rights or the number of Community air carriers eligible to be designated to take advantage of traffic rights, that Member State shall ensure a distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory and transparent procedure.'

Regulation (EC) No 1008/2008

9 Recital 10 in the preamble to Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3), states:

'In order to complete the internal aviation market, still existing restrictions applied between Member States, such as restrictions on the code sharing on routes to third countries or on the price setting on routes to third countries with an intermediate stop in another Member State (sixth freedom flights) should be lifted.'

10 Article 1(1) of that regulation provides as follows:

'This Regulation regulates the licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services.'

11 Article 2 of that regulation states:

'For the purposes of this Regulation:

1. "operating licence" means an authorisation granted by the competent licensing authority to an undertaking, permitting it to provide air services as stated in the operating licence;

...

4. "air service" means a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire;

...

8. "air operator certificate (AOC)" means a certificate delivered to an undertaking confirming that the operator has the professional ability and organisation to ensure the safety of operations specified in the certificate, as provided in the relevant provisions of Community or national law, as applicable;

...

10. "air carrier" means an undertaking with a valid operating licence or equivalent;

11. "Community air carrier" means an air carrier with a valid operating licence granted by a competent licensing authority in accordance with Chapter II;

...

13. "intra-Community air service" means an air service operated within the Community;

14. "traffic right" means the right to operate an air service between two Community airports;

...

16. "scheduled air service" means a series of flights possessing all the following characteristics:

   (a) on each flight seats and/or capacity to transport cargo and/or mail are available for individual purchase by the public (either directly from the air carrier or from its authorised agents);

   (b) it is operated so as to serve traffic between the same two or more airports, either:

      — according to a published timetable, or,

      — with flights so regular or frequent that they constitute a recognisably systematic series;

...

26. "principal place of business" means the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised.'

12 Article 3(1) and (2) of Regulation No 1008/2008 is worded as follows:

'1. No undertaking established in the Community shall be permitted to carry by air passengers, mail and/or cargo for remuneration and/or hire unless it has been granted the appropriate operating licence.

An undertaking meeting the requirements of this Chapter shall be entitled to receive an operating licence.

2. The competent licensing authority shall not grant operating licences or maintain them in force where any of the requirements of this Chapter are not complied with.’

13 Article 4 of that regulation provides as follows:

‘An undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that:

(a) its principal place of business is located in that Member State;

(b) it holds a valid AOC issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the Community air carrier;

...

(d) its main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft;

...

(h) it complies with the insurance requirements specified in Article 11 and in [Regulation No 785/2004]; ...

...’

14 Article 15 of that regulation, entitled ‘Provision of intra-Community air services’, is included in Chapter III thereof, itself entitled ‘Access to routes’. Pursuant to that article:

‘1. Community air carriers shall be entitled to operate intra-Community air services.

2. Member States shall not subject the operation of intra-Community air services by a Community air carrier to any permit or authorisation. Member States shall not require Community air carriers to provide any documents or information which they have already supplied to the competent licensing authority, provided that the relevant information may be obtained from the competent licensing authority in due time.

...

5. Notwithstanding the provisions of bilateral agreements between Member States, and subject to the Community competition rules applicable to undertakings, Community air carriers shall be permitted by the Member State(s) concerned to combine air services and to enter into code share arrangements with any air carrier on air services to, from or via any airport in their territory from or to any point(s) in third countries.

A Member State may, in the framework of the bilateral air service agreement with the third country concerned, impose restrictions on code share arrangements between Community air carriers and air carriers of a third country, in particular if the third country concerned does not allow similar commercial opportunities to Community air carriers operating from the Member State concerned. In doing so, Member States shall ensure that restrictions imposed under such agreements do not restrict competition and are non-discriminatory between Community air carriers and that they are not more restrictive than necessary.’

15 Article 22 of that regulation, entitled 'Pricing freedom', in Chapter IV thereof, itself entitled 'Provisions on pricing', is worded as follows:

'1. Without prejudice to Article 16(1), Community air carriers and, on the basis of reciprocity, air carriers of third countries shall freely set air fares and air rates for intra-Community air services.

2. Notwithstanding the provisions of bilateral agreements between Member States, Member States may not discriminate on grounds of nationality or identity of air carriers in allowing Community air carriers to set fares and rates for air services between their territory and a third country. Any remaining restrictions on pricing, including with respect to routes to third countries, arising from bilateral agreements between Member States are hereby superseded.'

German law

16 Paragraph 2(1), (7) and (8) of the Law on Aviation (Luftverkehrsgesetz), in the version published on 10 May 2007 (BGBl. 2007 I, p. 698) ('the LuftVG') is worded as follows:

'(1) German aircraft are authorised to fly only when they possess an authorisation to that effect (operating licence) and are entered, where provided for by legislation, in the register of German aircraft (aircraft register). An aircraft is authorised to fly only:

1. if that type of aircraft is approved (type approval);

2. if the certificate of airworthiness provided for in the legislation on the technical monitoring of aircraft is produced in respect of it;

3. if the owner of the aircraft has taken out third-party liability insurance … and

4. if the aircraft is equipped in such a way as not to exceed the technically acceptable threshold with regard to noise nuisance.

…

(7) Aircraft not registered and approved within the territory of application of the Law may enter the airspace of that territory, or be brought there in any other way, only after having obtained due authorisation. The authorisation is not necessary when a treaty between the country of origin and the Federal Republic of Germany, or an agreement binding on the two States, provides otherwise.

(8) The authorisation referred to in subparagraphs (6) and (7) may be granted in general terms or for a specific case; it may be accompanied by conditions and by a time-limit. …'

17 Paragraph 58 of the LuftVG provides as follows:

'(1) An offence is committed by any person who, intentionally or negligently:

…

12a. enters the airspace to which the present Law applies by means of an aircraft, or brings into it an aircraft in any other manner, without obtaining the authorisation provided for in Paragraph 2(7);

…

(2) The offence referred to in subparagraph (1), point … 12a is punishable by a fine of up to EUR 10 000 …'

18 Paragraph 94 of the Regulation on aircraft operating licences (Luftverkehrs-Zulassungs-Ordnung), of 10 July 2008 (BGBl. 2008 I, p. 1229) ('the LuftVZO') provides as follows:

'The authorisation to enter the airspace of the Federal Republic of Germany referred to in Paragraph 2(7) of the [LuftVG] shall be … issued by the Bundesministerium für Verkehr, Bau und Stadtentwicklung [(Federal Ministry of Transport, Construction and Town Planning)] or by another authority designated by it.'

19 Paragraph 95 of the LuftVZO is worded as follows:

'(1) An application for authorisation shall contain the following information:

1. the name and address of the owner of the aircraft;

2. the aircraft type and its registration status and registration number;

3. the predicted date and time of arrival and the likely time of its return flight or its flight to another destination;

4. the departure and arrival airports and, where appropriate, the transit airports within federal territory;

5. the number of passengers and the nature and volume of the cargo, the purpose of the flight, in particular in the case of carriage of a specific group and the place where that group was initially assembled;

6. in the case of a charter flight, the name, address and branch of the operator.

The authority issuing the authorisation may require other information. The Bundesminiterium für Verkehr, Bau und Stadtentwicklung, or any other authority designated by it, shall provide details of the procedure for the application for authorisation in the form of general administrative provisions.

(2) With the exception of the case referred to in subparagrah (3), application for an authorisation in respect of flights outside the regular schedules requiring landing facilities for commercial purposes (charter flights) must be made to the issuing authority not later than two whole working days before take-off of the intended flight and, in the case of a series of more than four flights, not later than four weeks before the take-off of the intended flights. Saturday is not deemed to be a working day for the purposes of calculation of the time-limit.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 International Jet Management is an airline company with its seat in Austria. It operates private non-scheduled flights, namely commercial flights operated on an ad hoc basis (charters). It offers not only air transport services within the European Union, but also uses its fleet for flights from third countries to the European Union, as it did in the dispute in the main proceedings.

21 At the material time, International Jet Management held an operating licence issued by the Austrian Ministry of Transport in accordance with Regulation No 1008/2008. It also held an AOC which had been issued to it by Austro Control GmbH, a company providing public services whose shares are owned by the Republic of Austria.

22 Between 9 December 2008 and 15 March 2009, International Jet Management operated private flights to Germany from Moscow, on six occasions, and Ankara, on one occasion.

23 International Jet Management did not have, for any of those flights, the authorisation to enter German airspace provided for in Paragraph 2(7) of the LuftVG, read in conjunction with Article 94 et seq. of the LuftVZO. In three cases the Luftfahrtbundesamt (Federal Office for Aviation) had refused it the authorisation to enter German airspace on the ground that it had not produced a 'non-availability declaration', namely a declaration that the air carriers holding an operating licence issued by the German authorities were either not willing to operate the flight in question or were prevented from operating it. In the other cases, the Luftfahrtbundesamt had not yet given a decision on the application for authorisation at the time of the flights.

24 Following those flights, International Jet Management was ordered, by a judgment of 24 May 2011 of the Amtsgericht Braunschweig (Braunschweig Local Court) (Germany), to pay various fines for infringment of the legislation in force.

25 International Jet Management brought an appeal against that judgment before the referring court. In support of that appeal, it claims, first of all, that Regulation No 1008/2008 confers on it the right to fly aircraft freely in European airspace, without it being required to obtain beforehand an authorisation issued for that purpose by the Member States concerned. It submits that, in accordance with the objective of that regulation, the market is free for airline companies established in Member States and wishing to operate air transport services.

26 Next, the general prohibition of any discrimination under Article 18 TFEU precludes in any event the imposition of the fines such as those which were imposed on International Jet Management. The requirement of an authorisation to enter German airspace in respect of the provision of air services from a third country is discriminatory given that, in reality, the Luftfahrtbundesamt examines only matters which have already been checked by the Austrian authorities, which is incompatible with the interpretation of that provision of the FEU Treaty by the Court in its judgment in Case C-382/08 *Neukirchinger* [2011] ECR I-139.

27 Lastly, International Jet Management argues, in the alternative, that the national legislation at issue in the main proceedings is incompatible with the free movement of services guaranteed by Article 56 TFEU.

28 The public prosecutor's office, on the other hand, seeks the dismissal of the appeal brought by International Jet Management. It submits that the rule requiring that an authorisation be obtained laid down by Paragraph 2(7) of the LuftVG is a measure for the protection of the national economy which the Federal Republic of Germany is justified in imposing because, first, Regulation No 1008/2008 applies only to intra-Community flight services, secondly, the freedom to provide services guaranteed by Article 56 TFEU does not apply to air transport and, thirdly, the scope of the prohibition of discrimination laid down in Article 18 TFEU is not affected either in the present case.

29 According to the public prosecutor's office, in the framework of their legislative power, the Member States are permitted to give preference to their national undertakings. Therefore airline companies from other Member States must ensure, by enquiring from the German companies beforehand, that no German company wishes to operate the flight concerned on similar conditions. This practice is justified in order to avoid distortions of competition because other Member States likewise protect their national companies in their relations with third countries.

30 Moreover, the requirement for authorisation to enter German airspace serves not only to protect the national economy but also meets safety needs. The authority issuing the authorisations requires from companies from other Member States that they produce not only a non-availability declaration, but also evidence of insurance and the AOC issued by their Member State of origin. Although it concedes that the issuing authority does not examine any matter which is not required to be checked by the Member State where the airline company has its seat, the public prosecutor's office submits that that practice nevertheless shows that the Member States frequently fail to fulfil their duty of supervision. Additional checks, which the Federal Republic of Germany may make with regard to airline companies who have their seat in another Member State in the case of flights from or to third countries, are therefore warranted.

31 Lastly, the public prosecutor's office contends that *Neukirchinger* is not relevant to the present case because that judgment concerned intra-Community air transport. The facts which gave rise to that judgment differ significantly from those here in so far as the planes making the flights at issue in the present case took off from third countries.

32 The referring court is uncertain as to the interpretation to be given to Article 18 TFEU and as regards its applicability to the dispute before it.

33 In those circumstances, the Oberlandesgericht Braunschweig (Higher Regional Court, Braunschweig) decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'(1) Does it fall within the scope of the prohibition of discrimination laid down in Article 18 TFEU … if a Member State (Federal Republic of Germany) requires an airline to obtain an authorisation to make inward flights in respect of charter flights (commercial flights in non-scheduled traffic) from non-member countries into the territory of that Member State, where that airline holds a valid operating licence within the meaning of Articles 3 and 8 of Regulation … No 1008/2008 …, issued in another Member State (Republic of Austria)?

(2) If the reply to question 1 is in the affirmative, is the requirement for an authorisation in itself contrary to Article 18 TFEU … if an authorisation to make an inward flight, the obtaining of which can be enforced by means of an administrative fine, is required for flight services from non-member countries by airlines which have received an operating licence in the other Member States, but not by airlines with an operating licence obtained in the Federal Republic of Germany?

(3) If the case falls within the scope of Article 18 TFEU … (question 1) but the requirement for authorisation is not itself found to be discriminatory (question 2), may the grant of an authorisation to make an inward flight in respect of the appellant's flight services from non-member countries to the Federal Republic of Germany be made conditional, on pain of an administrative fine, and without breaching the prohibition of discrimination, on whether the airline of the Member State proves to the authority which grants the authorisation that airlines with an operating licence in the Federal Republic of Germany are not in a position to carry out the flights (non-availability declaration)?'

Consideration of the questions referred

The first question

34 By its first question, the referring court asks, in essence, whether Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is applicable to a situation, such as that at issue in the main proceedings, in which a first Member State requires an air carrier holding an

operating licence issued by a second Member State to obtain an authorisation to enter the airspace of the first Member State to operate private flights in non-scheduled traffic from a third country to that first Member State, although such an authorisation is not required for air carriers holding an operating licence issued by that first Member State.

35 In this connection, Article 18 TFEU provides that, within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited.

36 Pursuant to Article 58(1) TFEU, freedom to provide services in the field of transport is governed by the provisions of the Title relating to transport, namely Title VI of the FEU Treaty. The freedom to provide services in the field of transport is therefore governed, in the primary law, by a special legal regime.

37 Air transport, like sea transport, is distinguished in that treaty from other modes of transport.

38 Pursuant to Article 100(1) and (2) TFEU, in so far as the EU legislature has not decided otherwise, air transport is not subject to the rules contained in Title VI of that treaty. As the Advocate General observed in point 30 of his Opinion, measures liberalising air transport services may therefore only be adopted under Article 100(2) TFEU.

39 In the present case, while it is true that the EU legislature has not, at this stage, under the shared competence conferred on it in the transport field by Article 4(2)(g) TFEU, adopted measures based on Article 100(2) TFEU on liberalisation of air transport services covering the routes between Member States and third countries, Article 18 TFEU may nevertheless be applied to such services, provided that they fall within the scope of application of the Treaties, within the meaning of that latter article (see, to that effect, *Neukirchinger*, paragraph 21 and the case-law cited).

40 It is therefore necessary to ascertain whether, in a situation such as that at issue in the main proceedings, concerning an air carrier with its seat in a Member State, which is the holder of an operating licence issued by the authorities of that Member State in accordance with Regulation No 1008/2008 and which, in respect of the provision of air transport services to another Member State, is subject, under the legislation of that other Member State, to the requirement to obtain prior authorisation, the fact that the services at issue are provided from a third country is such as to preclude the application of Article 18 TFEU.

41 In this connection, Regulation No 1008/2008, as is apparent from Article 1 thereof, does not only regulate the right of ‘Community air carriers’ to operate ‘intra-Community air services’, but also the licensing of those air carriers, which is the subject of Chapter II of that regulation.

42 It is apparent from the first subparagraph of Article 3(1) of that regulation that no undertaking established in the European Union is permitted to carry by air passengers, mail and/or cargo for remuneration and/or hire unless it has been granted the appropriate operating licence. Regulation No 1008/2008 does not exclude from the scope of that rule air carriers established in the European Union which carry out air transport of passengers from third countries to Member States.

43 In accordance with the second subparagraph of Article 3(1) of that regulation, an undertaking meeting the requirements of Chapter II of that regulation is entitled to receive an operating licence.

44 The conditions laid down in Article 4 of that regulation for the grant, by the competent authority of a Member State, of an operating licence to an undertaking, include in particular the condition that the ‘principal place of business’ of that undertaking is located in that Member State and the condition that its main occupation is to operate ‘air services’ in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft.

45 The meanings of the terms 'principal place of business' and 'air service' are specified in Article 2 of Regulation No 1008/2008. Under point 26 of that article, the principal place of business is 'the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised'. Article 2, point 4, of that regulation, for its part, defines an 'air service' as 'a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire'.

46 As the Advocate General observed in point 47 of his Opinion, that latter term therefore encompasses not only flights made within the European Union, but also those between a third country and a Member State. It must be observed, in this respect, that Regulation No 1008/2008 distinguishes 'air services' from 'intra-Community air services', the latter meaning, under Article 2, point 13, of that regulation, air transport services provided within the European Union.

47 It follows from those various provisions that, in respect of the provision of air transport services, including those between a Member State and a third country, an air carrier, such as International Jet Management, whose principal place of business is located in a Member State, must possess an operating licence granted by the competent authority of that Member State in accordance with the provisions of Chapter II of Regulation No 1008/2008.

48 Such an operating licence, the conditions for the issue of which were harmonised by Regulation No 1008/2008, guarantees that that air carrier obtained it in compliance with the common rules, in particular those concerning safety, and must therefore be recognised by the authorities of the other Member States.

49 In that context, it is apparent from the order for reference that, pursuant to the general administrative rules referred to in Paragraph 95(1) of the LuftVZO, the authority which issues the authorisation to enter German airspace examines, prior to the grant of that authorisation to an air carrier which holds an operating licence issued by the competent authority of another Member State, various matters which must be checked by that latter authority in accordance with the provisions of Chapter II of Regulation No 1008/2008.

50 Furthermore, recital 10 in the preamble to Regulation No 1008/2008 states that, in order to complete the internal aviation market, still existing restrictions applied between Member States, such as restrictions on the code sharing on routes to third countries or on the price setting on routes to third countries with an intermediate stop in another Member State should be lifted. As the European Commission pointed out at the hearing, it is apparent from this that, while the objective of that regulation is to complete the internal aviation market, the EU legislature considered that the achievement of that objective could also be thwarted by restrictions applied to air routes with third countries. In addition, having referred to such restrictions in the second subparagraph of Article 15(5) and in Article 22(2) of Regulation No 1008/2008, the EU legislature combined that reference with an express reference, in those provisions, to the obligation for the Member States to comply with the principle of non-discrimination on grounds of nationality with regard to Community air carriers.

51 Moreover, as the Finnish Government argued in its observations submitted to the Court, other rules of European Union secondary legislation relating to the aviation sector could also apply to air transport services provided between a third country and a Member State by an air carrier holding an operating licence issued by another Member State.

52 That is the case, inter alia, with Regulation No 261/2004, as is apparent from Article 3(1)(b) thereof, and with Regulation No 785/2004, as is apparent from Article 2(1) thereof. That is also the case with Regulation No 847/2004, which provides for cooperation between the Member States and the Commission in the process of negotiation and conclusion of air service agreements between Member States and third countries, where the subject-matter of those agreements falls partly within the

competence of the European Union. In addition, a series of agreements on air transport services were negotiated between the European Union and its Member States, on the one hand, and third countries, on the other hand, including so-called 'vertical' agreements, which authorise any European Union air carrier to provide air transport services between all the Member States and the third country concerned (see, inter alia, the agreements concluded with the United States of America and Canada, the signature and provisional application of which were approved by Decision 2007/339/EC of 25 April 2007 (OJ 2007 L 134, p. 1), and by Decision 2010/417/EC of 30 November 2009 (OJ 2010 L 207, p. 30) respectively).

53 It is apparent from all the considerations in paragraphs 41 to 52 above that the air transport services provided between a third country and a Member State by an air carrier holding an operating licence issued by another Member State are regulated by secondary legislation and that, in a situation such as that described in paragraph 40 above, the fact that the air transport services concerned are provided from a third country is not such as to prevent that situation from falling within the scope of application of the Treaties within the meaning of Article 18 TFEU.

54 It follows that that provision is applicable in a situation such as that in question in the main proceedings.

55 However, the German and French Governments contend, essentially, that the application of Article 18 TFEU in the context of a case such as that at issue in the main proceedings would result in depriving Article 58(1) TFEU of any useful effect. The French Government points out, in this connection, that, if a Member State were required, in the matter of the operation of air transport services between its territory and a third country, to treat in the same way, on the one hand, air carriers established on its territory and, on the other, air carriers established on the territory of one or more other Member States and which did not have a place of business on its territory, that would result in extending the freedom to provide services laid down in Article 56 TFEU to those air transport services.

56 That argument cannot be accepted.

57 According to the Court's settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-475/11 *Konstantinides* [2013] ECR, paragraph 44 and the case-law cited).

58 That provision of the FEU Treaty therefore has a scope which exceeds the prohibition of discrimination provided for in Article 18 TFEU.

59 Therefore, while the Member States are entitled, under Article 58(1) TFEU, to impose certain restrictions on the provision of air transport services in respect of the routes between third countries and the European Union in so far as, as it was observed in paragraph 39 above, the EU legislature has not exercised the power conferred upon it by Article 100(2) TFEU to liberalise that type of service, those States nevertheless remain subject to the general principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU.

60 Furthermore, neither the judgment in Case C-49/89 *Corsica Ferries (France)* [1989] ECR 4441, nor the judgment in Case C-17/90 *Pinaud Wieger* [1991] ECR I-5253, which were relied upon by the German and French Governments and which concern situations in which the Council of the European Union had not yet adopted legislation implementing the freedom to provide services in fields falling within the scope of transport by sea and road, seems to be capable of calling into question the applicability of Article 18 TFEU to a situation such as that at issue in the main proceedings.

61 The Court did not examine the legislation at issue in those judgments from the perspective of Article 7 of the EEC Treaty, now Article 18 TFEU, but from the perspective of the articles of the EEC Treaty relating to the freedom to provide services, in a legislative context which may be distinguished from that set out in paragraphs 41 to 52 above.

62 Having regard to the foregoing considerations, the answer to the first question is that Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is applicable to a situation, such as that at issue in the main proceedings, in which a first Member State requires an air carrier holding an operating licence issued by a second Member State to obtain an authorisation to enter the airspace of the first Member State to operate private flights in non-scheduled traffic from a third country to that first Member State, although such an authorisation is not required for air carriers holding an operating licence issued by that first Member State.

The second and third questions

63 By its second and third questions, which can be examined together, the referring court asks, in essence, whether Article 18 TFEU must be interpreted as precluding legislation of a first Member State which requires, on pain of a fine, an air carrier holding an operating licence issued by a second Member State to obtain an authorisation to enter the airspace of the first Member State to operate private flights in non-scheduled traffic from a third country to that first Member State, although such an authorisation is not required for air carriers holding an operating licence issued by that first Member State, and which makes the grant of that authorisation subject to production of a declaration confirming that the air carriers holding an operating licence issued by that first Member State are either not willing to operate those flights or are prevented from operating them.

64 In that regard, it is settled case-law that the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result (Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 92, and *Neukirchinger*, paragraph 32).

65 The legislation of a first Member State, such as that at issue in the main proceedings, which requires an air carrier holding an operating licence issued by a second Member State to obtain an authorisation to enter its airspace in respect of flights from a third country, although such an authorisation is not required for air carriers holding an operating licence issued by the first Member State, establishes a distinguishing criterion which leads to the same result as a criterion based on nationality.

66 In so far as, in accordance with Article 4(a) of Regulation No 1008/2008, the operating licence is issued by the competent authority of the Member State in which an air carrier has its principal place of business within the meaning of Article 2, point 26, of that regulation, such legislation in practice places at a disadvantage only air carriers with their seat in another Member State.

67 The same is also true, a fortiori, of legislation of a first Member State, such as that at issue in the main proceedings, which requires only those air carriers holding an operating licence issued by a second Member State, in order to be granted an authorisation to enter the airspace of the first Member State in respect of flights from third countries, to produce a non-availability declaration confirming that the air carriers holding an operating licence issued by the first Member State are either not willing to operate those flights or are prevented from operating them.

68 Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 54, and *Neukirchinger*, paragraph 35).

69 It is apparent from the order for reference that the public prosecutor's office considers that the requirement of an authorisation to enter German airspace at issue in the main proceedings serves the purposes of the protection of the national economy and of safety.

70 So far as concerns the protection of the national economy, this is an objective of a purely economic nature which cannot justify a difference in treatment such as that at issue in the main proceedings (see by analogy, as regards the justification of restrictions on the fundamental freedoms, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23, and Case C-20/09 *Commission* v *Portugal* [2011] ECR I-2637, paragraph 65).

71 As regards the safety objective, while such an objective undeniably constitutes a legitimate objective, it none the less cannot reasonably be relied upon in the dispute in the main proceedings.

72 It is apparent from the order for reference that the issue of an authorisation to enter German airspace is subject to the submission not only of a non-availability declaration, but also of evidence of third-party liability insurance and of an AOC. The referring court states that the matters covered by those documents are matters which should already have been checked by the Republic of Austria, which issued an operating licence to International Jet Management.

73 The conditions for the grant of an operating licence to an undertaking by the competent authority of a Member State include, in accordance with Article 4(h) of Regulation No 1008/2008, the requirement that the undertaking must comply with the insurance requirements specified in Article 11 of that regulation and in Regulation (EC) No 785/2004. Likewise, pursuant to Article 4(b) and Article 6(1) of Regulation No 1008/2008, an operating licence can only be issued by such an authority if the undertaking requesting it holds a valid AOC. An AOC, according to its definition in Article 2, point 8, of that regulation, confirms that the operator has the professional ability and organisation to ensure the safety of operations specified in the AOC, as provided in the relevant provisions of European Union or national law, as applicable.

74 Thus, for the Federal Republic of Germany to oblige an air carrier, such as International Jet Management, which holds an operating licence issued by another Member State, to be issued with an authorisation, such as that at issue in the main proceedings, to enter its airspace is not proportionate to the legitimate objective pursued. The safety interests to which the public prosecutor's office refers were already taken into account when the competent Austrian authority issued the operating licence to International Jet Management (see, to that effect, *Neukirchinger*, paragraph 42).

75 In addition, the German Government stated at the hearing that if air carriers holding an operating licence issued by another Member State who are operating flights from a third country to German territory make an intermediate stop on the territory of that other Member State, they are not required to have an authorisation to enter German airspace. Since the German Government has not stated why, in such a situation, the safety interests relied upon can be ignored, it does not seem that the legislation at issue in the main proceedings can, in any event, be justified by such interests.

76 It follows that legislation such as that at issue in the main proceedings constitutes discrimination on grounds of nationality, aggravated by the fine imposed in the event of failure to comply therewith (see, to that effect, *Neukirchinger*, paragraph 43).

77 Consequently, the answer to the second and third questions is that Article 18 TFEU must be interpreted as precluding legislation of a first Member State which requires, on pain of a fine, an air carrier holding an operating licence issued by a second Member State to obtain an authorisation to enter the airspace of the first Member State to operate private flights in non-scheduled traffic from a third country to that first Member State, although such an authorisation is not required for air carriers holding an operating licence issued by that first Member State, and which makes the grant of that authorisation subject to production of a declaration confirming that the air carriers holding an operating licence issued by that first Member State are either not willing to operate those flights or are prevented from operating them.

Costs

78 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is applicable to a situation such as that at issue in the main proceedings, in which a first Member State requires an air carrier holding an operating licence issued by a second Member State to obtain an authorisation to enter the airspace of the first Member State to operate private flights in non-scheduled traffic from a third country to that first Member State, although such an authorisation is not required for air carriers holding an operating licence issued by that first Member State.**

2. **Article 18 TFEU must be interpreted as precluding legislation of a first Member State which requires, on pain of a fine, an air carrier holding an operating licence issued by a second Member State to obtain an authorisation to enter the airspace of the first Member State to operate private flights in non-scheduled traffic from a third country to that first Member State, although such an authorisation is not required for air carriers holding an operating licence issued by that first Member State, and which makes the grant of that authorisation subject to production of a declaration confirming that the air carriers holding an operating licence issued by that first Member State are either not willing to operate those flights or are prevented from operating them.**

[Signatures]