INTRODUCTION TO EUROPEAN UNION TRANSPORT LAW

- SECOND EDITION -

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Consumatori e Mercato 2

Università degli Studi Roma Tre
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2

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* The handbook is the result of a common endeavour. The *Introduction* and the *Passengers' rights* module are by Vincenzo Zeno-Zencovich; the *Air transport*, *Rail transport* and *Port services* modules are by Margherita Colangelo.

FOREWORD TO THE SECOND EDITION

With the evolution of transport regulation in the EU in these last years and thanks to the success of the first edition (over 2000 downloads in 18 months) we have considered it useful to expand the topics presented in this primer. In particular we have added a specific module on the painstaking process of opening port services to competition. Furthermore a paragraph has been added on the Single European Sky (SES) programme.

Rome, September 2016

M. C. V.Z.Z.

FOREWORD

This handbook is the result of three years of teaching European Union Transport Law to the law students of the University of Roma Tre.
The course falls within the "Studying Law at Roma Tre" programme, which includes 14 classes entirely taught in English.
Although the outline is – for didactic purposes – very simplified we would like to point out the main features of this primer which identifies transport law as:

a) *A typical area of intensive EU regulation in which common principles concerning network industries and development of the industry are paramount.*
b) *A field of intense competition, passing from State monopolies to open markets dominated by articles 101, 102, and leaving open a certain space for state aid, considering the extremely important social relevance of transport services (article 107).*
c) *A model for the advanced protection of consumers and users which has moved from some modes of transport to all and has become the model for other consumer contracts.*

Following these lines the handbook is divided into three modules, reflecting areas where the intervention of EU law has been most significant: air transport, rail transport, and passengers' rights. To each module we have annexed the most relevant judgments and decisions by the EU Courts and Commission which we found particularly useful to illustrate, from a practical point of view, the policies underlying EU transport law and the conflicting interests of the various stakeholders.
Obviously there are other aspects which are touched by EU law, especially in the field of movement of goods, port infrastructures, and road safety, but we have preferred to focus, at least in this first edition, on the three aforementioned aspects.
We hope that this primer – which is made available by Roma TrE-press to the whole European academic community on a freely accessible basis – will contribute to the development of the subject as a course offered to students who are and increasingly will be the main beneficiaries of the growing transport networks in the EU.
We shall be most grateful to all our colleagues for their eventual critical remarks and suggestions.

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INTRODUCTION

SUMMARY: a) Basic principles of EU transport law and their evolution - b) Transport, competition law and State aids in the EU. Basic notions; b.1. The economics of network industries; b.2. Competition as an economic theory; b.3. EU competition law; b.3.1. Article 101 TFEU – Restrictive practices; b.3.2. Article 102 TFEU – Abuse of dominant position; b.4. Services of general interest (SGI), services of general economic interest (SGEI), public services, universal service; b.5. State aid; b.6. The financing of SGEIs and State aid; b.7. Mergers - c) The application of competition rules to transport: history and sources - d) Legal instruments applicable to SGEIs in air and land transport

a) Basic principles of EU transport law and their evolution

The cardinal points of European Union transport law were set out, from the beginning, in the Rome Treaty of 1957 which led to the founding of the European Economic Community (EEC) which originally comprised six countries: Belgium, France, Germany, Italy, Luxembourg and The Netherlands. The Treaty is the point of arrival of a lengthy political process promoted by long-sighted political leaders (noticeably the German Chancellor Konrad Adenauer, the French Prime Minister Robert Schumann, the Italian Prime Minister Alcide De Gasperi and the Belgian Foreign Minister Paul-Henri Spaak) whose aim was to ensure a stable peace in Europe through economic development after the devastations of World War II.

The main scope of the Treaty being that of promoting economic and social welfare, we find enshrined what are still today called the four fundamental (economic) freedoms:

1. Free movement of goods. According to Article 9 «The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries». This provision has a significant role in the field of transport considering the essential role of the various means of transport (train, truck, ship, plane) in moving freight from one country to another, and the (negative) role that customs duties and procedures may have, not only on the final price of the goods but also on the rapidity of their delivery.

2. Free movement of persons. According to Article 48 «Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest». Although the provision was meant to enable migrant workers to move where they could find better working conditions, it is clear that in transnational transport there is a constant movement of workers, aboard specific vehicles (drivers, stewards, tecnicians etc.), through Europe. In recent decades the notion has been significantly enlarged to include other categories such as students (the Erasmus programme) and citizens in general (on the basis of the Schengen Treaty), who commonly use public means of transport.

3. Free movement of services. According to Article 59 «Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished». Transport is a service, and therefore there is an obvious relevance of the provision in the liberalization in this sector.

4. Free movement of capital. According to Article 52 «Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished». Capital is an essential factor of production, and capital naturally moves to those countries where it is needed and where, hopefully, they will yield a higher profit. However freedom of establishment has not always been granted to foreign firms, especially in sectors considered strategic, such as transport.

Notwithstanding such promising fundamental principles, their full application to transport has not been easy, because of a further provision in the Rome Treaty. According to Article 61 «Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport», and these special rules appear to deny, or at least reduce, the importance of Article 59.

In fact Title IV of the Rome Treaty, entitled «Transport» and which includes Articles from 74 to 84, sets out a set of substantive and procedural rules, most of which still stand firm today.

There should be a common European transport policy (Article 74), which should lay down: a) common rules applicable to international transport; b) conditions under which non-resident carriers may operate transport services within a Member State; c) measures to improve transport safety (Article 75).

It is however necessary, in setting these common rules, to consider if the principles of the regulatory system for transport could have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities (Article 75). On the basis that political and social conditions are highly variable, the enactment of the four fundamental freedoms is clearly limited.

The principle of non-discrimination between national carriers and carriers of other Member States is affirmed (Article 76), but at the same time there is an express provision (Article 77) stating that State aid is compatible if it meets «the needs of co-ordination of transport» or represents reimbursement for the discharge of certain public service obligations; and that one must consider an appropriate regional economic policy to meet the needs of underdeveloped areas (Article 80).

There is a further rule which indicates that transport falls under a special legal regime: measures concerning transport rates and conditions must take account of the economic circumstances of carriers (Article 78). This means that one cannot apply only common business rules but one has to look at the inherent structure of a firm providing transport services, its costs, and its losses.

However discrimination consisting in carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question is not allowed (Article 79). Rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries are also prohibited (Article 80). And charges or dues in respect of the crossing of frontiers charged by a carrier in addition to the transport rates must not exceed a reasonable level after taking into account the costs actually incurred (Article 81).

The most important rule set out in Title IV of the Rome Treaty is of a procedural nature. According to Article 84 the provisions of Title lV apply only to transport by rail, road and inland waterway, while for sea and air transport the European Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down. In practice this provision meant to exclude from Community intervention these specific sectors, and the unanimity requirement, difficult when the EEC included only six Member States, rapidly became impossible to meet as the Community grew in membership, reaching, in the mid-90s fifteen States.

In 2007 the Rome Treaty was replaced by the two Lisbon Treaties: the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The former sets out the constitutional basis of the Union, its institutions, and its goals. The latter is the recasting of the Rome Treaty as it grew incrementally throughout the decades. Both Treaties entered into force on December 1st, 2009.

Matters concerning transport are regulated by the TFEU, which at its Article 4 states that «Shared competence between the Union and the Member States applies in the transport sector». This means that both are entitled to intervene in the field taking into account on one side national exigencies, and on the other side general European policies.

In many aspects the rules set out in the TFEU are very similar to the provisions of the Rome Treaty and tend to reproduce them.

So according to Article 58(1): «Freedom to provide services in the field of transport shall be governed by the provisions of the title relating to transport.» And Title VI, devoted to Transport, comprising again 11 articles (from 90 to 100), has practically the same text as Title IV of the Rome Treaty (articles from 74 to 83). The fundamental change is found in Article 100 (which takes the place of former Article 84): according to paragraph 1 «The provisions of this Title shall apply to transport by rail, road and inland waterway». And therefore there appears to be no change in respect of the past. However in paragraph 2 a new procedure is established: «The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport». Therefore the unanimity requirement is replaced by the majority rule set by Article 16 of the TUE.

The answer to the question why, after 50 years, so little has changed in the fundamental written provisions of the Treaties governing the Union must be found outside them. In the field of transport – as in practically all the sectors of competence of the Union – a fundamental role has been played by the European Court of Justice (ECJ), the highest court of the EU with competence to solve controversies between EU institutions (typically the Commission) and member States, and to provide the authentic interpretation of EU laws. Especially in this second role the ECJ decisions have a fundamental importance. One should, in fact, keep in mind that when a national Court asks the ECJ for the authentic interpretation of an EU Directive or regulation (so-called preliminary ruling) the decision of the ECJ is valid not only in the case in which the question is raised, or in

the jurisdiction to which that Court belongs, but in all Member States. Therefore the ECJ is – *de facto* – a legislator setting principles that supplement the ordinary legislative instruments (typically Directives and Regulations) adopted by the Council and the Parliament. We shall see that while the provisions in the Treaties have remained substantially unchanged, the whole economic and legal system in which transport services are established and provided is radically different from how it was designed 60 years ago. For this reason throughout the whole presentation of EU transport law it will be necessary to refer continuously to the many and relevant decisions of the ECJ (and sometimes of the EU Court of First Instance).

The two ground-breaking decisions, from which the whole evolution of the system starts, both arise from French cases. Until the *French Seamen* judgment[1], the Member States objected to the EU intervening in the maritime and air sectors. In fact they based this position on the very clear provision of paragraph 2 of Article 84, which set the unanimity rule. In the case at question the Commission challenged the French law which established that all seamen aboard French merchant vessels had to be French nationals. According to the Commission this law was clearly against the principle of free movement of workers, while the French government argued that the principle did not apply to sea transport.

The ECJ took a different view: «Since transport is basically a service, it has been found necessary to provide a special system for it, taking into account the special aspects of this branch of activity» (par. 27). Far from excluding the application of the Treaty to these matters, Article 84 [*i.e.* the current Article 100(2)] provides only that the special provisions of the Title relating to transport shall not automatically apply to sea and air transport sectors. Whilst under that Article, therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title relating to the common transport policy, it remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty (paras. 31-32).

This first gap in the strict interpretation of Title IV was further enlarged in the *Nouvelles Frontières* judgment[2]. In this case *Nouvelles Frontières*, an alternative tour operator, had applied airplane rates not approved by the competent French ministry of aviation, incurring significant administrative fines. The issue was, therefore, if such control over rates was contrary

[1] ECJ, case 167/73, *Commission of the European Communities v French Republic*.
[2] ECJ, joined cases 209/84 to 213/84, *Ministère Public v. Lucas Asjes and Others.*

or not to Community competition rules. The ECJ, in its decision, moved further in providing an extremely limited interpretation in the exception set out in Title IV.

According to the ECJ, as regards air transport in particular, the wording the Treaty indicated merely to define the scope of the transport articles as regards different modes of transport, by distinguishing between rail, road and inland waterway [covered by the current Article 100 (1)], and sea and air transport [covered by the current Article 100 (2)] (para.43).

It is clear from the wording of Article 70 [*i.e.* the current Article 90] that the objectives of the Treaty, including that regarding the institution of a system ensuring that competition in the common market is not distorted, are equally applicable to the transport sector. Therefore, in the absence of any provision in the Treaty to the contrary, it must be concluded that the rules in the Treaty on competition are applicable to transport (para. 45) and that Article 84 [the current Article 100] of the Treaty cannot be interpreted as excluding air transport from the general rules of the Treaty, including the competition rules.

Going to the heart of the question, decisions by the International Association of Air Travel (IATA) which set air fares should be considered concerted practices contrary to competition law, even if validated by an administrative body.

The development of EU transport law should therefore be considered mainly in the light of these decisions which have had a much more substantial role than the specific provisions of the Treaty.

b) Transport, competition law and State aids in the EU. Basic notions

In this paragraph we shall consider some of the fundamental EU rules in the field of competition law and State aids, as applicable to transport services. One should point out that in the European tradition, for over two centuries, competition among enterprises and State have been are two sides of the same coin, and the importance each of them plays is very much dependant on political, economic and social factors which change with the passing of time. It is important to keep in mind that Title VII of the TFEU includes both aspects (articles from 101 to 109).

b.1. The economics of network industries

As competition law must operate in a factual economic context, and as it may vary in accordance with different kinds of businesses, one must keep in mind that transport is a typical network industry.

«Railway, electricity and telecommunication sectors, as network industries, possess some important features which strongly determine their organizational structure. (…) The main defining characteristics of these kinds of industries are the very high fixed costs of developing their infrastructure, decreasing average costs by increasing output as well as the existence of advantages which arise from the conjoint production of different goods inside one firm. The duplication of the system is extremely expensive and economically inefficient thus network industries normally have features of natural monopolies. Moreover, before the investment in infrastructure, retailers and users fully depend on decisions of the firm willing to invest in the network facilities. (…) Finally, network industries usually provide essential services and have certain non-economic obligations set by governments, due to the high importance of continuity of supply of their services». A further distinctive feature is that «Network industries have often both competitive and non-competitive segments»[3].

The transition from public monopolies to competitive markets has been a slow process. For almost a century, network industries were organized as State monopolies for several reasons (*e.g.*, there was a belief that such industries were natural monopolies, *i.e.* that there was only space for one undertaking in the market; exclusive rights were often granted in return for the monopolist to provide universal service; because of the importance of these industries from several viewpoints governments believed it was important to consolidate various actors in one firm, which they would control).

In the late 1970s, the basic tenets of the monopoly model started to be challenged by economists, lawyers, policy-makers, industrialists and consumer organizations. Finally, the European Commission realized that public monopolies, which were based on the granting of exclusive rights to national undertakings, were fundamentally at odds with its internal market policy[4].

[3] European Commission, *Annexes to the Communication on the implementation of the railway infrastructure package Directives ('First Railway Package'),* Commission staff working document {COM(2006) 189 final} SEC (2006) 530.

[4] D. Geradin, *Twenty years of liberalization of network industries in the European Union: Where do we go now?*, November 2006, available on-line at <http://ssrn.com/abstract=946796>[accessed on 17.12.2014].

Competitive and non-competitive segments in different network industries[5]

Sector	Activities which may be non-competitive	Activities which are potentially competitive
Railways	Track and signalling infrastructure	Operation of trains; Maintenance facilities
Electricity	High-voltage transmission of electricity; Local electricity distribution	Electricity generation; Electricity «retailing» or «marketing» activities; Trading of electricity or network capacity; Metering services
Postal Services	Consumer-to-consumer delivery of mail; mail in residential areas	Transportation of mail; Delivery of urgent mail or packages; etc.
Telecommunications	The provision of a ubiquitous network; Local residential telephony in rural areas	Long-distance services; Mobile services; Value-added services; Local loop services to high volume business customers, especially in high-density areas; Local loop services in areas served by broadband; etc.
Air services	Airport services such as take-off and landing slots	Aircraft operations; Maintenance facilities; Catering services
Maritime transport	Port facilities (in certain cities)	Pilot services, port services

[5] OECD, *Report on experiences with structural separation*, 2006, p.9.

During the last 30 years the liberalization process has generally been gradual and has followed procedures common to many governments in various parts of the world which have engaged in the liberalization of network industries (telecommunications, postal services, energy, and transport).

This liberalization process (first observed in the United States in the late 1970s and in the United Kingdom in the early 1980s) became a central preoccupation of the European Commission at the end of the 1980s, because of pressure by the UK which had significantly moved in this direction during the long Conservative government of Margaret Thatcher.

The result is that in the EU some sectors, such as telecommunications and air transport, are now fully liberalized. Others sectors, such as energy, postal services, and rail transport, are not yet fully liberalized.

The key elements of liberalization processes rest on three pillars:

1) In the first place liberalization rules had to remove the exclusive rights conferred upon State owned companies in a monopolistic position. Opening up the market to competition was progressive, to provide incumbents (*i.e.* the existing monopolists) with time to reorganize themselves and get ready for competition.

2) In the second place it was necessary to establish a regulatory framework consisting of : a) substantive obligations to maintain or expand universal service; b) rules that ensure third-party access to the network, accounting separation and cost-allocation rules; c) rules designed to reduce switching costs (*i.e.* the possibility for a final user to change service providers); d) Member States had to create independent regulatory authorities. From this point of view liberalization has meant the opposite of de-regulation: rather, in all sectors we have seen – and still see, even years since the market opened up – an enormous amount of laws, regulations, by-laws, technical rules and guidelines which have rendered the legal scenario highly complex. This remark is valid also in the transport sector.

3) Finally, liberalization requires the application of competition rules to be used in support of the market opening process, as we have seen in the ECJ *Nouvelles Frontières* decision. Liberalization directives provide for pro-competition rules designed to «create a level-playing field between incumbents and new entrants»[6].

Two further remarks are necessary:

1) While liberalization has been largely driven by European directives, the degree of market opening tends to vary, sometimes

[6] Geradin, cited at fn 5, p. 6.

significantly, between Member States.

2) While liberalization has been particularly fast in some sectors, notably air transport and telecommunications, it has been much slower in others (*e.g.*, the rail transport sector has proved to be particularly difficult to liberalize).

In network industries liberalization has generally taken the following steps:

1. Vertical unbundling. Network industries traditionally are vertically integrated, in the sense that both networks and services are owned and operated by the incumbent (the typical example is the ownership of the railway tracks and the provision of rail transport services). Liberalization processes support vertical unbundling: the approaches range from a relatively limited degree of separation, such as accounting separation or the separation of network and services into different legal entities, to a full economic separation whereby the integrated firmis divested of its network operations.

2. Breaking down of barriers between network industries. Under the monopolistic model, markets tended to be clearly divided across sectorial lines. Liberalization is meant to allow and encourage firms to compete across a range of network industries seeking opportunities for growth and synergies. In the transport sector the most obvious example is that of so-called multi-modal transport, enabling freight or passengers to move easily from one means of transport to another (*e.g.* from ship to rail; from airplane to train).

3. Progressive withdrawal of the State. Liberalization has meant in many cases the privatization of State owned industries, or the entry of private partners into public enterprises. And in those cases in which ownership has remained in public hands, governance and management of these companies have adapted to those of private companies competing in and for the market.

Notwithstanding the remarkable results of the liberalization process, much still remains to be done. The most significant task is that of removing the remaining bottlenecks such as the inadequate implementation of liberalization directives in some of the Member States and the anti-competitive behavior by incumbents.

b.2. Competition as an economic theory

Competition took its first steps as an economic theory in the 18th century in the work of one of the founding fathers of modern economic the-

ory, the Scotsman Adam Smith.

Generally speaking, nowadays, in economic theory competition is assumed to produce the best outcomes for society, fulfilling four functions:

1. Lower prices. Competing firms reduce their prices in order to attract and conquer new shares of the market.
2. Firms will offer a wider range of goods and services thereby catering for larger segments of clients or consumers.
3. Competition promotes technical and commercial innovation which is seen as giving the firm a significant advantage over competitors.
4. Finally competition, which implies a plurality of firms, promotes a better and wider distribution of wealth, not concentrated in only one enterprise or place.

In the current EU context, there is the idea that competition law should be directed mainly at the interests of consumers, who therefore become the benchmark in order to establish the pro-competitive or anti-competitive nature of a market.

Familiarity with a few basic economic concepts is essential in order to grasp the role that competition law plays in EU law:

- Perfect competition exists when there is a large number of buyers and sellers, all sharing perfect information, the product is homogeneous and there are no barriers to entry or exit (so that sellers can enter or leave the market freely); in such a market, the price never exceeds the marginal cost (allocative efficiency) and goods are produced at the lowest possible cost (productive efficiency). A typical example might retail shops or bars and restaurants. But also in more complex industries one finds a considerable amount of competition, such as in the automobile industry.
- Monopoly: is a market where there is only one seller. We have seen that in the history of transport services monopoly was the rule, and in some instances still is.
- Natural monopoly: is the feature of a sector where a single firm can produce output to supply the market at a lower cost than can two or more firms. Typically, it may occur in industries facing relatively high fixed costs; public utilities (such as water and gas suppliers)

are often thought to be natural monopolies.

- Oligopoly: is a market where there is a small number of leading firms. A good example is that of transcontinental flights where only a limited number of airlines are competing on the same routes.
- Market power. In economics, market power is defined as the ability to price above short-run marginal cost: in other words, firms are said to have market power if they, individually or collectively, are able to restrict output, increase prices above the competitive level and earn monopoly profits, without losing all customers, for a significant period of time. In these cases they are said to have an exclusionary power. In perfectly competitive markets, market participants have no market power.

Establishing market power is, however, a complex operation which first requires the relevant market to be defined in terms of substitutability or interchangeability, *i.e.* as a market consisting of products or services which are interchangeable with each other but not (or only to a limited extent) interchangeable with those outside it; interchangeability may be with other products or with the same products from elsewhere. In fact it is only by defining the relevant market that a firm's market power can be assessed. For example, in the transport sector the various flights, by different air companies, between the same point of departure and destination are substitutable or interchangeable. This is not the case if the routes are different, or if the means of transport takes considerably more time to reach its destination (*e.g.* ship vs. airplane).

Substitutability may present itself in two forms:

1) Demand substitution: when users of the product/service are able to switch to substitutes, *i.e.* a product or a service which the consumer considers to be substitute for another. Interchangeability is determined by measuring the cross-elasticity of demand through the SSNIP test (Small but Significant Non-transitory Increase in Price), in the sense that a firm cannot have a significant impact on the prevailing conditions of sale, such as price, if its customers can switch easily to available substitute products or to suppliers located elsewhere. If, instead, there are no immediate alternatives to the product/service one assumes that the firm may raise its prices. In the transport sector passengers may easily switch from one airline to another, and now, increasingly, with the development of high-speed trains,

choose between travel by air or by rail on medium distance routes.

2) Supply substitution: when a similar producer may easily supply a substitute product. Here the example is that of an airline which can offer new services on a route which is insufficiently served by its competitors.

A relevant market must be seen under two aspects:

1) The relevant product market which comprises all those products and/or services which are regarded as interchangeable by the consumer, by reason of the products' characteristics, their prices and their intended use.

2) The relevant geographic market which comprises the area in which the undertakings concerned are involved in the supply and demand of products/services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

In order to determine a firm's market power it is necessary also to consider barriers to entry and to expansion: a firm will not be able to charge monopoly prices if other firms can freely enter the market. Barriers to entry, therefore, create asymmetries between incumbent firms and potential entrants.

There are two kinds of barriers to entry:

1) Absolute incumbent advantages which occur when an incumbent has access to a factor of production that is denied to other parties on equivalent terms (*e.g.* access to a port or an airport)

2) Strategic entry barriers: arise from first-mover advantages in the presence of sunk costs and associated behaviour (*e.g.*: economies of scale). In these cases the incumbent has consolidated presence on the market which is extremely difficult to duplicate.

b.3. EU Competition Law

The EU competition rules are primarily contained in Title VII, Ch. 1 of the current TFEU (Treaty on the Functioning of the European Union), and in particular in Articles 101, 102 and 106 TFEU.

There are also numerous other general provisions such as the Mergers Regulation 139/2004 (EUMR) whose primary source are Articles 103 and 352 TFEU and the Implementation Regulation 1/2003 (whose primary source are Article 101 and 102).

In order to guarantee the effectiveness of competition rules there is a complex public enforcement system. At the EU level, competition rules are enforced mainly – but not exclusively – by the European Commission

and its Directorate General on Competition. The decisions of the Commission may be challenged in front of the EU General Court (formerly the Court of First Instance) and on appeal in front of the ECJ.

However it should be remembered that Member States have a duty to apply EU law directly and therefore competition rules can be enforced by the national courts, and before them by the National Competition Authorities (NCA), independent bodies which are present in all Member States.

Before entering into a detailed analysis of the main provisions of EU competition law it should be noted that they clearly represent the evolution of the first antitrust law, the Sherman Act, which was introduced in the USA in 1890 and which in its first two articles contains substantially the principles that are set out in Articles 101 and 102 TFEU, which now must be examined thoroughly, because of their general importance not only for transport law, but for the whole EU legal system.

b.3.1. Article 101 TFEU (Restrictive practices)

According to Article 101 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 81 of the Rome Treaty):

«1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.»

A few comments are necessary:

Article 101 concerns joint conduct and requires a collusion between independent undertakings (there are different types of collusion depending on the intensity and form in which they manifest themselves, *e.g.* tacit and explicit collusion). A typical example might be that of two airlines which decide not to compete against each other in different geographical areas leaving the field to its competitor.

Article 101 concerns both horizontal (among competitors: *e.g.* two or more airlines) and vertical (between firms operating at different stages of the production and supply chain; *e.g.* an airline and an airport) agreements, which have different effects on competition and a different legal treatment.

The exceptions set by paragraph 3 of Article 101 are not automatic («may be declared»). However, in order to simplify the procedure the EU with its Regulation 1/2003 has introduced a system of legal exceptions that will apply automatically without the need for an *ex ante* official decision to be adopted by the Commission or any other authority. The same Regulation states that compatibility of an agreement with Article 101(3) can be established not only by the Commission but also by National Competition Authorities (NCAs) and by the national courts.

One should note that at its beginning, the crucial purpose of antitrust in Europe was to enhance the common market and the market integration: this has led the European Commission to a more interventionist policy through a broad interpretation of Article 101(1). In more recent times, the

Commission has moved to consider consumer welfare as the benchmark against which agreements are tested. In this sense the 2004 Competition Guidelines are explicit: «The objective of Article 101 is to protect competition in the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources» (according to Article 169 TFEU the Union should «ensure a high level of consumer protection» taking into account also their economic interests).

b.3.2. Article 102 TFEU– Abuse of dominant position

According to Article 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 82 Rome Treaty):

«Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.»

The enforcement of the rule requires, therefore, two objective elements: firstly that the firm be in a «dominant position» and, secondly, that there is an «abuse» of that position. This implies, on the one hand, that a firm may legitimately hold a «dominant position», which is not per se prohibited. On the other hand that a firm which is not in a «dominant position» may legitimately engage in a conduct that would be considered abusive if it were «dominant».

While Article 101 deals with agreements among two or more firms (or by an association of firms), Article 102 deals with the unilateral conduct of firms holding a dominant position. Dominance is measured in the EU by

defining the market and assessing the degree of market power of the firm involved, considering market shares and barriers to entry and expansion.

A rule-of-thumb principle is that firms that hold less than 40% of the market are not in a dominant position, while above that quota there is a strong assumption that they are. However, in one sense or the other, this *prima facie* assessment can be challenged. This depends very much on the structure of the market, the number of competitors, and market power of each of them. For example if one firm retains 35% of the market, but the rest is fragmented in very small enterprises, the former might easily retain a dominant position. Just as in the case of one firm holding 41% of the market and another firm holding 39%, according to various factors, neither or both could be considered.

Article 102 applies to exclusionary and exploitative abuses, even if the Commission has paid more attention to the former than the latter (exploitative abuse: *e.g.*, charging of unfair prices). Typical examples of exclusionary abuses are: predatory pricing (when the dominant firm sells under its costs in order to weaken and possibly exclude a new entrant), exclusive dealing (when the dominant firm imposes on its clients an exclusivity clause), discount and rebates (in order to prevent clients from passing to competitors), tying contracts (for example contracts lasting many years to prevent passing to competition), refusal to supply (typically if clients buy also products from competitors).

According to EU law, firms enjoying a dominant position have a 'special responsibility' towards competitors and clients (up-stream and down-stream) which entails a duty to supply on a non-discriminatory basis its goods or services. In network industries this notion has evolved into the so-called essential facilities doctrine.

The concept of essential facility derives from the abusive conducts of 'refusal to deal' and 'discriminatory dealing' and involves: the refusal by an undertaking, which owns or controls a facility or an infrastructure to which competitors require access in order to provide a service to their customers, to allow that access; or, allowing access only on such unfavourable and discriminatory terms that new or existing competitors are placed at a competitive disadvantage so that they cannot compete effectively.

This concept has been widely adopted in the context of liberalized sectors such as transport where ports, airports, railway tracks and motorways are considered typical 'essential facilities' indispensable for the provision of transport services.

b.4. Services of general interest (SGI), Services of general economic interest (SGEI), public services, universal service

The European Treaties have represented an unprecedented innovation in the tradition of European States which historically have privileged protectionist and monopolistic economic policies. The opening towards economic freedoms and competition is therefore balanced in other, equally important (especially for transport services) provisions of the TFEU.

Article 106.2 (formerly Article 86) tries to indicate a compromise between the two tendencies: «Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union».

What are Services of General Interest (SGI) and Services of General Economic Interest (SGEI)?

Services of General Interest (SGIs): «In Union practice, the concept of SGI refers to services, whether 'economic' or not, that the Member States regard as being of general interest, and which they therefore subject to specific public service obligations. The concept covers services of general economic interest (SGEIs) that fall within the scope of the TFEU and non-economic services of general interest, which are not subject to the rules in the TFEU.»[7] Typical examples of SGIs are educational and health services which, generally speaking, are offered to all citizens on a gratuitous basis.

Services of General Economic Interest (SGEIs): «The term refers in general to services of an economic nature that the public authorities in the Member States at national, regional or local level, depending on the allocation of powers between them under national law, subject to specific public service obligations through an act of entrustment on the basis of a general-interest criterion and in order to ensure that the services are provided under conditions which are not necessarily the same as prevailing

[7] European Commission, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, Commission Staff Working Document, SEC(2010) 1545 final, p.15.

market conditions.»[8] As we shall see a considerable number of transport services are considered as SGEIs.

Their importance is clearly stated in one of the opening provisions of the TFEU:

«Given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions» (Article 14).

This means that SGEIs operate under a special legal regime in which non-economic principles (such as «social and territorial cohesion») tend to prevail over market economy and free competition rules, with the objective of reaching the goals with which the SGEIs have been entrusted. Typical examples are local and regional transport services, ferry-boat services to small or distant islands and small airports in peripheral areas.

Together with SGIs and SGEIs one must consider other two categories:

Public Services: are those services whose delivery is generally considered to be in the public interest and may be regulated and financed by the State; Public Service Obligations (PSOs): refer to the specific requirements that a public authority may impose on the provider of the service in order to ensure that certain public interest goals are met; the provision of public services comprises the compensation that public authorities may need to grant the providers for the performance of these tasks. In general SGEIs are or may be burdened with PSOs.

Universal service: is the obligation on a supplier of goods or services to provide them at an affordable cost and guaranteed quality to all who require them. Universal service was originally provided by the State monopolist. The most ancient and typical case is that of the postal service: letters can be received and send from any part of the country and not only the price of the service generally does not take into account distance, but is also below cost. With the liberalization of most network services universal service has generally been maintained as an obligation of the incumbent, which however claims compensation for losses incurred in when providing it.

[8] European Commission, cited at fn 7, p.16.

b.5. State aid

As we have already pointed out competition and State aid are two faces of the same coin that coexist in EU law and practice. Clearly, in the case of SGEIs, in order to enable them to accomplish their mission they must receive public funds or other forms of aid.

The main provision in this field is Article 107 (formerly Article 87):

«1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

aid to make good the damage caused by natural disasters or exceptional occurrences;

aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to

an extent that is contrary to the common interest;
(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.»

The structure of the norm is simple: para. 1 states a general prohibition; para. 2 lists the cases of automatic exemption; para. 3 the cases in which an exemption may be granted. As applied to transport we find aid to consumers, which falls under the *de minimis* rule (para. 2), in the case of subsidies for the purchase of new, less polluting, vehicles, and aid for the development (para. 3) of certain areas when special travel rates are applied to residents, with the difference in price being paid to the carrier. Or great infrastructural transport works, such as the East/West corridors approved and financed in part by the EU.

Clearly State aid does not concern only SGEIs but the whole economic sector, and generally speaking has been used, and still is used, mostly to help national industries which are in crisis. One can easily detect two opposite tensions: on the one hand the endeavour of EU institutions (mostly the Commission) to ensure and widen the principles of a free, open, and competitive common market. On the other governments which both at a national and a local level must pay heed to political and social stances which have their merits, but generally are not coherent with the rules of competition.

b.6. The financing of SGEIs and State aid

To balance these opposing tendencies, it must first be ascertained in what circumstances compensation for SGEIs is to be – or not to be – considered a State aid under Article 107.

This role has been taken by the ECJ which has established that not all State funding for public services which have an economic nature is to be regarded as State aid. According to the ruling of the ECJ in the 2003 *Altmark* case[9], there is no State aid where:

(1) The public service obligations are clearly defined;

(2) The parameters used to calculate the compensation are established in an objective and transparent manner;

(3) Compensation for the public service merely covers costs and a reasonable profit; and

(4) Where the undertaking is chosen by a public procurement procedure allowing for the selection of the tenderer capable of providing those

[9] ECJ, case C-280/00.

services at the least cost to the community, or the compensation is determined on the basis of an analysis of the costs of an average «well-run» undertaking in the sector concerned.

If any one of these cumulative conditions is not met, then the State intervention may be regarded as State aid and the European Commission has to be notified to make an assessment.

It is worthwhile noting that the case arose from a controversy related to the local bus service in the German region of Magdeburg, which had been entrusted for many years to Altmark. A new entrant had challenged the renewal of the licence to Altmark on the basis that it violated EU provisions on State aid.

However the four requirements set out in the decision have been widely applied in other sectors involving SGEIs. Subsequently the Commission issued a «State Aid Package on Services of General Economic Interest» (also known as post-Altmark Package) composed by the SGEI Decision[10] and the SGEI Framework[11] .

Recently the whole legislation has been recast and includes:

- Communication from the Commission (2012/C 8/02) on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest;
- Commission Decision of 20 December (2012/21/EU) on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest;
- Communication from the Commission (2012/C 8/03), European Union framework for State aid in the form of public service compensation (2011);
- Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest.

[10] European Commission, decision (EC) No 842/2005.

[11] European Commission, *Community framework for State aid in the form of public service compensation* (2005/C 297/04).

Frequently, faced with complaints, by the Commission or by competitors, concerning State aid to ailing companies Member States argue that the moneys provided are an investment. This happens invariably when a company is State owned and new funds, generally in the form of new capital or subscription of new shares, are provided. In order to verify the appropriateness of the defense the EU has introduced the so-called «Market Economy Investor Principle» (MEIP). The MEIP tests whether state aid exists when the State acts as a market participant.

According to the principle, funds that are provided on «terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market economy conditions» are deemed not to grant an advantage to the recipient. Thus such funds are not classified as State aid. In the transport sector the test has been repeatedly used to qualify as State aid significant funding by the Greek and the Italian governments in their failing airlines Olympic and Alitalia.

b.7. Mergers

A merger occurs when two or more independent entities unite. There are two ways this may happen. Either the two firms join and create a new entity, or one firm acquires control over another firm, which remains, from a legal point of view, autonomous but, from an economic point of view, its activities are and must be coordinated with those of its new ownership.

Competition law is concerned with and by mergers because they eliminate a competitor from the market and may contribute to creating a dominant position. Mergers may be horizontal: *e.g.* between two competing airlines. But they may also be non-horizontal when two firms that provide services in the same sector join: *e.g.* an airline and a groundhandling company.

Initially the Commission had to rely on what are now Articles 101 and 102 in order to control mergers. The European Union Merger Regulation (EUMR) was first introduced in 1989 and then was amended in 2004.

The EUMR applies to concentrations (which occur where two or more undertakings on a market merge their businesses, where there is a change in control of an undertaking or where a full-function joint venture is created) with a Community dimension.

If the concentration does not have a Community dimension, national legislation, and not EU law, applies.

The EUMR provides that, in general, concentrations with a Community dimension must be notified to the Commission and must be suspended until the Commission's final assessment, which must be addressed within a period of 25-35 working days. The Commission's assessment must determine whether or not the merger constitutes a significant impediment to effective competition.

c) The application of competition rules to transport: history and sources

One should note, however, that the application of competition rules to transport sector has been subject to particular conditions.

Originally, Regulation 17/62 implemented general procedural rules for the enforcement of EC competition rules, but it was extremely short-liven. A few months later the application of this Regulation was withdrawn from the transport sector by Regulation 141/62, which explicitly exempted from Regulation 17/62 the sectors of transport by rail, road and inland waterway, for a three-year period, and that of air transport indefinitely, stating that *«the distinctive features of transport»* justified such an exemption from Treaty competition rules).

The Commission stated that notwithstanding Regulation 141/62, Regulation 17/62 still applied to activities that are ancillary to air transport (including groundhandling services, computer reservation systems and computerized air cargo information systems[12]). But it took more than 20 years before effective competition was, gradually, introduced.

These are the main following steps:

i. Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway.

ii. Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport.

iii. Regulation 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector.

iv. Regulation 3976/87 on the application of Article 85(3) of

[12] See the *Olympic Airways* decision (85/121/EEC: Commission Decision of 23 January 1985 relating to a proceeding under Article 11 (5) of Council Regulation No 17 (IV/C/31.163).

the Treaty to certain categories of agreements and concerted practices in the air transport sector.

v. Regulation 1617/93 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tarifffs on scheduled air services and slot allocation at airports. Consequently, air, maritime and rail transport services were subject to special procedural rules contained in sector-specific implementing regulations (this applied until 1 May 2004, *i.e.* when Regulation 1/2003 came into force).

vi. Regulation (EC) No 1/2003 on the implementation of the rules on competition. The Regulation expressly states: «As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation.» It, therefore, repealed Regulation 141/62 and amended Regulations 1017/68, 4056/86, 3975/87 in order to suppress the specific procedural provisions they contain. Regulation 1/2003 has been subsequently amended by Regulation 411/2004 repealing Regulation 3975/87 and amending Regulations 3976/87 and 1/2003, in connection with air transport between the Community and third countries.

vii. Regulation 1419/2006 repealing Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation 1/2003 as regards the extension of its scope to include cabotage and international tramp services.

There has been, therefore, a progressive alignment of transport sector to the general rules applicable to all the other sectors. Nevertheless some specific regulations still have been implemented (in particular in the air transport sector), such as:

viii. Regulation 1459/2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports.

ix. Regulation 487/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.

d) Legal instruments applicable to SGEIs in air and land transport

	Sectoral State Aid Communications containing SGEI provisions	**Relevant Sectoral Legislation containing SGEI provisions** *
Land Transport	Guidelines on railway undertakings (Community guidelines on State Aid for railway undertakings, 2008)	Regulation on public passenger transport services by rail and by road [Regulation (EC) No 1370/2007]
Air Transport	*2014 Guidelines on State aid to airports and airlines replacing:* Guidelines on air transport (Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, 2005) State Aids in the aviation sector (Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the aviation sector, 1994)	Regulation on the operation of air Services [Regulation (EC) No 1008/2008] Ground-handling Directive (Council Directive 96/67/EC)

* See European Commission, *Reform of the EU State Aid Rules on Services of General Economic Interest,* COM(2011) 146 final.

FIRST MODULE
AIR TRANSPORT

SUMMARY: 1.1. Introduction - 1.2. Sources: i) International level; ii) Community level - 1.3. The application of competition law to air transport - 1.4. The liberalization packages - 1.5. The operation of air services: Regulation (EC) 1008/2008: i) Licensing; ii) Access to routes; iii) Pricing - 1.6. The regulation of air transport infrastructures; 1.6.1. Airport charges; 1.6.2. Ground handling; 1.6.3. Slots - 1.7. Computerized reservation systems - 1.8. Competition law: selected topics: 1.8.1. Market definition; 1.8.2. Anticompetitive practices: the case of travel agent incentive scheme - 1.8.3. Airline alliances and mergers: i) Types of alliances; ii) EU and US regime for alliance review; iii) Commitments; iv) Mergers - 1.9. Public intervention, SGEIs and State aid - 1.10. The external competence of the EU and the 'Open Skies' actions: i) The 'Open Skies' judgments; ii) Regulation 847/2004; iii) EU-US 'Open Skies' agreement. - 1.11 The 'Single European Sky' programme; 1.11.1 The framework (Regulation 549/04); 1.11.2 The provision of air navigation services (Regulation 550/04); 1.11.3. Coordination and integration (Regulation 551/04); 1.11.4 Interoperability of the ATM network (Regulation 552/04)

1.1. INTRODUCTION

Air transport represents a central sector for the EU economy and has traditionally played a fundamental role in the integration process and the creation of the Single Market. The importance of this sector is evident if one considers that, according to the data published by the European Commission, it involves more than 150 scheduled airlines, a network of over 400 airports, 60 air navigation service providers and more than 3 million employees in the European Union (EU); moreover, airlines and airports alone contribute more than 140 billion to the European GDP and about 800 million passengers departed from or arrived at EU airports in 2010.

Air transport has been traditionally a highly regulated industry, dominated by national flag carriers and state-owned airports. In this sector the role of the State has always been pervasive, at a rate of market failures deriving mainly from three factors: the strategic importance of the sector; barriers to entry; asymmetric information (see, *e.g.*, flight security) and negative externalities (*e.g.* noise pollution).

In recent years the air transport sector has been at the heart of a heated debate at an international level. In the last decade the almost full liberaliza-

tion of the sector has been strained by several factors, such as bankruptcies and attempts to rescue some national flag carriers, as well as the success of low cost operators, oil crises, terrorist attacks and natural events obstructing regularity of operations. Thus regulation of this sector is in continuous evolution. However it is a fact that European policy has profoundly transformed the air transport industry by creating the conditions for competitiveness in this sector: new routes and airports, greater choice, low prices and an increased overall quality of service, in addition to improved levels of security.

1.2. SOURCES

In order to understand the very complex regulation of air transport, two levels of supranational sources must be distinguished, *i.e.* the international and the Community level.

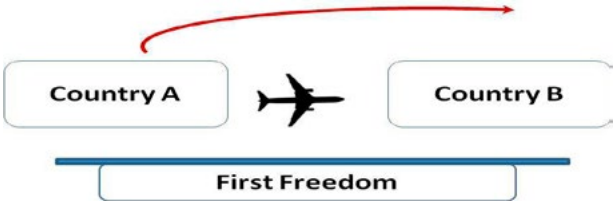
i) International level

The fundamental source for international air transport is the 1944 Chicago Convention: on that occasion, 54 nations met at Chicago to «make arrangements for the immediate establishment of provisional world air routes and services» and «to set up an interim council to collect, record and study data concerning international aviation and to make recommendations for its improvement». Article 1 reaffirms Article 1 of the Paris Convention of 1919, by recognising the pre-existing rule of customary international law, that «every State has complete and exclusive sovereignty over the airspace above its territory.»

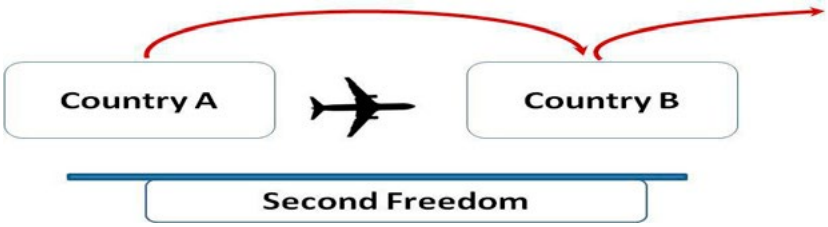
It gave birth to the International Civil Aviation Organization (ICAO), currently acting as a technical body within the United Nations system: it adopts international standards and recommended practices relating to international civil aviation including safety, security, and environmental protection.

The Chicago signatories also signed the 'Five Freedoms Agreement':

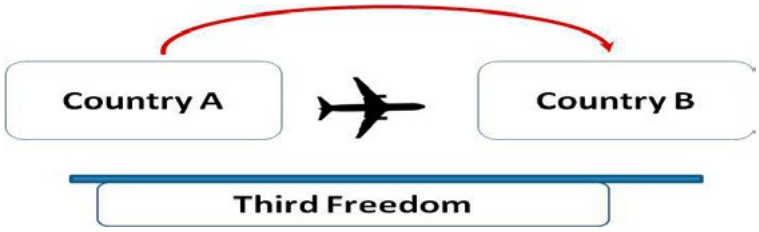
- First Freedom*:* the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to fly across its territory without landing;



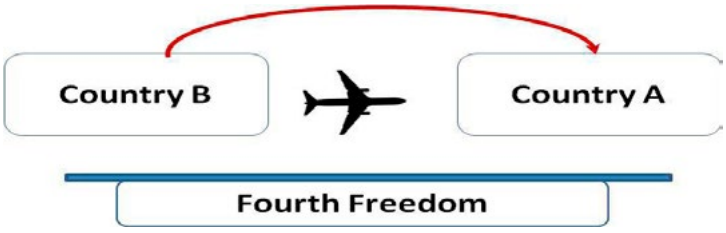
- Second Freedom: the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to land in its territory for non-traffic purposes (such as technical reasons);



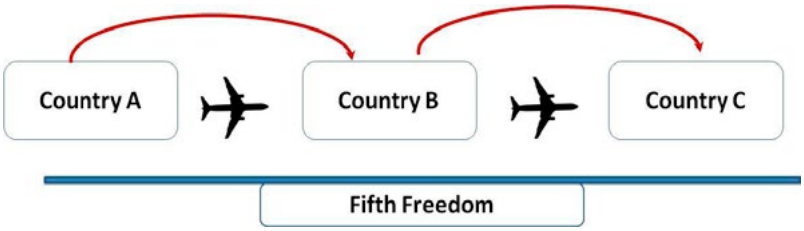
- Third Freedom: the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier;



- Fourth Freedom: the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier;



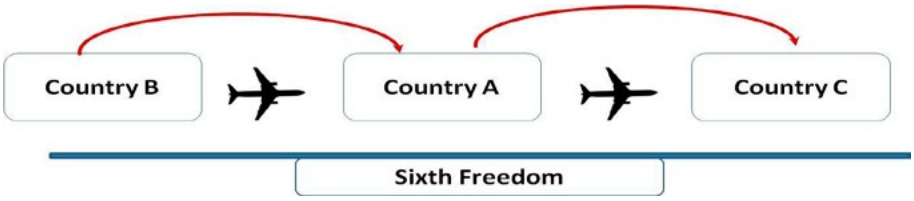
- Fifth Freedom: the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined for a third State.



Only these first five freedoms have been officially recognized as such by international treaty. Cabotage was not included in the list of formal freedoms. In international law, cabotage is a creation of maritime law, originally held to apply to a state reserving to itself the right to restrict all coastal navigation between two ports within its territory for the exclusive use of its own subjects with the object of protecting its own navigation. In the context of international air law, cabotage has been defined neutrally as «the carriage of passengers, cargo, and mail between two points within the territory of the same state for compensation or hire», but also peremptorily as «a sovereign right that has traditionally been reserved to the exclusive use of that state's national carriers»[1].

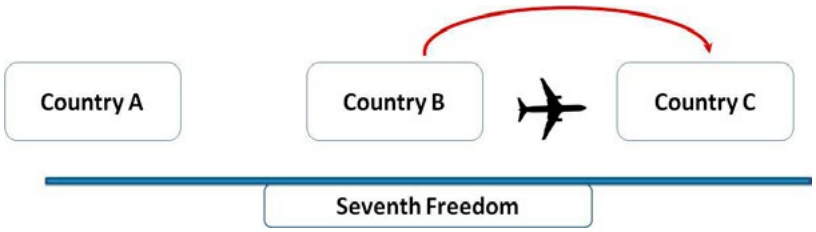
Several other freedoms have been added since the Chicago Convention and although most are not officially recognised under international treaties, they have been agreed by a number of countries. In detail:

- Sixth Freedom: the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other States (*i.e.* a combination of 3rd and 4th freedom rights, enabling an airline to carry revenue traffic between two foreign countries via its own State);

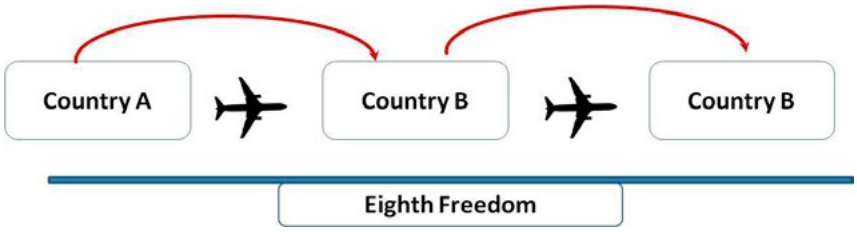


[1] B.F. Havel, *Beyond Open Skies. A New Regime for International Aviation*, Kluwer Law International, Alphen aan den Rijn 2009, p. 120.

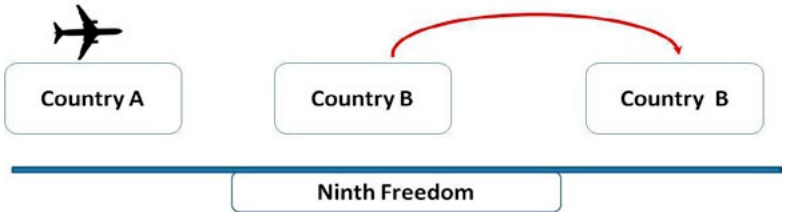
- Seventh Freedom: the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State;



- Eighth Freedom (also known as 'consecutive cabotage'): the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the Seventh Freedom Right) outside the territory of the granting State



- Ninth Freedom (also known as 'stand alone' cabotage): the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State.



Sometimes the 8th and 9th freedoms are considered together so that the freedoms of the air would be 8[2].

ii) Community level

Community objectives for the air transport sector have been achieved largely through a combination of important ECJ judgments concerning the application of primary EC Law and the gradual introduction of secondary air transport legislation. The first obstacle to achieving progress in the field of air transport was the EEC Treaty itself, which exempted air transport from the common rules (Article 84). In the years following the Treaty of Rome air transport was organized on the basis of the public regulation of conditions of business, rather than on free market competition. Traditionally air transport has been characterised by the existence of virtual national monopolies, market sharing and very high tariffs.

In the mid-1980s the central role of the transport sector in general was affirmed as a consequence of the full operation of competition and freedom of services principles and of some fundamental judgements of the ECJ (*e.g. Nouvelles Frontières* case).

The 1986 *Nouvelles Frontières* case was the turning point in the Commission's attempts to introduce liberalization into the air sector. In this case, the ECJ definitively confirmed that the competition rules of the EC Treaty applied to the air transport sector.

1.3. THE APPLICATION OF COMPETITION LAW TO AIR TRANSPORT

Regulation 17/62 implemented general procedural rules for the enforcement of EC competition rules in application of Articles 81 and 82 of the Rome Treaty. However, some months later, the transport sector was exempted from the application of Regulation 17/62 by Regulation 141/62.

According to Regulation 141/62, the distinctive features of transport justified such an exemption from Treaty competition rules. The Commission stated that notwithstanding Regulation 141/62, Regulation 17/62 applied to activities that are ancillary to air transport (ancillary activities include groundhandling services, computer reservation systems and computerized air cargo information systems).

However, it was clear that the competition rules could not be able to be

[2] Images are taken from <http://www.bangaloreaviation.com/2014/09/freedoms-air.html> [accessed on 17.12.2014].

enforced effectively without the introduction of some liberalization measures. By the mid-1980s, there was a relative institutional consensus that the time had come for liberalization and adoption of adequate implementing rules in the air transport sector. In this period the central role of the transport sector in general has been affirmed as a consequence of the full operation of competition and freedom of services principles and of the above-mentioned judgements of the ECJ. Since the *Nouvelles Frontières* case, there has been no doubt that air transport is subject to EU competition rules. However, for many years the air transport sector remained subject to specific competition implementing rules. This specific procedural regime terminated with the entry into force of Regulation 1/2003, repealing Regulation 141/62 and amending Regulations 1017/68, 4056/86, 3975/87. Then Regulation 411/2004 finally empowered the Commission to apply the competition enforcement rules to all air transport, also to the routes between the EU and third countries.

1.4. THE LIBERALIZATION PACKAGES

The aim of EU liberalization policy since its introduction in 1987 has been the gradual creation of a truly single market based upon the freedom to provide air services throughout the Community in accordance with a single set of rules.

The first package of 1987 comprised the following legislation: Reg 3975/87 (application of competition rules); Reg 3976/87 (block exemptions of airline cooperation agreements, computer reservation systems, and ground handling agreements); Directive 87/601 (air fares); Decision 87/602 (capacity sharing and market access). This package had only limited effects on air transport regulation; however it provided some relaxation of the provisions contained in many bilateral agreements between Member States that limited the ability of their airlines to compete.

The second package of 1990 was, like the first package, intended to be an intermediate step to be revised later and comprised Regulation 2343/90 (market access), Regulation 2342/90 (air fares) and Regulation 2344/90 (block exemptions).

The third package can be seen as a significant step forward for the liberalization of air transport within the Community and the most important and far-reaching of all three packages. It included the following legislation:

- common rules on the licensing of air carriers (Regulation 2407/92);

- rules on access for Community air carriers to intra-Community air routes (Regulation 2408/92);
- rules on fares and rates for intra-Community air services (Regulation 2409/92);

Under this package, which entered into force in January 1993, full application of the competition rules of the Treaty to the liberalized air transport market in accordance with Regulations 3975/87 and 3976/87 (as amended) was affirmed. It gradually introduced the freedom to provide services within the EU and in April 1997 the freedom to provide cabotage (*i.e.* the right for an air carrier of one Member State to operate a route within another Member State).

1.5. THE OPERATION OF AIR SERVICES: REGULATION (EC) 1008/2008

The current framework regulating the operation of air services in the EU is governed by Regulation (EC) 1008/2008, which has repealed Regulations (EEC) 2407/92, 2408/92 and 2409/92, introducing a number of substantial changes to previous rules. Three main objects of the current Regulation may be identified: i) the licensing of Community air carriers; ii) the right of Community air carriers to operate intra-Community air services; and iii) pricing.

With regard to these objects, the key points of the Regulation, as set out in the Preamble, are the establishment of more stringent monitoring of compliance with the requirements of the operating licences of all Community air carriers and of their financial situation, together with a clear definition of the conditions under which public service obligations may be imposed. Moreover, Regulation 1008/2008 stresses that customers should have access to all air fares and air rates irrespective of their place of residence within the Community or their nationality and irrespective of the place of establishment of the travel agents within the Community. As for pricing, the underlying principle is that customers should be able to compare effectively the prices for air services of different airlines: this means that the final price to be paid by the customer for air services originating in the Community should at all times be indicated, inclusive of all taxes, charges and fees.

i) Licensing

The essential precondition for a carrier to operate air services in the EU is the holding of an operating licence, which is defined by the Regulation as an authorisation granted by the competent licensing authority to an undertaking, permitting it to provide air services as stated in the operating licence itself [see Article 2(1) and Article 3(1)]. An operating licence is not required for air services performed by non-power-driven aircraft and/or ultralight power-driven aircraft and for local flights.

Article 4 sets out the conditions required of an undertaking for it to be granted the operating licence, *i.e.*:

> *«(a) its principal place of business is located in that Member State;*
> *(b) it holds a valid AOC* [air operator certificate, *i.e.* a certificate delivered to an undertaking confirming that the operator has the professional ability and organization to ensure the safety of operations specified in the certificate, as provided in the relevant provisions of Community or national law, as applicable] *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;*
> *(c) it has one or more aircraft at its disposal through ownership or a dry lease agreement;*
> *(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;*
> *(e) its company structure allows the competent licensing authority to implement the provisions of this Chapter;*
> *(f) Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party;*
> *(g) it meets the financial conditions specified in Article 5;*
> *(h) it complies with the insurance requirements specified in Article 11 and in Regulation (EC) No 785/2004; and*
> *(i) it complies with the provisions on good repute as specified in Article 7.»*

It is worth specifying that the condition of effective control sub f) requires the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:

(a) the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking (Article 2).

As mentioned before, the financial condition of the carrier is considered a crucial element. Indeed, Article 5 specifies that each applicant is required to submit a business plan for at least the first three years of operation and the competent authority is required to assess if: i) the undertaking can meet at any time its actual and potential obligations, established under realistic assumptions, for a period of 24 months from the start of operations; and ii) it can meet its fixed and operational costs, incurred by operations according to its business plan and established under realistic assumptions, for a period of three months from the start of operations, without taking into account any income from its operations.

The requirements fixed by the Regulation are subject to monitoring by the competent licensing authority, the validity of the operating licence depending on the air carrier's compliance with them. Air carriers are required to notify the licensing authority: i) in advance of any plans for the operation of a new air service to a continent or a world region not previously served, or any other substantial change in the scale of their activities, including, but not limited to, changes in the type or number of aircraft used; ii) in advance of any intended mergers or acquisitions; and iii) within 14 days of any change in the ownership of any single shareholding which represents 10% or more of the total shareholding of the Community air carrier (or of its parent or ultimate holding company). In these cases, carriers - in addition to the duty to communicate their audited accounts - may be required to submit a revised business plan (Article 8).

Negative assessment by the competent authority occurs if it finds that the air carrier is unlikely to meet its actual and potential obligations for a 12-month period: in this case, it can suspend or revoke the operating licence, however it can consider granting a temporary licence, not exceeding 12 months. The authority must without delay make an in-depth assessment of the financial situation of an air carrier if there are clear indications that financial problems exist or when insolvency or similar proceedings are opened against it, and review the status of the operating licence within 3 months.

Article 9 regulates suspension and revocation of the licence, which can occur:

i) if the aforementioned audited accounts are not provided;
ii) if the Community air carrier knowingly or recklessly furnishes the competent licensing authority with false information on an important point;
iii) if an air carrier's AOC is suspended or withdrawn;
iv) if such a carrier no longer satisfies the requirements relating to good repute.

In all the cases concerning operating licenses, the competent authority is required to take a decision on an application as soon as possible, and not later than three months after all the necessary information has been submitted.

Regulation 1008/2008 contains also some important provisions with regard to the use of the aircrafts, which must be included in the national register (Article 12). In particular Article 13 contains an important distinction between dry and wet lease agreements which can be used by carriers:

- dry lease agreement: an agreement between undertakings pursuant to which the aircraft is operated under the AOC of the lessee (in this case only the aircraft is leased);
- wet lease agreement: an agreement between air carriers pursuant to which the aircraft is operated under the AOC of the lessor (it includes pilots and in-flight personnel).

Without prejudice to Article 4(c) (under which licensing requires an airline to have one or more aircraft at its disposal through ownership or a dry lease agreement), Article 13 provides that a Community air carrier may have one or more aircraft at its disposal through a dry or wet lease agreement. Community air carriers may freely operate wet-leased aircraft registered within the Community except where this would lead to endangering safety. Prior approval is required in the following cases:

- a dry lease agreement to which a Community air carrier is a party or a wet lease agreement under which the Community air carrier is the lessee of the wet-leased aircraft is subject to prior approval in accordance with applicable Community or national law on aviation safety;
- a Community air carrier wet leasing aircraft registered in a third country from another undertaking must obtain

> prior approval for the operation from the competent licensing authority, which may grant it if the Community air carrier demonstrates that all safety standards equivalent to those imposed by Community or national law are met, and one of the following conditions is fulfilled:
> *«(i) the Community air carrier justifies such leasing on the basis of exceptional needs, in which case an approval may be granted for a period of up to seven months that may be renewed once for a further period of up to seven months;*
> *(ii) the Community air carrier demonstrates that the leasing is necessary to satisfy seasonal capacity needs, which cannot reasonably be satisfied through leasing aircraft registered within the Community, in which case the approval may be renewed; or*
> *(iii) the Community air carrier demonstrates that the leasing is necessary to overcome operational difficulties and it is not possible or reasonable to lease aircraft registered within the Community, in which case the approval shall be of limited duration strictly necessary for overcoming the difficulties.»*

If there is no reciprocity as regards wet leasing between the Member State concerned or the Community and the third country where the wet-leased aircraft is registered, the competent authority may refuse the approval.

ii) Access to routes

Article 15 contains the fundamental principle of access to intra-Community air services, *i.e.* that Community air carriers are authorised to operate Community air services and Member States cannot subject their operation to any permit or authorisation. Nor can such operating freedom be restricted by bilateral agreements between Member States. A direct consequence of this principle is that Community air carriers are permitted to combine air services and to enter into code sharing arrangements (see para. 1.8.3) when operating intra-Community air services and without prejudice to the Community competition rules, furthermore they must be allowed by Member States to combine air services and to enter into code sharing 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. In the latter case, restrictions may be imposed by the Member State concerned 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 itself: nevertheless such restrictions must not reduce competition, must be non-discriminatory between Community air carriers and must not be more restrictive than necessary.

Another important provision is Article 16 concerning public service obligations (PSOs) that can be imposed by a Member State in respect of scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory, any such route being considered vital for the economic and social development of the region which the airport serves. The imposition of a PSO is allowed only to the extent necessary to ensure on that route the minimum provision of scheduled air services satisfying fixed standards (to be set in a transparent and non-discriminatory way) of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest. Article 16 provides also that in instances where other modes of transport cannot ensure an uninterrupted service with at least two daily frequencies, the Member States concerned may include in the public service obligation the requirement that any Community air carrier intending to operate the route gives a guarantee that it will operate the route for a certain period. Specific criteria for the assessment of the necessity and the adequacy of a PSO are indicated by the Regulation, *i.e.*:

«(a) the proportionality between the obligation and the economic development needs of the region concerned;

(b) the possibility of having recourse to other modes of transport and the ability of such modes to meet the transport needs under consideration, in particular when existing rail services serve the envisaged route with a travel time of less than three hours and with sufficient frequencies, connections and suitable timings;

(c) the air fares and conditions which can be quoted to users;

(d) the combined effect of all air carriers operating or intending to operate on the route.»

When a Member State wishes to impose a PSO, it is required to inform the Commission, the other Member States concerned, the airports concerned and the air carriers operating the route in question. Then the Commission must publish a detailed information notice in the Official

Journal of the European Union.

When a PSO has been imposed, any other Community air carrier must at any time be allowed to commence scheduled air services meeting all the requirements of the PSO. If this does not occur, the Member State concerned may limit access to the scheduled air services on that route to only one Community air carrier for a period of up to four years (five years in the case of an airport serving an outermost region), after which the situation must be reviewed.

The right to operate the services on a PSO route must be offered by public tender (Article 17). The invitation to tender must cover, *inter alia,* objective and transparent parameters on the basis of which compensation, if any, for the discharging of the PSO must be calculated.

Regulation 1008/2008 also specifies that the exercise of traffic rights (*i.e.* the rights to operate an air service between two Community airports) must be subject to published Community, national, regional and local operational rules relating to safety, security, the protection of the environment and the allocation of slots. Particular cases are also considered, as it is provided that under certain conditions fixed by the Regulation, a Member State may regulate the distribution of air traffic between airports serving the same city or conurbation linked one to another and may limit or refuse the exercise of traffic rights to deal with serious environmental problems or in the case of an emergency (Articles 19-21).

iii) Pricing

The fundamental principle affirmed by Articles 22-24 of Regulation 1008/2008 is the freedom for Community air carriers to set air fares (the prices to be paid to air carriers or their agents or other ticket sellers for the carriage of passengers on air services and any conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services) and air rates (to be paid for the carriage of cargo) for intra-Community air services. This implies that no exceptions – apart from the case of a PSO- or restrictions or discriminations on the grounds of nationality or identity of carriers provided by Member States, including with respect to routes to third countries, are allowed.

Under Article 23, air rates and fares available to the general public must include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State. The final price to be paid must at all times be

indicated and must include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. At least the following must be specified:

(a) air fare or air rate;
(b) taxes;
(c) airport charges; and
(d) other charges, surcharges or fees, such as those related to security or fuel.

The presence of optional price supplements must be also adequately signalled: this means that they must be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an «opt-in» basis.

Except in the case of a PSO, discrimination in access to fares between passengers or between users of the cargo service on the basis of their place of residence or their nationality within the Community is prohibited.

These provisions of Regulation 1008/2008 must be read in conjunction with the Unfair Commercial Practices Directive (2005/29/EC), according to which failure to provide consumers with clear, appropriate and complete information relating to the price and any other cost associated with the provision of a service may constitute an unfair practice. In compliance with the Directive, airlines must provide consumers with the information they need in a timely and clear manner in order to make an informed choice.

As clarified by CPC Report on Airlines' Taxes, Fees, Charges, and Surcharges, in line with Article 6 of the UCP Directive the following actions can be regarded as misleading:

- incorrect calculation of fees and taxes in the price of the flight ticket;
- presenting costs which are contributing to the air carriers' general income as taxes and fees imposed by other bodies.

Moreover, according to Article 7 of the Directive the following actions by airlines can be regarded as misleading omissions:

- the final price of the flight ticket does not include all the unavoidable taxes, charges and fees which are to be paid by the consumer (*e.g.* booking fee or fuel surcharge);
- no clear and easily accessible information is provided on

the refundability of charges, fees and taxes.

Thus, according to EU law, clear information about the final price of a service should be provided from the beginning of the reservation process. All taxes and fees should be correctly named so as not to mislead the consumer by implying that charges imposed by the airline are in fact imposed by other bodies (*e.g.* airports or governments). It is also a requirement that all fees should be correctly calculated. Finally, the airline should make it clear which costs will be reimbursed in case of the non-use of a flight ticket.

Materials: case C-112/11, ebookers.com Deutschland GmbH; case c-487/12, Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia

1.6. THE REGULATION OF AIR TRANSPORT INFRASTRUCTURES

1.6.1 Airport charges

There are a number of activities connected to the operation of air services. Among them, airports offer facilities and services, the cost of which is generally reflected in the airport charges.

Airport charges play a key role in the functioning of the aviation sector in the relationships between airport managing bodies and airport users, specifically airlines. Nevertheless they did not become the object of a specific piece of legislation until 2009 in Directive 2009/12/EC, establishing common principles for the levying of these charges at EU airports. Before this Directive came into force, these levies were subject only to national legislations, so that there were significant differences among Member States.

Materials: case C-163/99, Portuguese Republic v Commission

Practice has demonstrated the strategic role of airport charges and the critical aspects related to their legal qualification and to public funding policies of infrastructures. These elements have stimulated the adoption of a legislation at EU level regulating the essential features of airport charges and the way they are set, as in the absence of such a framework, basic requirements in the relationship between airport managing bodies and airport users are considered at risk by EU authorities (Recital 2).

First of all, an airport charge is defined by the Directive 2009/12/EC as a levy collected for the benefit of the airport managing body and paid by the airport users (*i.e.* any natural or legal person responsible for the carriage of passengers, mail and/or freight by air to or from the airport concerned) for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight [Article 2(4)]. Recital 1 specifies that airport managing bodies providing facilities and services for which airport charges are levied should operate on a cost-efficient basis.

The airport managing body is defined as the body having as its objective the administration and management of the airport or airport network infrastructures (*i.e.* a group of airports duly designated as such by the Member State and operated by the same airport managing body) and the coordination and control of the activities of the different operators present in the airports or airport network concerned.

It is important to clarify that airport charges do not include: i) the charges collected for the remuneration of en route and terminal air navigation services in accordance with Regulation (EC) No 1794/2006; ii) the charges collected for the remuneration of ground handling services regulated by the Directive 96/67/EC; iii) the charges levied for the funding of assistance to disabled passengers and passengers with reduced mobility referred to in Regulation (EC) No 1107/2006. However the Directive is without prejudice to the right of each Member State to apply additional regulatory measures that are not incompatible with such a framework or other relevant provisions of EU law with regard to any airport managing body located in its territory or the possibility for a Member State to determine if and to what extent revenues from an airport's commercial activities may be taken into account in establishing airport charges (including *e.g.* economic oversight measures, such as the approval of charging systems and/or the level of charges, including incentive-based charging methods or price cap regulation).

Another important point is that the Directive does not apply to all EU airports, but only to two categories: 1) to any airport located in a territory subject to the Treaty and open to commercial traffic whose annual traffic is over five million passenger movements; 2) to the airport with the highest passenger movement in each Member State. These requirements have been the object of many discussions at EU level. With regard to the former, initially the Commission would have set a lower threshold (1 million

passenger movement or 25000 tonnes of freight), but many airport managing bodies and low cost airlines strenuously opposed this: the reasoning behind the setting of a minimum size is that the management and funding of small airports are not considered to call for the application of a common framework. With regard to the latter requirement, it states that in a Member State where no airport reaches the minimum size for the application of the Directive, the airport with the highest passenger movements enjoys a privileged position as a point of entry to that Member State: for this reason it is necessary to apply the Directive to that airport in order to guarantee respect for certain basic principles in the relationship between the airport managing body and the airport users, in particular with regard to transparency of charges and non-discrimination among airport users. Recently the ECJ confirmed the legitimacy of this second requirement in the judgment of 12 May 2011, *Grand Duchy of Luxembourg v European Parliament and Council of the European Union*[3]: the Court dismissed the action of the Grand Duchy of Luxembourg by which it requested the Court to annul Directive 2009/12/EC, on the ground that the aforementioned second requirement would constitute an infringement of the principles of equal treatment, proportionality and subsidiarity.

Materials: case C-176/09, Grand Duchy of Luxembourg v European Parliament and Council of the European Union

As a founding principle, Article 3 of the Directive provides that Member States must ensure that airport charges do not discriminate among airport users (but the modulation of airport charges for issues of public and general interest, including environmental issues, on the basis of relevant, objective and transparent criteria, is allowed). To that end, the Directive provides for the establishment by the managing body of a compulsory procedure for regular consultation between the airport managing body itself and airport users (or the representatives or associations of airport users) with respect to the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. Such a consultation procedure, taking place at least once a year, unless agreed otherwise, is regulated by Article 6, requiring Member States to ensure that, wherever possible, changes to the system or the level of airport

[3] ECJ, case C-176/09.

charges are made with agreement between the airport managing body and the airport users: more specifically, the airport managing body must submit any proposal to modify the system or the level of airport charges to the airport users, together with the reasons for the proposed changes, no later than four months before they enter into force, unless there are exceptional circumstances which need to be justified to airport users. The airport managing body must normally publish its decision or recommendation no later than two months before its entry into force and justify its decision with regard to the views of the airport users in the event that no agreement on the proposed changes is reached.

In this case, in addition to the consultation, the Directive also provides a claim procedure, through which either party may seek the intervention of an independent supervisory authority, established by the same Directive at Article 11: a modification of airport charges decided upon by the airport managing body must, if brought before the independent supervisory authority, not take effect until that authority has released its decision, for which (at least in the form of an interim decision) a deadline of 4 months is set. These provisions do not apply in two cases, i.e: i) if there is a mandatory procedure under national law whereby airport charges, or their maximum level, must be determined or approved by the independent supervisory authority; ii) if there is a mandatory procedure under national law whereby the independent supervisory authority examines, on a regular basis or in response to requests from interested parties, whether such airports are subject to effective competition (in this case, whenever warranted on the basis of such an examination, the Member State must decide that the airport charges, or their maximum level, are to be determined or approved by the independent supervisory authority).

Another founding principle of the Directive 2009/12/EC is transparency. To that end, it states that on every occasion when consultations are to be held, information on the components serving as a basis for determining the system or the level of all charges levied at each airport must be provided by the airport managing body to airport users. Minimum information to be provided includes: *«(a) a list of the various services and infrastructure provided in return for the airport charge levied; (b) the methodology used for setting airport charges; (c) the overall cost structure with regard to the facilities and services which airport charges relate to; (d) the revenue of the different charges and the total cost of the services covered by them; (e) any financing from public authorities of the facilities and services which airport charges relate to;*

(f) forecasts of the situation at the airport as regards the charges, traffic growth and proposed investments; (g) the actual use of airport infrastructure and equipment over a given period; and (h) the predicted outcome of any major proposed investments in terms of their effects on airport capacity» (Article 7).

Also airport users are required to submit information to the airport managing body before every consultation on: (a) forecasts as regards traffic; (b) forecasts as to the composition and envisaged use of their fleet; (c) their development projects at the airport concerned; and (d) their requirements at the airport concerned.

As mentioned above, the Directive provides the establishment by Member States of an independent supervisory authority responsible to ensure the correct application of the new legislation (Article 11). In order to guarantee its independence, the authority must be legally distinct from and functionally independent of any airport managing body and air carrier and it must exercise its powers impartially and transparently. For this reason, Member States that retain ownership of airports, airport managing bodies or air carriers or control of airport managing bodies or air carriers are required to ensure that the functions relating to such ownership or control are not vested in the independent supervisory authority. The funding mechanism set by Member States for the supervisory authority may include levying a charge on airport users and airport managing bodies.

A fundamental role is played by the independent authority in the consultation procedure regulated by Article 6. Article 11 also specifies that in respect of disagreements over a decision on airport charges taken by the airport managing body, measures are taken to establish a procedure for resolving such disagreements between the airport managing body and the airport users, to determine the conditions under which a disagreement may be brought to the independent supervisory authority and the criteria against which disagreements will be assessed for resolution. When undertaking an investigation into the justification for the modification of the system or the level of airport charges, the independent supervisory authority must have access to necessary information from the parties concerned and must consult the parties concerned. The authority is required to issue a final decision as soon as possible (in any case within 4 months of the matter being brought before it, being an extension of 2 months admitted only in exceptional and duly justified cases). The decisions of the independent supervisory authority must have a binding effect, without prejudice to parliamentary or judicial review, as applicable in the Member States.

Other relevant provisions of the Directive 2009/12/EC may be summarized as follows:

- Article 8 (New infrastructure): the airport managing body is required to consult with airport users before plans for new infrastructure projects are finalised.
- Article 9 (Quality standards): Member States must take the necessary measures to allow the airport managing body and the representatives or associations of airport users at the airport to enter into negotiations with a view to concluding a service level agreement with regard to the quality of service provided at the airport. Any such service level agreement must determine the level of the service to be provided by the airport managing body which takes into account the actual system or the level of airport charges and the level of service to which airport users are entitled in return for airport charges.
- Article 10 (Differentiation of services): the airport managing body is allowed to vary the quality and scope of particular airport services, terminals or parts of terminals, with the aim of providing tailored services or a dedicated terminal or part of a terminal. In these cases airport managing bodies may set differentiated airport charges.

To conclude, it is worth noting that, although the deadline for transposing the Directive was set on 15 March 2011, some Member States (namely Austria, Germany, Italy and Luxembourg) had failed to respect the deadline.

1.6.2 Ground handling

Among the activities related to air transport, ground handling services have a primary role as they are essential to the proper functioning of air transport. In fact the Community provided specific legislation in 1996 when it adopted Directive 96/67/EC with the aim of achieving the gradual opening-up of access to the ground handling market, which had been so far subject mainly to the power of the airport managing bodies, so as to help reduce the operating costs of air carriers and improve the quality of service.

Generally, ground handling services are all the activities carried out at the airport to enable airlines to carry out air transport activities (*e.g.* taxi guidance, cleaning, refuelling, baggage services, etc.) and a distinction may be drawn between air-side services (*e.g.*: ramp handling, fuelling and de-

fuelling operations, aircraft maintenance, catering services) and land-side services (passenger-related services such as ticketing, baggage handling at check-in desks, etc.) provided to airport users at airports.

Airport operators, airlines and independent ground handling companies are the most important stakeholders in ground handling markets. Generally, airport operators provide the infrastructure and in some cases they provide ground handling services to airlines. Airlines are involved as clients for ground handling services, but some carriers, especially network carriers, supply themselves as self-handler, mostly at their home base. At the same time, most self-handling airlines provide ground handling services to other airport users as a third party supplier. Self-handling is defined as a situation in which an airport user directly provides for himself one or more categories of ground handling services and concludes no contract of any description with a third party for the provision of such services (for the purposes of this definition, among themselves airport users must not be deemed to be third parties where one holds a majority holding in the other, or a single body has a majority holding in each). Moreover, independent ground handling companies may operate in this business.

In detail, the Annex to the Directive lists ground handling services as follows:

> *« 1. Ground administration and supervision comprise: 1.1. representation and liaison services with local authorities or any other entity, disbursements on behalf of the airport user and provision of office space for its representatives; 1.2. load control, messaging and telecommunications; 1.3. handling, storage and administration of unit load devices; 1.4. any other supervision services before, during or after the flight and any other administrative service requested by the airport user.*
> *2. Passenger handling comprises any kind of assistance to arriving, departing, transfer or transit passengers, including checking tickets and travel documents, registering baggage and carrying it to the sorting area.*
> *3. Baggage handling comprises handling baggage in the sorting area, sorting it, preparing it for departure, loading it on to and unloading it from the devices designed to move it from the aircraft to the sorting area and vice versa, as well as transporting baggage from the sorting area to the reclaim area.*
> *4. Freight and mail handling comprises: 4.1. for freight: phys-*

ical handling of export, transfer and import freight, handling of related documents, customs procedures and implementation of any security procedure agreed between the parties or required by the circumstances; 4.2. for mail: physical handling of incoming and outgoing mail, handling of related documents and implementation of any security procedure agreed between the parties or required by the circumstances.
5. Ramp handling comprises: 5.1. marshalling the aircraft on the ground at arrival and departure (provided that these services are not provided by the air traffic service); 5.2. assistance to aircraft packing and provision of suitable devices (provided that these services are not provided by the air traffic service); 5.3. communication between the aircraft and the air-side supplier of services (provided that these services are not provided by the air traffic service); 5.4. the loading and unloading of the aircraft, including the provision and operation of suitable means, as well as the transport of crew and passengers between the aircraft and the terminal, and baggage transport between the aircraft and the terminal; 5.5. the provision and operation of appropriate units for engine starting; 5.6. the moving of the aircraft at arrival and departure, as well as the provision and operation of suitable devices; 5.7. the transport, loading on to and unloading from the aircraft of food and beverages.
6. Aircraft services comprise: 6.1. the external and internal cleaning of the aircraft, and the toilet and water services; 6.2. the cooling and heating of the cabin, the removal of snow and ice, the de-icing of the aircraft; 6.3. the rearrangement of the cabin with suitable cabin equipment, the storage of this equipment.
7. Fuel and oil handling comprises: 7.1. the organization and execution of fuelling and defuelling operations, including the storage of fuel and the control of the quality and quantity of fuel deliveries; 7.2. the replenishing of oil and other fluids.
8. Aircraft maintenance comprises: 8.1. routine services performed before flight; 8.2. non-routine services requested by the airport user; 8.3. the provision and administration of spare parts and suitable equipment; 8.4. the request for or reserva-

tion of a suitable parking and/or hangar space.
9. Flight operations and crew administration comprise: 9.1. preparation of the flight at the departure airport or at any other point; 9.2. in-flight assistance, including re-dispatching if needed; 9.3. post-flight activities; 9.4. crew administration.
10. Surface transport comprises: 10.1. the organization and execution of crew, passenger, baggage, freight and mail transport between different terminals of the same airport, but excluding the same transport between the aircraft and any other point within the perimeter of the same airport; 10.2. any special transport requested by the airport user.
11. Catering services comprise: 11.1. liaison with suppliers and administrative management; 11.2. storage of food and beverages and of the equipment needed for their preparation; 11.3. cleaning of this equipment; 11.4. preparation and delivery of equipment as well as of bar and food supplies.»

The Directive makes an important distinction between two types of ground handling services: (1) the categories of services to which, at airports reaching a certain threshold, free access exists for suppliers of ground handling services and for which airport users are free to perform self-handling; and (2) the limited number of specific categories of ground handling services (generally also referred to as restricted services and including baggage handling, ramp handling, fuel and oil handling, freight and mail handling as regards the physical handling of freight and mail between the air terminal and the aircraft) which may, at certain airports, be reserved for a limited number of ground handling service suppliers and self-handling users respectively.

In detail, it provides for a gradual opening of the market initially through a different implementation schedule according to whether self-handling services or third party handling services are involved. By January 2001, the Directive applies to any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic, whose annual traffic is not less than 2 million passenger movements or 50,000 tonnes of freight, without prejudice of the following specific provisions:

- freedom of self-handling (Article 7): it applies to any airport regardless of its volume of traffic. However, for the following four categories of ground handling services Member States may reserve the right to self-handle to no fewer than two airport users at airports with

more than 1 million passenger movements or 25,000 tonnes of freight per annum: baggage handling; ramp handling; fuel and oil handling; and freight and mail handling. As an exemption, at an airport where specific constraints of available space or capacity make it impossible to open up the market and/or implement self-handling to the degree provided for in the Directive, the Member State in question may decide to reserve self-handling to a limited number of airport users for services other than the four above-mentioned categories, whereas for these four categories, self-handling may be banned or restricted to a single airport user (Article 9);

- freedom of third party handling (Article 6): it applies to airports whose annual traffic is not less than 3 million passenger movements or 75,000 tonnes of freight, or whose traffic has been not less than 2 million passenger movements or 50,000 tonnes of freight during the six-month period prior to 1 April or 1 October of the preceding year. For the same four categories of ground handling services noted above, Member States may limit the number of suppliers to no fewer than two for each category. However, at least one of the authorized suppliers may not be directly or indirectly controlled by: i) the managing body of the airport, ii) any airport user who has carried more than 25% of the passengers or freight recorded at the airport during the year preceding that in which those suppliers were selected, iii) a body controlling or controlled directly or indirectly by that managing body or any such user. At an airport where specific constraints of available space or capacity make it impossible to open up the market and/or implement third party handling to the degree provided for in the Directive, the Member State in question may decide to reserve to a single supplier, one or more of the categories mentioned above and limit the number of suppliers for one or more categories of ground handling services other than the four mentioned above to no fewer than two, one of whom should be independent, as defined above (Article 9).

Member States must notify the Commission, at least three months before they enter into force, of any exemptions they grant on the basis of Article 9 and of the grounds which justify them. In this case the Commission publishes the Member State's decision in the Official Journal and invites interested parties to submit comments. After close examination, the Commission may within three months approve the Member State's decision or oppose it if it deems that the alleged constraints have not been proven to exist or that they are not so severe as to justify the exemption. Generally every exemption can be approved only for a limited time. When deciding on exemptions under Article 9, the Commission is assisted by an advisory committee made up of representatives of the Member States and chaired by the representative of the Commission (Article 10).

Another limit to the opening of the market to third parties may apply in the case provided by Article 8, under which, notwithstanding the application of Articles 6 and 7, Member States may reserve for the managing body of the airport or for another body the management of the centralized infrastructures used for the supply of ground handling services whose complexity, cost or environmental impact does not allow of division or duplication (*e.g.*, baggage sorting, de-icing, water purification and fuel-distribution systems), eventually making it compulsory for suppliers of ground handling services and self-handling airport users to use these infrastructures.

The Directive requires Member States to take the necessary measures for the organization of a selection procedure for suppliers authorized to provide ground handling services at an airport where their number is limited in the cases provided for in Article 6 (2) or Article 9. In particular, suppliers of ground handling services must be chosen:

(i) following consultation with the Airport Users' Committee [established under Article 5] by the managing body of the airport, provided the latter:

- does not provide similar ground handling services; and
- has no direct or indirect control over any undertaking which provides such services; and
- has no involvement in any such undertaking;

(ii) in all other cases, by competent authorities of the Member States which are independent of the managing body of the airport concerned, and which shall first consult the Airport Users' Committee and that managing body.

However, the managing body of the airport may itself provide ground

handling services without being subject to the selection procedure. Similarly, it may, without submitting it to the said procedure, authorize an undertaking to provide ground handling services at the airport in question:

- if it controls that undertaking directly or indirectly; or
- if the undertaking controls it directly or indirectly (Article 11).

A fundamental provision of the Directive (Article 4) regards the separation of accounts imposed between ground handling activities and other activities conducted by the subjects involved (airport managing body, airport user or the supplier of ground handling services).

In order to improve the effectiveness of the opening-up of a ground handling market, the Directive imposes that Member States ensure that suppliers of ground handling services (third operators and self-handlers) have access to airport installations to the extent necessary for them to carry out their activities, unless relevant, objective, transparent and non-discriminatory conditions upon such access are imposed by the airport managing body or public authority. As a consequence of such an approach, also the space available for ground handling at an airport must be divided among suppliers to the extent necessary for the exercise of their rights and to allow effective and fair competition and a fee related to the access to airport installation may be collected if it is determined according to the usual non-discriminatory criteria (Article 16). Specifically on this topic, the ECJ has clarified that Article 16(3) precludes the managing body of an airport from making access to the ground handling market in the airport subject to payment by a supplier of ground handling services or by a self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations. On the other hand, that body is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

Materials: case C-363/01, Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa AG

Thus the managing body of the airport can place conditions upon the access and in addition collect an access fee which has been further defined as a commercial fee, which has to be determined according to relevant, objective, transparent and non-discriminatory criteria. In practice, the possi-

bility of levying the fee has not been taken up by all airports: some airports do not charge an access fee to handlers or air carriers, but other airports do.

To conclude, it is worth noting that public intervention in the ground handling market may be pervasive, if one considers that the Directive allows Member States to subordinate the ground handling activity of a supplier (as well as of a self-handling user) to the approval of a public authority independent of the managing body of the airport (Article 14). Moreover Member States may prohibit a supplier of ground handling services or an airport user from supplying ground handling services or self-handling if that supplier or user fails to comply with the rules imposed upon him to ensure the proper functioning of the airport and require suppliers of ground handling services at an airport to participate in a fair and non-discriminatory manner in carrying out the public service obligations laid down in national laws (Article 15). However the right of appeal enjoyed by any party with a legitimate interest against the decisions taken pursuant to Articles 7 (2) and 11 to 16 is provided by Article 21.

As affirmed by the Commission in its 2007 Report[4], since its adoption the prices of ground handling services have gone down across the board in nearly all Member States, this decrease being more visible in those Member States which had handling monopolies or a highly regulated market before 1996. Moreover the Commission acknowledges the positive effects of the Directive on the degree of competition at EU airports, as for almost all categories of groundhandling services the number of service suppliers in the market has gone up. Nevertheless, independent ground handling service suppliers consider that their commercial opportunities have remained limited, as in their opinion only a small part at, notably, the larger airports is effectively open and not in the hands of the incumbent air carrier and/or the airport operator. Moreover, air carriers and handlers consider that at those airports where the management body runs the airport but at the same time acts as a supplier of ground handling services competition is distorted and that the present Directive does not provide strong enough tools to prevent this kind of situation. On the other hand, the airports argue that independent service suppliers and air carriers enjoy advantages which airport operators do not have, as they may operate at a global level and are thereby in a position to benefit from economies of scale.

Thus, evaluations on the Directive have shown that the positive effects

[4] European Commission, *Report on the application of the Directive 96/67/EC*, COM(2006) 821 final.

reached by the current legal framework are not sufficient. Moreover in the last decade the air transport sector has been subject to relevant changes, first of all as a consequence of its enormous growth. On 1st December 2011 the European Commission presented a comprehensive package of measures ['Better Airports Package'[5]], containing three proposals concerning slots, ground handling, and noise. The new proposal for a Regulation on ground handling, aiming at improving the efficiency and quality of services offered at EU airports by ensuring better coordination of operations at airports and by enlarging airlines' choice of handlers available, includes key measures such as the full opening up of the self-handling market for airlines, increasing the minimum number of service providers (in restricted services) from two to three at large airports, giving the airport managing body the role of «ground co-ordinator» of ground services, and defining the legal framework for the training and transfer of staff.

1.6.3. Slots

The slot represents the key element to enter the market, the essential condition for the functioning and development of traffic, and is defined as «the permission given by a coordinator (…) to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off as allocated by a coordinator in accordance with this Regulation» [Article 2(a) of Regulation No 95/93, as amended].

In recent years one of the most widely discussed problems affecting major European airports concerns the lack of runway slots to satisfy all demand by airlines; furthermore data suggest that the number of airports affected will probably increase. The European Commission has been aware of this phenomenon for a long time: after the European single aviation market came into force and Council Regulation 95/93 was adopted, it commissioned studies by sector experts, as provided by the Regulation itself. Regulation 95/93 was amended about ten years later, but the new Regulation 793/2004 has left the rules on slot allocation unchanged. Nevertheless two important Reports has focussed on this issue and it is still on the agenda of the Commission, which recognises the inability of current EU rules to remedy conditions in congested airports: the first one

[5] European Commission, *Airport policy in the European Union – Addressing capacity and quality to promote growth, connectivity and sustainable mobility*, COM (2011) 823.

was made by NERA in 2003 and concerned slot allocation schemes[6]; the second is the result of Mott MacDonald Group's study presented in 2006 and its purpose was to assess the likely effects of introducing secondary slot trading[7].

On the basis of the Airports Council International Europe (ACI) and airlines data, experts have demonstrated the excess demand for slots at certain European airports. As the availability of a slot is strictly connected to airport capacity, it is a scarce resource by definition. Thus whereas in most industries supply generally grows against excess demand, in the aviation market sufficient increases in airports' capacity and runway supply are prevented by many factors, which can be summarised as: the lack of sufficient suitable land to construct additional runways; the lack of alternative locations for new airports; the planning lead times required to construct new runways where it is possible; the pressure by environmental groups that obstructs political initiatives for the construction of new runways (local noise levels, air pollution, etc.); the substantial capital cost of providing additional capacity. In addition, most European airports are still publicly controlled utilities, so that political issues and budget restrictions occur.

The level of congestion determines how airports are classified. The current Slot Regulation No. 95/93 (as amended) does not have a general application, but it concerns only coordinated and facilitated – thus congested – airports and provides that in these cases slots are to be assigned to air carriers on an administrative basis (and not by payment). In other words, slot allocation is prearranged only in the case of congestion, where the current Slot Regulation applies. Slots must be distinguished from airport charges, which are a levy paid by airport users for facilities and services related to landing, take-off, lighting and parking of aircraft, and processing of passengers an freight (as explained in para. 1.6.1) provided by the airport managing body. The cost related to the use of landing and take-off rights is linked to airport charges, so that air carriers pay these charges, which are aimed at covering infrastructural costs, only in the case of effective use of the slots: in this system airport charges, uniform in the day and measured on the basis of costs, do not result in an adequate instrument to connect demand and supply of capacity.

[6] NERA, *Study to assess the effects of different slot allocation schemes*, Report for the European Commission, DG TREN, January 2004.

[7] Mott MacDonald, *Study on the Impact of the Introduction of Secondary Trading at Community Airports*, Report for the European Commission, DG TREN, November 2006.

Specifically, in the case of congested airports, the primary allocation is made from the slot pool by the airport coordinator, subject to the principle of historical precedence, *i.e.* grandfather rule, combined with the 'use it or lose it' mechanism: according to these principles, once an air carrier has been allocated a series of slots and has used them regularly during a season (*i.e.* for at least 80% of the time during the scheduling period for which it has been allocated), that airline has the right to be allocated the same slots for the next equivalent season and not return them to the slot pool. This mechanism can continue indefinitely. Slots placed in the pool – *i.e.* those remaining from the grandfather rule and those turned back – must be distributed among applicant air carriers; in particular 50% of these slots must first be allocated to new entrants unless requests by new entrants are less than this percentage.

The application of grandfather rights is controlled by the coordinator, as are many other aspects, including slot mobility: as a qualified natural or legal person appointed by member states, the coordinator is the sole person responsible for the allocation of slots at coordinated airports. Member States are also required to ensure that a coordination committee, whose membership must be open at least to the air carriers using the airports in question and their representative organization, the airport managing body concerned, the traffic control authorities and representatives of general aviation regularly using the infrastructure, is set up. A derogation to the general rules is provided by Article 9 when public service obligations have been imposed on a route: in this case, a Member State may reserve at a coordinated airport the slots required for the operations envisaged on that route. Moreover, some enforcement rules, including slot withdrawal, are provided by Article 14 in order to guarantee compliance by operators with the Regulation and to avoid the misuse of slots or 'slot abuse', but an overall quantification of their effect does not yet exist.

The current Regulation contains a list of procedures allowed for slot mobility, distinguishing between transfers and exchanges. While exchanges are permitted only «one for one», there are different cases in which slots can be transferred, as Article 8a rules: by an air carrier from one route or type of service to another route or type of service operated by the same air carrier; or i) between parent and subsidiary companies, and between subsidiaries of the same company, ii) as part of the acquisition of control over the capital of an air carrier, iii) in the case of a total or partial takeover when the slots are directly related to the air carrier taken over. Such transfers or exchanges must be notified and confirmed by the coordinator.

Moreover, Article 8a(3) contains rules for new entrants, stating that slots allocated to them cannot be transferred for a period of two scheduling seasons except in the cases expressly provided in the same paragraph.

In none of the cases mentioned is there any reference to monetary consideration and this has generally led to the conclusion that sales of slots are forbidden. In the ambiguity of Regulation, which neither mentions monetary consideration nor contains an explicit ban, a 'grey market' has developed in Europe. Airlines have managed to exchange slots by trades at coordinated airports, where in substance it was not allowed, adopting an elusive scheme along these lines: Airline A exchanges slots with Airline B, but, by way of such exchange, receives from B slots for which it has no requirement or at uncommercial times, purely for the purpose of returning them to the pool after the exchange (these are often named as 'junk' slots). In these cases, it can be argued that monetary compensation occurs.

The UK High Court, in an important decision in March 1999 (the *Guernsey* case), recognised the existence of a secondary market in slots and interpreted the European rules as approving the right of airlines to exchange scarce slots for money[8]. This interpretation, which constitutes a precedent in the English system but was not shared by other national judges or by the European Court of Justice, has led the UK to develop a secondary market for slots.

Only on 30th April 2008 did the European Commission adopt a Communication on the application of the current Regulation, acknowledging that exchanges of slots for monetary and other consideration took place at a number of congested Community airports[9]. Arguing that the current legislation did not contain an explicit and clear prohibition of such exchanges, the Commission declared that it did not intend to pursue infringement proceedings against Member States where secondary trading took place in a transparent manner. Finally, the Commission undertook to make an appropriate proposal, should the safeguard of competition or other reasons require a revision of the existing legislation.

The Commission's stance has been subject to criticism as it did not align with sector experts' opinion, according to which clear and detailed legislation on slot allocation would be necessary to ensure transparency of negotiations

[8] High Court of Justice, Queen's Bench Division, *Regina v. Airport Coordination Ltd, ex parte The States of Guernsey Transport Board,* 25 March 1999.

[9] European Commission, *On the application of Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, as amended*, COM(2008) 227 final, 30 April 2008.

and legal certainty. In particular, the NERA Report clearly affirmed that the introduction of a new slot trading regime would require an amendment to the existing slot Regulation. Contrariwise the Commission considered that the current regime did not prevent the existing secondary trading practices so that at the time it was considered unnecessary to adopt new specific rules: the Commission declared to continue monitoring the functioning of Regulation 793/2004 and consider whether it was necessary to amend it.

But this regulatory framework is changing, as the aforementioned Better Airports Package also includes a reform for slot Regulation[10]. In this proposal the Commission acknowledges that the allocation and use of slots could be made more effective by introducing market mechanisms and many provisions are amended, including those concerning mobility of slots, which is explicitly allowed also under monetary consideration. The most relevant amendments regard: the introduction of the possibility of secondary trade in slots; the broadening of the definition of «new entrant»; the strenghtening of the transparency of the slot allocation process and the independence of coordinators; the integration of slot allocation with the reform of the European air traffic management system; the introduction of a new kind of airport (the «network airport»); the '80-20' rule, providing a new threshold of 85% instead of 80%.

1.7. COMPUTERIZED RESERVATION SYSTEMS

Computerized reservation systems (CRSs) are the result of the opening up of the internal automated systems that major airlines set up in the 1960s for scheduling and booking operations, containing relevant information such as seat availability, fares and schedules. Automated systems were developed by airlines to handle their own internal reservations instead of relying on manual operations, which had proved to be obsolete in the increasingly competitive environment in which airlines found themselves operating.

CRS technology was made available on the U.S. market in the 1970s as a means to help operators to cope with the increase in the number of air fares and services deriving from the deregulation process that preceded the EU by a decade. United Airlines and American Airlines were the first to successfully open up their internal systems to travel agents by means of CRS, but European airlines soon developed their own CRSs. At the time, the air

[10] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports*, COM(2011) 827 final, 1 December 2011.

transport industry failed to create a single neutral CRS, airlines building separate proprietary CRSs. In the EU two separate CRSs were set up, Amadeus and Galileo, the former founded by Air France, Iberia, Lufthansa, SAS and TAM, and the latter by Air Lingus, Sabena, Alitalia, British Airlines, Swissair, TAP, KLM, Olympic Airlines, and Austrian Airlines.

The information contained in CRSs included not only data concerning the founding airlines, but also data from the internal reservation systems of any airline or travel agent participating in the system, agreeing to make its services saleable through the system. Participation required an airline to pay a fee for every booking transaction (booking fee) and travel agents to pay a subscription fee. Because of their high-speed processing and real-time links to most airlines, CRSs worked as a fundamental marketing instrument to distribute the airline's seat availability and its fares to the public, and thus they became a competitive necessity, leading fees to increase. Ancillary products, such as hotel reservations, car rentals, and other modes of transport, were added to CRSs databases afterward. In such a system, airlines needed to participate in CRSs in order to sell their services to a large number of travellers and travel agents needed to subscribe to a CRS in order to have access to reliable information about air transportation products on offer. Provided that, for efficiency and cost saving reasons, the vast majority of the travel agencies relied on only one CRS, the CRS providers competed to attract the travel agencies to their system, *e.g.* through incentive payments. As a result, in order to capture all travel agencies, airlines needed to participate in all CRSs, as different CRSs were not substitutes from an airline's perspective. This situation lowered the competitive pressure among CRSs, allowing them to acquire considerable market power and to raise fees.

In the first place CRS regulations both in Europe and in the U.S. were a response to minimise the risk of competitive problems in the adjacent CRS and airline markets. The fundamental concern was avoiding abusive conducts by system owners, which could use market power linked to CRSs to expand their own position in the air transportation market ('leverage' of market power). In other words, market power gave airline-owned CRSs the incentive and ability to limit competition in both the CRS and airline markets. As highlighted in the study conducted by the Brattle Group and Norton Rose for the EU Commission[11], the most pervasive anticompetitive

[11] The Brattle Group – Norton Rose, *Study to Assess the Potential Impact of Proposed Amendments to Council Regulation 2299/89 with Regard to Computerized Reservation*

practice was display bias, by which each CRS could give priority on the display screen to flights operated by its parent carrier and less prominence to those operated by rival carriers. CRSs could also provide more reliable and up-to-date information on their respective owner-airlines, because the parent carrier's internal reservation system and the CRS were housed in the same computer («architectural» bias), and/or impose discriminatory booking fees and other access terms on rival carriers. Other exclusionary behaviours could be adopted by parent carriers: *e.g.*, in markets in which a CRS parent carrier had a significant presence, it would limit its participation in competing CRSs so as to make them unattractive to local travel agents; alternatively, a parent carrier would refuse to provide certain financial benefits or other rewards to local travel agencies that subscribed to rival CRS systems.

The EU's first intervention on CRS dates back to 1989 with the adoption of Regulation 2299/89. The 1989 CRS Code of Conduct was part of a 1998 block exemption to the general prohibition against anti-competitive agreements, one of several that the Community approved in the liberalization process, covering certain agreements among airlines that wanted to set up a joint CRS system. In a nutshell, the main provisions are prescribed to provide at least one unbiased display, to give all carriers access to their system on non-discriminatory terms (including non-discriminatory booking fees) and to refrain from including certain highly restrictive terms in contracts with travel agents. The Code of Conduct has been revised twice since 1989 (in 1993 and in 1999) with the aim of further clarifying the principles contained in the original and updating it to problems that have arisen subsequently. In 1993, the Commission added several new provisions, among which the most significant addition was a requirement that parent carriers give other CRSs the same information and booking opportunities that they gave their own CRS (mandatory participation rule). In 1999 other amendments were due to complaints received from air carriers and CRS vendors concerning alleged infringements of the Code. Moreover in 1999 the Code was also expanded to include rail transport. Among new additions, a non-discrimination requirement with regard to pricing was introduced in Article 10, according to which a CRS should treat all carriers alike with respect to their fees and services. Really, mandatory participation and non-discrimination rules have had controversial effects, inhibiting CRSs from freely competing with one another. As the Commission itself acknowledged in its 2007 Consultation Paper, the Code's non-discrimination requirement resulted in stifling price competition, preventing CRS

Systems, Report for the European Commission, 2003.

vendors from providing a discount to one airline unless it was also to all the others. Moreover, if it is true that the «mandatory participation» requirement was designed to prevent parent carriers from restricting competition in the CRS market, it is also true that it resulted in significantly limiting these carriers' leverage to negotiate better fees and terms from any individual CRS.

More recently, in 2009, as a result of a lengthy process following two consultations launched in 2002 and 2007, a new Regulation has been adopted, repealing Regulation 2299/89. Contrariwise, the US Department of Transportation (DOT) decided to phase out CRS regulation on the basis of the divestment of CRS ownership by US airlines and of the development of alternative distribution channels and the availability of information and booking facilities over the Internet. The EU Commission acknowledged positive effects of the deregulation process in the U.S., such as the reduction of CRS booking fees and incentive payments and the growing development of direct booking tools by the bigger travel agencies, nevertheless it did not followed DOT's policy.

Really, changes in CRS ownership and technology are gradually eroding the framework for which the Code was established. It is worth mentioning that currently, three CRSs remain in operation on the EU market and they are not in the hands of the airlines anymore: Amadeus (founded solely by European airlines, *i.e.* Air France, Iberia, Lufthansa and SAS; the first three airlines still hold minority shares); Travelport (an amalgamation of Galileo and Worldspan, now a public company); Sabre (originally set up by American Airlines, Cathay Pacific, All Nippon Airways, China Airlines, and Singapore Airlines, is now a public company). But EU authorities have considered some features which still require the presence of a Regulation (*e.g.*, the fact that low-fare airlines often do not participate in CRSs, the Internet does not offer unbiased information, many corporate travellers remain dependent upon travel agents and their use of CRSs). Thus, certain provisions are regarded as necessary in so far as they contain transport products, in order to prevent abuse of competition and to ensure the supply of neutral information to consumers.

Regulation 80/2009 defines CRS as «a computerized system containing information about, *inter alia*, schedules, availability and fares, of more than one air carrier, with or without facilities to make reservations or issue tickets, to the extent that some or all of these services are made available to subscribers». The 2009 Code of Conduct applies to any CRS used or offered for use in the Community for air transport services, and to rail-transport products

incorporated alongside air-transport products into the principal display of a CRS. It contains rules of conduct for system vendors (*i.e.* any entity and its affiliates responsible for the operation or marketing of a CRS) and for transport providers and some specific provisions on data protection.

With regard to the first group of rules (Articles 3-8), in detail Regulation requires system vendors to:

- not attach unfair and/or unjustified conditions to any contract with a participating carrier or require the acceptance of supplementary conditions which, by their nature or according to commercial usage, have no connection with participation in its CRS;
- not make it a condition of participation in its CRS that a participating carrier may not at the same time be a participant in another system or that a participating carrier may not freely use alternative reservation systems such as its own Internet booking system and call centres;
- load and process data provided by participating carriers with equal care and timeliness, subject only to the constraints of the loading method selected by individual participating carriers;
- publicly disclose, unless this is otherwise made public, the existence and extent of a direct or indirect capital holding of an air carrier or rail-transport operator in a system vendor, or of a system vendor in an air carrier or rail-transport operator;
- not reserve any specific loading and/or processing procedure, any other distribution facility, or any changes to these, for one or more participating carriers, including its parent carrier(s);
- ensure that its distribution facilities are separated, at least by means of software and in a clear and verifiable manner, from any carrier's private inventory and management and marketing facilities;
- provide a principal display or displays for each individual transaction through its CRS and include therein the data provided by participating carriers in a neutral and comprehensive manner and without discrimination or bias;

- introduce a specific symbol in the CRS display which shall be identifiable by the users for the purposes of the information on the identity of the operating air carrier subject to an operating ban under Article 11 of Regulation (EC) No 2111/2005;
- not attach unfair/unjustified conditions to a contract with a subscriber, such as preventing a subscriber from subscribing to or using any other system, requiring the acceptance of supplementary conditions which have no connection with subscription in its CRS, or imposing an obligation to accept an offer of technical equipment or software.

As results from the list mentioned above, the explicit prohibition of discriminatory conditions, contained in the old Code, has been deleted from the Regulation, which uses the wording of «unfair and/or unjustified conditions». Under Article 12, system vendors are also requested to submit an independently audited report every four years or upon request from the Commission.

Moreover Article 7 prescribes specific rules on Marketing Information Data Transfer (MIDT), *i.e.* information based on flight bookings made through CRSs and consists of data such as airline code, booking status code, flight number, class of service, booking date, departure date, agency name, cancellation indicator, etc. As the information is highly detailed, MIDT allows an airline, which receives a complete breakdown of the travel agent's sales by destination, by airline and by fare class, to monitor the demand for travel on rival carriers and maintain tight control over individual travel agents. Article 7 prescribes that any marketing, booking and sales data may be made available by system vendors provided that they are offered with equal timeliness and on a non-discriminatory basis to all participating carriers, including parent carriers. Moreover, participating carriers are required to not use such data in order to influence the choice of the subscriber. However no identification either directly or indirectly of an EU subscriber should be possible through such data, unless the subscriber and the system vendor agree on the conditions for their appropriate use.

Article 8 treats the principle of equivalent treatment in third countries providing that where the treatment of Community air carriers by a system vendor operating in a third country is not equivalent to the treatment of the third country participating carriers, the Commission may require all system vendors operating in the Community to treat air carriers of that

third country in a manner that is equivalent to the treatment of Community air carriers in that third country.

With regard to the rules of conduct for transport providers, participating carriers, and intermediaries handling the data, are requested to ensure that the data which they submit to a CRS are accurate. Moreover a parent carrier, subject to reciprocity, shall not discriminate against a competing CRS by refusing, *e.g.*, to provide the latter with the same information on its own transport products that it provides to its own CRS, nor directly or indirectly favour its own CRS by obliging a subscriber to use a particular CRS to sell its transport products.

With regard to the rules on the protection of personal data, they provide that personal data collected in the course of the activities of a CRS for the purpose of making reservations or issuing tickets for transport products must only be processed in a way compatible with these purposes. As concerns the processing of such data, a system vendor must be considered as a data controller in accordance with Article 2(d) of Directive 95/46/EC (Privacy Directive).

To conclude, where the Commission finds that there is an infringement of Regulation 80/2009, it may require the undertakings or associations of undertakings concerned to bring such an infringement to an end and impose on the latter fines not exceeding 10% of the total turnover the preceding business year where, intentionally or negligently, they infringe the Regulation. In this case the Commission must first issue to the undertakings or associations of undertakings concerned a statement of objections and and give them an opportunity to submit their views.

1.8. COMPETITION LAW ISSUES: SELECTED TOPICS

1.8.1. Market definition

The approach generally used by the Commission to define the relevant market in the air transport sector is the so-called 'point-of-origin/point-of-destination' (O&D) or 'city-pair' approach. The O&D is a demand-based approach according to which every combination of point-of-origin and point-of-destination must be considered as a separate market from the customer's point of view. A further relevant distinction can be made between different groups of passengers, namely between:

- time-sensitive passengers, who choose a carrier on the basis of criteria such as the number of daily flights offered, the convenience of its timetable, the location of

the airport, the possibility of modifying reservations at short notice (these are typically business travellers);

- non-time-sensitive passengers, who are generally more flexible with regard to timetables and more price-sensitive (in this category leisure travellers may be included).

In its assessment, the Commission, after having defined the relevant routes, must evaluate the conditions of subsitutability or interchangeability occurring in the market, considering the different transport alternatives available on a case-by-case basis. In this evaluation the Commission may consider: airport substitution, the existence of services operated by low cost carriers, indirect flights and the alternatives offered by other means of transport (*e.g.* high speed trains)[12].

1.8.2. Anticompetitive practices: the case of travel agent incentive scheme

The Commission has investigated cases relating to discount and rebate schemes in air transport.

A fundamental case, concerning commissions paid by airlines to travel agents, arose from a complaint from Virgin against British Airways, leading finally to the landmark ruling held by ECJ in case C-95/04 P, *British Airways v Commission*.

Materials: case C-95/04 P, British Airways v Commission

1.8.3. Airline alliances and mergers

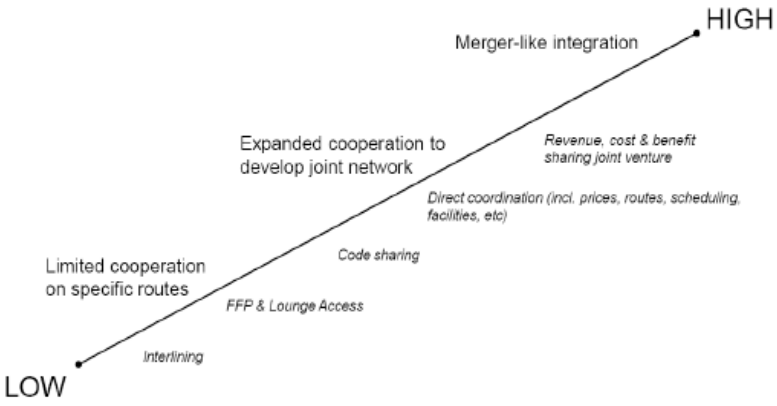
i) Types of alliances

International alliances between air carriers have become a common practice in the airline industry at the global level. Cooperation may take different forms. A first distinction may be drawn between tactical and strategic alliances:

- tactical alliances occur when carriers want to address a specific deficiency in their networks; they typically involve only two carriers and cover a limited number of routes, with the principal objective of providing connectivity to each carrier's respective networks;

[12] On this topic, see M. Negenman - M. Jaspers - R. Wezenbeek - J. Stragier, *Transport*, in J. Faull – A. Nikpay (eds.), *The EC Law of Competition,* Oxford University Press, Oxford 2007, p. 1578 ff.

- strategic alliances are a very common form of agreement between carriers that may imply different degrees of co-operation, varying from a basic level [*e.g.* involving frequent flyer programmes (FFPs) or standard code-share agreements] to higher levels of cooperation (*e.g.* involving direct coordination on prices, routes, scheduling, facilities, etc. up to revenue- or profit-sharing joint ventures). Joining one of the three existing branded global alliances (Star Alliance, SkyTeam, Oneworld) implies coordination on a multilateral basis aimed at creating a large worldwide joint network.



Source: European Comission - US Department of Transportation, *Transatlantic Airline Alliances: Competitive issues and regulatory approaches*, 2010, p. 5.

Several reasons leading air carriers to enter into cooperative arrangements can be identified, *e.g.*: achieving a better network reach, minimising risk exposure, sharing risks of launching new routes, creating expensive projects (for instance, information technology projects), etc. Membership of global alliances implies many benefits for carriers, *e.g.*: carriers may link their networks of routes and sell tickets on the flights of their commercial partners, thereby offering travellers access to a high number of destinations, more convenient and better coordinated schedules and other services (such as single on-line prices, single point check-in, coordinated service and product standards, reciprocal frequent flyer programs); a glob-

al alliance brand has wide recognition from which airlines may benefit; members of global alliances may also jointly finance long-term projects.

The most basic form of cooperation is represented by interlining agreements, under which a carrier is allowed to sell a journey, or part of a journey, on the services of another carrier, together with the procedures for settlement of the revenue owed to the carrying airline, and payment of an Interline service charge (ISC) to the ticketing carrier, in recognition of the costs of sale incurred. In other words, interlining allows carriers to have access to routes they do not serve and passengers to book multiple segments of a journey on multiple airlines, having a single ticket and baggage transferred between airlines with one check-in.

Interlining must be distinguished from code-share agreements, which allow for a flight operated by one carrier, called 'operating carrier' (which will offer the flight for sale under its own code or designator and associated flight number), also to be marketed by another carrier, under that other carrier's code and flight number – the 'marketing carrier'. The carrier that issues tickets to the passenger for a journey involving a code-share flight is known as the 'ticketing carrier', whose functions may be carried out by a third carrier or by the marketing carrier. There exist some variants to this basic form of code-sharing. As explained in the Report prepared for the European Commission by a group of experts on competition impact of code-share agreements, the main types of code-sharing are:

- parallel operation on a trunk route - two carriers both operate the same sector, and each gives its code to the other's operated flights (*e.g.*, flights between Paris and Milan, operated by Air France and Alitalia, which have each others' codes as well as their own);
- unilateral operation on a trunk route - a carrier puts its code on a sector operated by another carrier, but not by itself, and not (necessarily) connecting to one of its own operated flights (for example, British Airways puts its code on Manchester-Chicago, operated by American Airlines; Delta puts its code on Paris-Boston, operated by Air France);
- behind and beyond route (connecting to a trunk route service) – a carrier puts its code on sectors, operated by another carrier, to provide connections with its own operated services. Connecting code-shares generally re-

quire the marketing carrier to sell an interline journey, *i.e.* one involving travel on its own service and then on the service of the partner carrier ('interline code-share'; *e.g.*, British Airways sells a journey from London Heathrow to Albuquerque, via Dallas, with the US domestic sector operated by American Airlines)[13].

Typical provisions of code-share arrangements include:

- specification of routes covered by the agreement;
- provisions allowing each carrier to market a flight under its own code, and requiring the marketing carrier to identify the flight to the customer as being actually operated by the operating carrier before the transaction is finalised;
- provisions on the minimum level of operational, ground and in-flight service to be granted by cooperating airlines;
- safety and security provisions;
- provisions for handling passengers and disruption events;
- provisions on mapping of reservations booking classes;
- provisions on pricing, revenue management, ticketing, commission payments, taxes, etc.

There are several possible motivations for airlines to conclude a code-share agreement, for instance:

- to enlarge the offer that airlines can make to customers (*e.g.* in terms of the number of destinations, the flight timings), without sustaining the costs and difficulties involved in additional investment in equipment or in mergers with other airlines (which may in any case be prohibited by legislation or international agreements);
- to enhance the presence of an airline in markets where it would otherwise have no profile (usually at the end of a route away from the airline's home country), and hence to facilitate the sale of its services by a marketing carrier which may be much better known in that market;
- to facilitate collusion between the involved airlines, which can jointly dominate a market.

The frequent flyer programme is a marketing tool, typically used by

[13] Steer Davies Gleave et al., *Competition impact of code-share agreements*, Report for the European Commission, 2007, p.8.

airlines to attract business traffic and to develop customer loyalty: under such programmes, airline customers may accumulate frequent-flyer miles generally corresponding to the distance flown with that airline or its partners, which can be redeemed for air travel, other goods or services, or for increased benefits, such as travel class upgrades, airport lounge access, etc.

ii) EU and US regime for alliance review

As clarified by the Report published by the EU Comission and the US Department of Transportation (DOT) in 2010[14], under Article 101 TFEU, the following conditions must be fulfilled in order to consider an alliance compatible with the common market:

- the alliance should achieve economic benefits, such as cost efficiencies or qualitative efficiencies;
- consumers must receive a fair share of the identified efficiencies;
- competition restriction must be deemed reasonably necessary in order to produce the identified efficiencies;
- each O&D route where restrictions of competition have been identified must be examined, taking into account both actual competition and potential competition.

As the enforcer of EU competition rules, the Commission may initiate an investigation on its own initiative if there are concerns that an alliance may infringe such rules or as a result of a complaint. Since 1 May 2004, due to changes introduced by Regulation No 1/2003, the Commission obtained jurisdiction to investigate air transport services between the EU and third countries: prior to that date, the Commission lacked effective enforcement powers to enable it to issue a decision relating to international air transport. Moreover, from 1 May 2004, airlines are no longer required to notify the Commission of the cooperation agreement or apply for negative clearance or exemption: carriers must instead themselves conduct an assessment of whether their cooperation is in breach of EU competition rules. However the Commission or a national competition authority may open an investigation if there are sufficient indications that the cooperation may be incompatible with the common market.

[14] European Comission - US Department of Transportation, *Transatlantic Airline Alliances: Competitive issues and regulatory approaches*, 2010, available on-line at <http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf>[accessed on 17.12.2014].

In the U.S., on the other hand, the process of reviewing and making a decision on antitrust immunity (ATI) applications occurs before alliances are implemented, through a two-step procedure conducted by the DOT: in the first stage, the DOT will approve alliance agreements if it finds that they are not adverse to the public interest or, even if they reduce competition, they are necessary to meet a serious transportation need or to achieve important public benefits which cannot be satisfied by reasonably available alternatives; the second step, following the approval of the agreements, is the DOT's decision to grant ATI. Carriers are however not required to apply for antitrust immunity in any instance, as they may proceed with commercial cooperation at their own risk and subject to traditional antitrust enforcement by the U.S. Department of Justice (DOJ) and other agencies.

iii) Commitments

Many cases of alliance agreements have been concluded by the Commission through the imposition of commitments with the aim of fully removing all competition concerns. To this end, as a general principle, commitments must be unambiguous and their implementation must not depend on any action by third parties who are not bound by corresponding commitments: moreover, they must be effective and respect the principle of proportionality.

Typical commitments imposed in alliance agreements cases are:

- in the case of congested airports, parties to the agreement may be required to make slots available (without charge) to competitors in order to support new or additional services;
- parties may be required to conclude interlining agreement with the new entrant;
- in order to prevent the parties from increasing frequencies with the sole purpose of making new entry difficult, they may be required to freeze or reduce their frequencies (frequency freeze);
- parties may be required to conclude block-space agreements (BSAs) with new entrants: under a BSA, the new entrant (the marketing carrier) can sell a certain number or percentage of reserved seats on flights of the incumbent (the operating carrier).

In addition, there can be price reduction commitments (according to

which the parties, if they reduce prices on a route where they face competition, are required to apply an equivalent price reduction on routes where they still enjoy a monopoly, allowing consumers to enjoy the benefit of lower fares on these other routes as well) and behavioural commitments (*e.g.*, the Commission may oblige the parties to refrain from applying loyalty remuneration schemes).

Materials: case AT.39964,
Air France/KLM/Alitalia/Delta

iv) Mergers

Mergers in the air transport sector have been a widespread phenomenon in recent years, confirming the trend towards industry consolidation (*e.g.*, British Airways/Iberia). Selected cases are available in the materials:

Materials: cases T-177/04, EasyJet v Commission; T-411/07, Aer Lingus Group plc v Commission

1.9. PUBLIC INTERVENTION, SGEIs AND STATE AID

With regard to air transport services, some preliminary conditions are worth recalling. As mentioned above, public service obligations can only be imposed in accordance with Regulation (EC) No 1008/2008 on a specific route or group of routes, and not on any generic route originating from a given airport, city or region. Moreover, public service obligations can only be imposed on a route to fulfil transport needs which cannot be adequately met by an existing air route or by other means of transport. With regard to airports, it is possible for the overall management of an airport, in well-justified cases, to be considered a service of general economic interest (SGEI) (*e.g.* if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development), allowing public authorities to impose a public service obligation on it to ensure that the airport remains open to commercial traffic.

With regard to State aid, in 1994 the Commission adopted the Guidelines on the application of Articles 92 and 93 of the EC Treaty (now Articles 107-108) and Article 61 of the EEA (European Economic Area) Agreement to State aids in the aviation sector in the context of the liber-

alization of the market for air transport services in order to provide a level playing field for air carriers: these guidelines covered aids granted by EU Member States in favour of air carriers, considering that at the time many airlines were benefiting from State intervention in the form of direct operating aids, aids aimed at improving the airline's financial structure and exclusive rights concessions.

In 2005, after the «first round» of the *Charleroi* case[15], the Commission published the Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, which added to the 1994 Guidelines. Under these Guidelines, which considered the changes that had occurred in the air transport sector and the existence of several different levels of competition between the different types of airports, a fundamental distinction was drawn between four categories of airports:

- category A, «large Community airports», with more than 10 million passengers a year,
- category B, «national airports», with an annual passenger volume of between 5 and 10 million,
- category C, «large regional airports», with an annual passenger volume of between 1 and 5 million,
- category D, «small regional airports», with an annual passenger volume of less than 1 million.

Materials: case T-196/04, Ryanair v. Commission; Commission Decision 2009/155/EEC Alitalia

In 2011 – and thus after the 'second round' of the *Charleroi* case, *i.e.* the judgement of the Court of First Instance (CFI)[16] – the Commission launched a consultation to provide feedback on the application of the 1994 and 2005 Aviation Guidelines as well as any comments and proposals regarding the public financing of airports and airlines. On 20 February 2014 new guidelines replacing both the 1994 and the 2005 Guidelines were adopted[17].

The new Guidelines start by considering that in the last decade the market environment of the aviation industry in the EU has changed considerably: for instance, large hubs are often affected by congestion and many regional air-

[15] European Commission, Decision 2004/393/EC concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi.
[16] CFI, *Ryanair v. Commission*, case T-196/04.
[17] European Commission, *Guidelines on State aid to airports and airlines*, C (2014) 963.

ports have been set up. The landscape of airport activities has also evolved, as they have become a new market, with half of their revenues stemming from non-aeronautical activities, and are increasingly in the hands of private companies. It is a fact that there is growing involvement by private undertakings in airports, even if they are still predominantly publicly owned and managed. The greatest proportion of public ownership occurs for smaller airports, which often rely on public support to finance their operations. As regards airlines, concentration has stepped up and the 'low cost - low fares' model has developed successfully, whereas some flag carriers have been faced with economic difficulties. *«The application of State aid rules to the airport and air transport sectors constitutes part of the Commission's efforts aimed at improving the competitiveness and growth potential of the Union airport and airline industries. A level-playing field among airlines and airports in the Union is of paramount importance for these objectives, as well as for the entire internal market. At the same time, regional airports can prove important both for local development and for the accessibility of certain regions, in particular against the backdrop of positive traffic forecasts for air transport in the Union.»* (2014 Guidelines, para. 9)

As a general consideration, it is worth recalling that State aid rules apply only where the recipient is an undertaking: the ECJ has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status or ownership and the way in which they are financed. «Economic activity» may be defined as any activity consisting in offering goods and services on a market (the economic nature of an activity as such does not depend on whether the activity generates profits). In the air transport sector, it includes:

- the activity of airlines (which consists in providing transport services to passengers and/or undertakings);
- airport activity.

With regard to the latter, the Commission's 1994 Aviation Guidelines reflected the view that «[t]he construction [or] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids». In *Aéroports de Paris*, the European Courts ruled against this view and held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity[18]. More re-

[18] ECJ, case C-82/01 P, *Aéroports de Paris v Commission,* case C-82/01 P.

cently, in the *Leipzig-Halle airport* case[19], European judges clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part. Public support for such activities may therefore constitute State aid in the meaning of Article 107 TFEU.

Materials: case C-288/11 P, Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission

In the cases mentioned above, the EU judges confirmed that not all the activities of an airport are necessarily of an economic nature. Activities that normally fall under State responsibility in the exercise of its official powers as a public authority (*e.g.* air traffic control, police, customs, firefighting and activities necessary to safeguard civil aviation against acts of unlawful interference) are not of an economic nature, so that they do not fall within the scope of the State aid rules. However the public funding of such non-economic activities must not lead to undue discrimination between airport managers, must be strictly limited to compensate the costs and may not be used to finance other economic activities; otherwise, any possible overcompensation by public authorities of costs incurred in relation to non-economic activities may constitute State aid.

With regard to public funding of airport infrastructure, it is considered free of aid if in similar circumstances a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have granted the same funding (according to the so-called 'Market Economy Operator Principle', MEOP, also known as 'Market Economy Investor Principle' or MEIP). This assessment should in principle be based on a business plan taking into account available information and foreseeable developments at the time when the public funding was granted. Under the new Aviation Guidelines, if a genuine transport need and positive externalities for a region exist, investment aid to airports will continue to be accepted by the Commission with maximum levels of aid (so-called 'aid intensity') ranging from 75% to 25% of eligible costs depending on in the size of the airport. To ensure proportionality, the maximum permissible aid intensities are higher for smaller airports than for larger airports.

The Guidelines consider investment aid for infrastructure projects at

[19] ECJ, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, case C-288/11 P.

big airports (over 5 million passengers per annum), which are supposed to be normally privately funded and may in principle not receive state aid, unless a clear market failure exists. Moreover, public funding of safety upgrading programmes related to activities that normally fall under State responsibility in the exercise of its official powers as a public authority ('public remit' activities: air traffic control, police, customs, firefighting and activities necessary to safeguard civil aviation against acts of unlawful interference) does not usually fall within the ambit of State aid control, it being understood that undue discrimination between airport managers must be avoided. If it does not relate to the public remit, the Commission will assess whether it constitutes State aid.

According to the Guidelines, the maximum permissible aid intensities for investment aid to finance airport infrastructure at airports located in remote regions may be increased by up to 20 percent, irrespective of the airport's size. Small airports with an average traffic below 1 million passengers per annum may receive a maximum aid intensity of 75%. However, in exceptional circumstances (in particular in the case of airports located in peripheral regions of the EU), on the basis of a case-by-case analysis, a higher aid intensity may be justified. In its assessment, the Commission, on the receipt of a business plan based on sound forecasts, must take into consideration whether the region is already served by another airport or other modes of transport (*e.g.* a high speed train or train connections to other airports) and must also analyze whether the infrastructure has prospects of meeting in the medium-term the forecast demand of airlines, passengers and freight forwarders in the catchment area of the airport.

With regard to operating aid, while the 1994 and 2005 Aviation Guidelines did not allow the granting of operating aid to airports, the 2014 Guidelines – considering that many regional airports, which are assumed to play a positive role in ensuring regional accessibility, depend today on public support to finance their operating losses – authorise operating aid to regional airports for a transitional period of 10 years, in order to allow them to adjust to the new market situation. At the end of the transitional period, all airports should, in principle, be able to cover their operating costs. However, smaller airports with up to 700,000 passengers per year can benefit from operating aid without a transitional period and a special regime is provided for those airports, with higher aid intensities and a re-assessment of the situation after 5 years. Also in this case the key element for the Commission's assessment of operating aid to each airport will be an

ex ante business plan ensuring that the company managing the airport will be able to cover all operation costs at the end of the 10 year transitional period. Moreover, the Commission will also apply these new provisions to ongoing cases.

The Guidelines consider that certain airports have an important role to play in terms of regional connectivity of isolated, remote or peripheral regions of the EU and can be entrusted with an SGEI: in this case, the overall management of an airport could be an SGEI if, without this airport, part of the area that it serves would be isolated from the rest of the EU to an extent that would hamper its social and economic development. Aid could be granted to discharge such an SGEI and assessment would be made on a case-by-case basis.

With regard to the aid addressed to airlines, the Guidelines will apply to all airlines and airports, irrespective of their business model (low cost or traditional carriers). Also in this case the MEIP test applies, according to which arrangements between airports and airlines are free of state aid when a private investor, operating under normal market conditions, would have accepted such terms. The Guidelines advise how the test must be applied; they identify as the most relevant criterion for assessment the *ex ante* profitability prospects over the expected duration of these arrangements.

However, it should be clear that the revised rules do not forbid price differentiation in airport/airline arrangements: the Commission considers that commercially justified price differentiation – including marketing support, rebate and incentive schemes – is a standard practice in the aviation industry, as long as it complies with the relevant competition and sectoral rules.

With regard to start-up aid, the Guidelines provide that airlines departing from airports with fewer than 3 million passengers per year can receive this kind of financing for up to 3 years for increasing the connectivity of a region by launching a new route. The aid may cover a maximum of 50% of the airport charges and should be allocated on a non-discriminatory basis. An *ex ante* business plan should show that the route will become profitable after the start-up period; in the absence of this, the airline must provide an irrevocable commitment to continue operating the route for at least as long as the period during which it received start-up aid. More flexible rules are provided for remote regions.

The Guidelines allow the granting of aid of a social character for the benefit of the final consumer: however, this aid should in principle cover only certain

categories of passengers travelling on the route, except for routes linking with remote regions (outermost regions, islands and sparsely populated areas).

Finally, the Aviation Guidelines do not include the conditions under which Member States may grant state aid to companies in financial difficulty, as they are set out in the Commission's Rescue and Restructuring Guidelines[20].

1.10. THE EXTERNAL COMPETENCE OF THE EU AND THE 'OPEN SKIES' ACTIONS

Historically relationships in the air transport sector among States have been regulated through bilateral agreements under general provisions of international law. At the end of the Second World War, several States which subsequently became members of the Community concluded bilateral agreements (known as 'Bermuda type agreements') on air transport with the USA.

With the aim of replacing the set of bilateral agreements by a single agreement to be concluded between the Community and the USA, the European Commission has since the early 1990s repeatedly sought to obtain from the Council a mandate to negotiate an air transport agreement of that kind with the US authorities. In 1990 the Commission submitted to the Council a first request for a Council decision on a consultation and authorisation procedure for agreements concerning commercial aviation relations between Member States and third countries. In 1992 a second, slightly modified, proposal for a decision followed.

Both proposals were based on Article 113 of the EC Treaty (now, Article 207 TFEU), because the Commission considered that the conclusion of international air transport agreements fell within the sphere of the commercial policy of the Community. The Council refused to give effect to the initiatives by the Commission, stating that:

- Article 84(2) [now 104(2)] of the Treaty constituted the proper legal basis for the development of an external policy on aviation;
- the Member States retained their full powers in relations with third countries in the aviation sector, subject to measures already adopted or to be adopted by the Council in that domain (in this regard, in the course of bilateral negotiations, the Member States concer-

[20] European Commission, *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*, 2014/C 249/01.

ned should take due account of their obligations under Community law and should keep themselves informed of the interests of the other Member States);

- negotiations at Community level with third countries could be conducted only if the Council deemed such an approach to be in accordance with the common interest, on the basis that they were more likely to produce a better result for the Member States as a whole than the traditional system of bilateral agreements (Conclusions of 15 March 1993).

In 1995, the Commission raised the matter once more, and in 1996 the Council gave the Commission a limited mandate to negotiate with the USA, in liaison with a special committee appointed by the Council, in relation to the following matters: competition rules; ownership and control of air carriers; CRSs; code-sharing; dispute resolution; leasing; environmental clauses; transitional measures.

In the event of a request from the United States to that effect, authorisation was granted to extend the negotiations to: State aid; measures to avert bankruptcy of air carriers; slot allocation at airports; economic and technical fitness of air carriers; security and safety clauses; safeguard clauses and any other matter relating to the regulation of the sector. On the other hand, it was explicitly stated that the mandate did not cover negotiations concerning market access (including code-sharing and leasing in so far as they related to traffic rights), capacity, carrier designation and pricing.

In the meantime, in 1992, the US took the initiative of offering to individual European States the possibility of concluding a bilateral 'Open Skies' agreement. In 1993 and 1994, the US strengthened its efforts to conclude such agreements with the largest possible number of European States. The aim of such agreements was to facilitate, in particular, free access to all routes, the granting of unlimited route and traffic rights, the fixing of prices in accordance with a system of 'mutual disapproval'and the possibility of sharing codes. Thus the objective of these agreements was to liberalize air transport between the signing parties, including the right to fly onwards from a destination to a third country – known as 'fifth freedom' traffic rights (*e.g.*, to continue a flight from New York to Brussels onwards to Munich).

The first US Open Skies deal was agreed in 1992 with the Netherlands. Afterwards a very large number of liberalized bilateral agreements were

established with the US. The long awaited EU-US deal was signed in April 2007 and took effect in March 2008.

It is worth noting that a particular provision is generally included in such agreements with regard to airline alliances: in fact in exchange for a country signing an Open Skies bilateral agreement, the US Government grants anti-trust immunity to the designated carriers from the two respective States, enabling them to make joint decisions on pricing, scheduling, capacity provision and service quality. This is a very important provision, considering that without such immunity airline alliances would be very restricted in terms of what aspects of their businesses they could jointly undertake.

i) The 'Open Skies' judgments

In 1994 the Commission brought actions against seven Member States (Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany) which were signatories to Open Skies agreements as well as an action against the United Kingdom.

The Commission alleged, in particular, that, by concluding those agreements, they had:

> (i) infringed the external competence of the Community since only the Community has competence to conclude such an agreement (this complaint has not been raised against the United Kingdom) and
>
> (ii) infringed the provisions of the Treaty concerning the right of establishment by permitting the United States to refuse traffic rights in its airspace to air carriers designated by the Member State which is party to the agreement, if a substantial part of the ownership and effective control of that carrier were not vested in that Member State or in its nationals (clause on the ownership and control of airlines or nationality clause).

The Commission considered that the bilateral negotiations and agreements by individual Member States failed to take account of the fact that the EU had become one large liberalized market, similar in nature to the American market on the other side of the Atlantic. According to the Commission, instead of a balanced agreement between two partners of equal size, these bilateral agreements gave US companies considerable operational opportunities in the European market, without gaining any rights of equivalent value for European airlines in the United States. In the view of the Commission, the only way for the EU to achieve a more balanced

outcome is by pooling the negotiating leverage of all EU Member States together and arriving at a joint approach towards external policy in this field[21].

The Court's judgments established the application of the so-called 'AETR' principle[22], so that the Community acquires an external competence by reason of the exercise of its internal competence, «where the international commitments fall within the scope of the common rules», or «in any event within an area that is already covered by such rules».

According to the Court, «whenever the Community had included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries, it acquires an exclusive external competence in the spheres covered by those acts.» The Court identified three specific areas of Community exclusive competence: airport slots, CRSs, and intra-Community fares and rates.

Even in instances where Member States sought to take action to reflect Community law directly in the text of their bilateral agreements, the Court found that they nonetheless had failed in their obligations, because Member States no longer have competence to make undertakings of any sort on these issues (there are however further issues typically addressed in bilateral air services agreements, in addition to the areas identified by the Court, where the Community has exclusive external competence, *e.g.* safety issues, air carrier liability, etc.).

The Court found that the eight agreements in question contain elements depriving Community air carriers of their rights under the Treaty, the nationality clauses in the agreements being a clear violation of the right of establishment.

Therefore, as clarified by the Commission, although the Court could not have invalidated the agreements under international law, they constitute an infringement of Community law for which Member States are responsible towards the beneficiaries of the right of establishment (*i.e.*, Community carriers)[23]. Such agreements have strict clauses covering ownership and control which ensure that only airlines that are owned and controlled by nationals of the two parties to the agreement can benefit from the traffic rights granted. This means that Community carriers majori-

[21] European Commission, press release IP/02/1609.

[22] ECJ, *Commission* v *Council*, case 22/70.

[23] European Commission, *Communication on the consequences of the Court judgments of 5 November 2002 for European air transport policy*, COM/2002/0649 final.

ty-owned by interests from outside their home Member State are shut out of international routes to and from that country. Moreover, Community carriers based in one Member State, but with an establishment in another, cannot take advantage of their rights under the Treaty to fly international routes from both. Under Community law, such discrimination must be considered illegal and all Community carriers, as long as they have an establishment in a Member State, must be able to fly international routes from there, regardless of where in the Community their principle place of business is, or of where in the Community their owners originate.

Materials: Case C-467/98, Commission v Kingdom of Denmark

To sum up, the so-called Open Skies judgments of 5 November 2002 of the ECJ marked the start of a Community external aviation policy. This case law testifies the Community's powers in the field of international air services, whereas traditionally these services had always been governed by bilateral agreements between States. Moreover, the Open Skies judgments identify three areas coming under the exclusive jurisdiction of the Community: CRSs, intra-Community tariffs and time slots, each of which is governed entirely by Community legislation.

After the 2002 Open Skies judgement, the Commission has focussed on the objective of implementing the Community's external aviation policy through the development of a Common Aviation Area (CAA, comprising EU and its partners located along its southern and eastern borders) with a view to achieving a high degree of economic and regulatory integration of aviation markets in this area and the launch of targeted negotiations on global agreements in the major regions of the world.

ii) Regulation 847/2004

The Open Skies judgments meant that international air services negotiations are now to be carried out in close cooperation and coordination between the European Commission and EU Member States.

Bilateral negotiation by a Member State is covered by Regulation (EC) No 847/2004, which states that a Member State may, without prejudice to the respective competencies of the Community and its Member States, enter into negotiations with a third country concerning a new air service agreement or the modification of an existing air service agreement, provided that:

– any relevant standard clauses, developed and laid down jointly be-

tween Member States and the Commission, are included in such negotiations and;

– the notification procedure is complied with (the Member State must notify the Commission of its intentions in writing).

The Commission must make the notification, on request, available to other Member States, subject to the requirements of confidentiality. If, within 15 working days of receipt of the notification, the Commission concludes that the negotiations are likely to undermine the objectives of EU negotiations underway with the third country and/or lead to an agreement which is incompatible with EU law, it is required to inform the Member State accordingly.

A Member State cannot enter into any new arrangement with a third country which reduces the number of EU air carriers that may be designated to provide services between its territory and that country.

iii) EU-US 'Open Skies' agreement

The EU-US Air Transport Agreement was signed on 30 April 2007 and provisionally applied from 30 March 2008 for all EU Member States. Prior to the agreement, Member States that had already bilateral Open Skies agreements with the US had the right for their airlines to fly without restrictions on capacity or pricing to any point in the US, but only from their home country. New rights deriving from this First Stage Agreement can be summarised as follows:

- the recognition of all European airlines as «Community air carriers» by the US, allowing for the consolidation of the EU aviation sector and compliance with the November 2002 Court cases in the Open Skies judgments;
- the possibility for any Community air carrier to fly between any point in the EU to any point in the US, without any restrictions on pricing or capacity;
- the possibility to continue flights beyond the US towards third countries (5th Freedom);
- the possibility to operate all-cargo flights between the US and any third country, without a requirement that the service starts or ends in the EU (7th Freedom) and so-called 7th Freedom rights also for passenger flights between the US and a number of non-EU European countries, *i.e.* direct flights between the US and Croatia

or Norway;
- a number of access rights to the US «Fly America» programme for the transport of passengers and cargo financed by the US Federal Government;
- more freedom to enter into commercial arrangements with other airlines (code-sharing, wet-leasing etc.);
- rights in the area of franchising and branding of air services to enhance legal certainty in the commercial relations between airlines;
- possibility of antitrust immunity for the development of airline alliances;
- rights for EU investors in the area of ownership, investment and control of US airlines; rights in the area of inward foreign investment in EU airlines by non-EU European investors; rights in the area of ownership, investment and control by EU investors in airlines in Africa and non-EU European countries.

In May 2008 second-stage negotiations were launched and the Second Stage Agreement was initialled in March 2010. The aim of this second stage is providing for considerable further advances, including additional investment and market access opportunities, as well as strengthening the framework of cooperation in regulatory areas such as safety, security and, in particular, the environment. Main topics covered by the agreement include: reform of airline ownership and control rules; cooperation on environmental matters; provisions on the social dimension; cooperation on security; extension of the role of the EU-US Joint Committee.

The Second Stage Agreement was formally adopted by the Council of Transport Ministers in June 2010 and officially signed by high-level representatives from the United States, European Member States and the European Commission. In accordance with the provisions of the Lisbon Treaty, consent to the agreement by the European Parliament is required for its formal entry into force.

1.11 THE 'SINGLE EUROPEAN SKY' PROGRAMME

The undeniable success of the liberalization of EU air transport and airport infrastructures has brought to a dramatic increase of passengers who fly from or to European airports. To those hundreds of millions (nearly 900 in 2014) one should add also air freight transport which too has

increased considerably especially thanks to the development and creation of new infrastructures.

This has inevitably brought to a crisis in the air traffic management (ATM) system, which still, significantly, is governed by national procedures which are simply the evolution of those which were introduced over 90 years ago when commercial air transport started in Europe. It has been calculated that in 2014 the European ATM system controlled, employing over 16.000 air traffic controllers, 26.800 flights on an average daily basis, most of them concentrated in peak hours. This situation is seen as one of the causes of air traffic congestion and of the difficulty of coping with unexpected crisis, such as the 2010 volcanic ash crisis which, from distant Iceland, ended up by paralyzing much of Northern European air transport.

The complexity of the system is increased not only by the inevitable differences in each national administrative tradition, but also by the fact that air space – and air space control – is still an essential strategic and military resource. The needs of civil aviation must therefore be accommodated with national security exigencies and the principle of sovereignty on national airspace set out by Article 1 of the Chicago convention.

Since 2004 the EU has gained competence in ATM and has set as goals the following:

- A simplification of the present system of 37 air navigation service providers and 60 control centers (for 28 countries!), grouping ATM centers in 9 big regional areas.
- Subsequently, a simplification of air routes – which presently follow ancient national paths – reducing the overall distance, with beneficial effects on flight schedules, operational costs and environmental impact.
- Maintaining a very high level of safety which is ensured by the very strict licensing procedures we have seen at para. 1.5 and which must be guaranteed and enhanced in the new common air traffic control environment.

Several of the most serious – albeit rare – air traffic accidents in Europe over the last 30 years (or averted accidents) were due to traffic control mismanagement at take-off (Linate 2001), at landing (Zurich 1990), or mid-air (Uberlingen 2002).

The empowerment of the EU Commission in the field of ATM is based

on four Regulations enacted in 2004, subsequently revised and extended in 2009. To these extremely articulated legal instruments one must add scores of technical rules and specifications. Furthermore the Commission has created several committees and bodies which are in charge of the process of implementing the Single European Sky (SES) programme.

1.11.1 The framework (Regulation 549/04)

Regulation 549/04 (as subsequently augmented by Regulation 1070/09) sets the general framework of the EU action for the creation of a "Single European Sky". In particular it provides the basic definitions on air traffic control (ATC), aeronautical information services, air navigation services, and airspace management.

The Regulation brings into focus the fundamental role of two agencies: the European Aviation Safety Agency (EASA), which was established by Regulation 216/08; and Eurocontrol (European Organization for the Safety of Air Navigation) which was established way back in 1960 through an international agreement.

1.11.2 The provision of air navigation services (Regulation 550/04)

Regulation 550/04 (as subsequently amended by Regulation 1070/09) establishes the basic rules concerning the provision of air traffic services (ATS). One of the most important principles is that such an activity "is connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules of competition".

However the public nature of the ATS providers does not prevent the application of certain rules concerning service fees which we have met in other areas of air transport regulation. Therefore the services offered to users (*i.e.* airlines) should be proportionate to the cost, taking into account the objectives of safety and economic efficiency, and should be fair and transparent, avoiding discriminatory practices.

As the charges imposed on users will be reviewed by the EU Commission on a regular basis, there surely will be a negotiation between the big pan-European carriers and the ATS providers, also to avoid significant differences from one geographic zone to another.

The Regulation, furthermore, sets stringent quality requirements for

ATS providers including competence in management and staff, adoption of processes for safety and quality management, reporting systems, financial strength, liability and insurance rules, avoidance of conflicts of interest (typically when the State owns both the ATS provider and the main flag carrier), security procedures.

These qualifications are extremely important not only for air traffic safety reasons, but also because, (and this is the major step towards the SES) the Regulation introduces the notion of "Functional Airspace Block" (FAB) in which the European airspace will be subdivided and each will be under the control of a specific ATS provider.

Nine FABs have been established:

- UK-Ireland
- Denmark-Sweden
- Baltic (Lithuania, Poland)
- Blue Med (Cyprus, Greece, Italy, Malta)
- Danube (Bulgaria, Romania
- Central Europe (Austria, Bosnia-Erzegovina, Croatia, Czech Republic, Hungary, Slovakia, Slovenia)
- FABEC (Belgium, France, Germany, Luxembourg, Netherlands, Switzerland)
- North European (Estonia, Finland, Latvia, Norway)
- South West (Portugal, Spain and Atlantic Islands)

Although the creation of the FABs has significantly reduced the number of ATS providers (which were 37), there still are significant issues of coordination between FABs when an airline moves from one block to another: for example, a flight from London to Bucharest must pass under the control of four ATS providers.

1.11.3. Coordination and integration (Regulation 551/04)

This last issue is examined by Regulation 551/04 (as amended by Regulation 1070/09) on the organization and use of the common European airspace.

One of the main scopes of the Regulation is the creation of a common aeronautical information infrastructure which should provide all the relevant data such as meteorological information, situation of traffic on the different routes and on ground. Furthermore the management of the airspace network requires the design of a new European route map and the

coordination of scarce resources such as aviation frequency bands.

This coordination has a significant impact on the provision of air transport services, and in particular on:

- Flight planning, which should tend to be coordinated at a European level. This has direct effects on passenger flight schedules and connections.
- Optimal use of airspace capacity, especially landing and take-off slots
- More direct routing between departure/destination points, options for diversion from congested areas, special provisions during periods of congestion and crisis.

1.11.4 Interoperability of the ATM network (Regulation 552/04)

Finally, Regulation 552/04 (as amended by Regulation 1070/09) is devoted to the interoperability of the Air Traffic Management (ATM) network.

To reach this goal the first step is the implementation of common European standards and procedures, a role which is entrusted mainly on Eurocontrol.

Considering that air navigation is nearly entirely governed by digital technologies, on board and on ground, it is essential that these are able to communicate with each other providing and receiving the same and unambiguous information.

This interoperability is enhanced by the fact that gradually air traffic control is been supplemented by a series of European satellites (the Galileo programme) which should enable a much more precise localization of each aircraft, especially once it has reached its cruising altitude, without impediments related to adverse meteorological conditions.

SECOND MODULE
RAIL TRANSPORT

Summary: 2.1. Introduction - 2.2. EU policy and the railway packages - 2.3. Main features of rail transport - 2.4. Railway infrastructure and the single European railway area; 2.4.1. Access to railway infrastructure and services; 2.4.2. Allocation of infrastructure capacity; 2.4.3. Regulatory body; 2.4.4. Licensing - 2.5. Unbundling of railway activities - 2.6. Safety - 2.7. State aid for railway undertakings - 2.8. Public service obligations in rail transport - 2.9. The protection of rail workers

2.1. INTRODUCTION

The railway sector has been subject to delayed 'europeanization', so in contrast to air transport, reforms in this sector are still very much in progress. This is primarily because rail transport has traditionally been organized on a purely national basis, both from a regulatory and a technical point of view. Lack of operational and technical uniformity has led to a sort of mosaic development of national networks that hardly interconnect.

It is well-known that the railway sector has a long tradition of public service, as railways generally provided transport services at lower prices than air services and other modes of transport. Rail transport began in the first half of the nineteenth century and rose to be the primary means of transport by the beginning of the twentieth century. Then the advent of motor vehicles powered by internal combustion engines began to eat into that dominance. Data reveal that since the end of the Second World War, the role played by rail in the transport market has been in constant decline.

There are many reasons for this. Perhaps the most important initially was the rise of other forms of transport that were more flexible and less expensive (buses, lorries and the private car). Other reasons include the inadequate adaptation of the rail network to new patterns of economic activity, urbanisation and the consequent changes in traffic flows. But really a large degree of responsibility for decline is ascribed to the management of the railways. As noted in 1996 by the Commission[1], it is generally agreed that States have usually denied railway enterprises the freedom of a commercial business; the authorities have tended not to allow sufficient manage-

[1] European Commission, White Paper of 30 July 1996, *A strategy for revitalising the Community's railways*.

rial independence, they have imposed obligations without compensating fully for the costs involved and they have required the maintenance of very uneconomic services. Thus railways have been largely insulated from market forces and investment has often been inadequate or misdirected. Governments have generally compensated for this situation with large subsidies that met losses without being directed towards the improvement of efficiency.

The main factors leading to market failures in this sector are:

- the multi-service/multi-purpose nature of railways in Europe, giving rise to significant economies of scale and scope;
- the dependence of railway service provision on the existence of a fixed, costly and very specific infrastructure giving rise to a natural monopoly (these costs being largely sunk);
- the existence of numerous technical and legal barriers to entry[2].

Recent data reveal that the European rail industry generates a turnover of 73bn euros and has 800,000 employees. Each year public authorities invest considerable sums in the rail sector. In 2009 this amounted to 20bn in government payments for public service obligations (PSOs) and 26bn in public investment for infrastructure. The critical role played by rail in the effective functioning of the European economy is also confirmed: more than 8 billion passenger journeys are made by rail each year and rail carries about 10% of all freight traffic across Europe, with an estimated revenue of 3 billion[3].

2.2. EU POLICY AND THE RAILWAY PACKAGES

The aim of EU intervention in the rail sector has never been to secure rail privatisation and indeed the introduction of competition has only been one among a number of the Commission's objectives, which include making a clear distinction between the roles of government, infrastructure manager and train operator, and putting inter-modal competition onto a

[2] L. Di Pietrantonio – J. Pelkmans, *The Economics of EU Railway Reform*, Bruges European Economic Policy Briefing No. 8, September 2004, p. 7.

[3] Data divulged by the European Commission, *European Railways at a junction: the Commission adopts proposals for a Fourth Railway Package*, press release, 30 January 2013.

level playing field.

There were many obstacles to introducing a European railway policy. The Commission started proposing changes to railway policy in the early 90s, but it faced hostility from Member States, which did not want to lose their sovereignity in this sector. Since the negotiations on the drafting of the Treaty of Rome, two alternatives have been proposed concerning the setting up of a European transport policy: on the one hand, the Dutch favoured an approach based on liberal market-driven policies (which best suited their compact trading economy); on the other hand, France, Germany and Italy (with large territories and dispersed populations) were much more used to extensive State intervention in the provision of both road and rail transport and wanted a common transport policy which would allow such intervention to continue.

First Community legislation in this sector includes: Directive 91/440/EEC on the development of the Community's railways; Directive 95/18/EC on the licensing of railway undertakings; Directive 95/19/EC on the allocation of railway infrastructure capacity and the charging of infrastructure fees.

The prime objective was to ensure an effective enforcement of access rights to the railway infrastructure, as clarified by Article 1 of the Directive 91/440/EEC:

> *«The aim of this Directive is to facilitate the adoption of the Community railways to the needs of the Single Market and to increase their efficiency;*
> *- by ensuring the management independence of railway undertakings;*
> *- by separating the management of railway operation and infrastructure from the provision of railway transport services, separation of accounts being compulsory and organizational or institutional separation being optional,*
> *- by improving the financial structure of undertakings,*
> *- by ensuring access to the networks of Member States for international groupings of railway undertakings and for railway undertakings engaged in the international combined transport of goods.»*

It is worth mentioning some fundamental definitions:

- railway undertaking: any private or public undertaking whose main business is to provide rail transport services

for goods and/or passengers with a requirement that the undertaking should ensure traction (*i.e.* the provision of a locomotive and a driver);

- infrastructure manager: any public body or undertaking responsible in particular for establishing and maintaining railway infrastructure, as well as for operating the control and safety systems.

At this stage, the only way a railway undertaking from one Member State could obtain access to the rail passenger transport market of another Member State for the provision of international passenger transport services was by entering into an international grouping (*i.e.* any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States).

In July 1998, the Commission presented three new proposals aimed solely at making existing legislation more effective. On 26 February 2001, the Council adopted the three Directives known as the «rail infrastructure package»:

- Directive 2001/12/EC amending Council Directive 91/440/EEC on the development of the Community's railways;
- Directive 2001/13/EC amending Council Directive 95/18/CE on the licensing of railway undertakings;
- Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

At the same time, the Commission undertook to submit a further package of measures following these main guidelines:

- opening up the national freight markets to cabotage;
- setting high safety standards for the rail network, based on regulations established by an independent body and on clear definition of the responsibilities of each player involved;
- updating the Interoperability Directives to harmonise the technical requirements and provisions on use of all components of the high-speed and conventional railway networks;
- gradual opening-up of international passenger services;
- promotion of measures to safeguard the quality of rail

services and users' rights[4].

On 23 January 2002, the European Commission proposed a new set of measures aimed at revitalising the railways through the rapid construction of an integrated European railway area. The new package was based on the guidelines of the 2001 White Paper and the declared aim was to improve safety and interoperability and the full opening up of the rail freight market as from 1 January 2007, together with the establishment of the European Railway Agency (designed as an entity responsible for providing technical support for the safety and interoperability work).

The Second Railway Package includes:

- Directive 2004/49/EC on safety on the Community's railways and amending Council Directive 95/18/CE on the licensing of railway undertakings and Directive 2001/14/CE on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification;
- Directive 2004/50/EC amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system;
- Directive 2004/51/EC amending Council Directive 91/440/EEC on the development of the Community's railways;
- Regulation (EC) No 881/2004 establishing a European Railway Agency.

On 3 March 2004, the Commission put forward new proposals to open up the international passenger transport market by 2010 and to regulate passenger rights and the certification of train crews, leading to the adoption of the Third Railway Package in October 2007. The main provisions of this package comprise:

- the introduction of open access rights for international rail passenger services including cabotage by 2010 (according to which operators may pick up and set down passengers at any station on an international route, in-

[4] European Commission, White paper, *European transport policy for 2010: time to decide*, COM(2001) 370 final.

cluding at stations located in the same Member State);
- the introduction of a European driver licence allowing train drivers to circulate on the entire European network (the drivers are required to meet basic requirements concerning their educational level, age, physical and mental health, specific knowledge and practical training of driving skills);
- the strengthening of rail passengers' rights.

This package is formed by:
- Directive 2007/58/EC amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure;
- Directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the Community;
- Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70;
- Regulation (EC) No 1371/2007 on rail passengers' rights and obligations;
- Regulation (EC) No 1372/2007 amending Council Regulation (EC) No 577/98 on the organization of a labour force sample survey in the Community.

To sum up, the main important provisions of the Railway packages may be listed as follows:
- liberalization of rail freight (from 2007) and passenger (from 2010) markets;
- separation of the management of infrastructure, freight and passenger services, at least into separate divisions with their own profit and loss accounts and balance sheets;
- non discriminatory setting of access charges and allocation of paths;
- establishment of a rail regulator, independent of the infrastructure manager and any train operator, to whom appeal could be made in the case of dispute;

- establishment of a performance regime to incentivise the infrastructure manager;
- creation of the European Railway Agency;
- provision of passengers' rights.

Nevertheless, some problematic issues remain in the implementation of such measures. In particular, there exists a failure to ensure adequate independence of the infrastructure manager from train operators where these were still part of the same company, together with an insufficient implementation of the charging framework set out in Directive 2001/14, including a lack of the required performance regime. Moreover, the experience demonstrates a failure to establish an independent regulator with appropriate powers and accessibility and the lack of sufficient incentives for the infrastructure manager to reduce costs and the level of access charges.

On 30 Jan 2013 the European Commission announced a comprehensive package of measures to deliver better quality and more choice in railway services in Europe[5]. Several key points of this new proposal are identified by the Commission. First of all, the new measures intend to cut the administrative costs of rail companies and facilitate the entrance of new operators into the market: the ERA will be the entity entitled to issue EU wide vehicle authorisations for placing on the market as well as EU wide safety certificates for operators. Another fundamental aim is to open up domestic passenger railways to new entrants and services from December 2019: according to the proposal, companies will be able to offer domestic rail passenger services across the EU either by offering competing commercial services or through bidding for public service rail contracts, which account for a majority (over 90%) of EU rail journeys and will become subject to mandatory tendering, whereas at present national domestic passenger markets remain largely closed (only Sweden and the UK have fully opened their markets, while Germany, Austria, Italy, the Czech Republic and the Netherlands have opened theirs to a limited extent). Strengthening infrastructure managers so that they control all the functions at the heart of the rail network (including infrastructure investment planning, day-to-day operations and maintenance, as well as timetabling) is another important concern of the new package: to this end, in view of full passenger market opening in 2019, it provides the Compliance Verification Clause, under which rail undertakings forming part of a vertically integrated structure could be prevented from operating

[5] European Commission, *The Fourth Railway Package – Completing the single European railway area to foster European competitiveness and growth*, COM(2013) 25 final.

in other Member States if they have not first satisfied the Commission that all safeguards are in place to ensure a level playing field in practice, and fair competition is possible in their home market. Moreover, with regard to the workforce, Member States will be able to protect workers by requiring new contractors to take them on when public service contracts are transferred, going beyond the general EU requirements on transfers of undertakings.

2.3. MAIN FEATURES OF RAIL TRANSPORT

First of all, a distinction must be made between freight and passenger transport. With regard to the latter, which is the core of this handbook, a further distinction is relevant, *i.e.* between: a) long-distance services (intercity and high-speed services) with a degree of substitutability (hence inter-modal competition) with other modes (road-air) and with some possibility of hosting a degree of intra-modal competition; and b) commuter line markets (urban and regional services) where a better complementarity with other modes of transport might result in sustainable solutions, but where intra-modal competition is likely to produce diseconomies of scale and scope.

Railway infrastructure is generally considered a typical example of an essential facility. In fact high sunk costs for the establishment of a railway network mean that it is not economically viable to duplicate or build alternative routes, so that it is generally agreed that duplication of the network is not a reasonable economic option. Different cost categories may be identified and relate essentially to: tracks; signalling systems (ground-based, visual, electronic systems and related equipment); overhead electricity grid; stations and marshalling points.

The features mentioned above influence market definition in this sector. According to case-law, the Commission has referred to the general O&D approach, used also in air transport, and three relevant markets in rail passenger transport have been distinguished:

- the market for access to infrastructure;
- the market for the provision of traction;
- the market for international rail passenger transport.

A further distinction must be made between the upstream market (provision of services to rail undertakings) and the downstream market (provision of services by rail undertakings). From the point of view of demand, also in the case of railways, passengers may be classified as leisure/business,

non-time sensitive/time sensitive passengers[6].

Materials: T-374-5, 384 and 388/94, European Night Services v. Commission; T-229/94, Deutsche Bahn AG v. Commission; T-79/95 and 80/95, SNCF and British Railways v. Commission; Commission Decision, GVG/FS (2004/33/EC)

2.4. RAILWAY INFRASTRUCTURE AND THE SINGLE EUROPEAN RAILWAY AREA

The new Directive 2012/34/EU establishing a single European railway area has been recently adopted and must be implemented by Member States by 16 June 2015: it recasts Directives 91/440/EEC, 95/18/EC and 2001/14/EC with the aim of merging the three directives with their successive amendments and of modernising legislation in force. It applies to the use of railway infrastructure for domestic and international rail services.

It lays down:

- the rules applicable to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State;
- the criteria applicable to the issuing, renewal or amendment of licences by a Member State intended for those railway undertakings;
- the principles and procedures applicable to the setting and collecting of railway infrastructure charges and the allocation of railway infrastructure capacity (Article 1).

It is conceived to ensure fair competition on the rail market segments that have already been opened to competition, *i.e.* rail freight services and international passenger transport, not to extend the scope of market opening, which is the object of the above-mentioned Fourth Railway Package.

2.4.1. Access to railway infrasctructure and services

The fundamental principle affirmed in Section 4 of Directive 2012/34, containing the conditions of access to railway infrastructure, is that railway undertakings must be granted the right of access to railway infrastructure

[6] M. Negenman - M. Jaspers - R. Wezenbeek - J. Stragier, *Transport*, in J. Faull – A. Nikpay (eds.), *The EC Law of Competition*, Oxford University Press, Oxford 2007, p. 1632.

in all Member States for the purpose of operating international passenger services and all types of rail freight services. With regard to the former, this means that railway undertakings must be entitled to pick up passengers at any station located along the international route and set them down at another, including stations located in the same Member State (Article 10).

Article 11 provides that Member States may limit this right of access in the case of services covered by public service contracts. However, such limitation must not have the effect of restricting the right to pick up passengers at any station located along the route of an international service and to set them down at another, including stations located in the same Member State, except where the exercise of that right would compromise the economic equilibrium of a public service contract.

The Directive defines the minimum access package and the mandatory access to services to which railway undertakings are entitled (Annex II).

A central role is played by the infrastructure manager, defined as any body or firm that is responsible in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling.

Infrastructure managers must publish a network statement containing the following information, in particular:

- the nature of the infrastructure which is available to railway undertakings and the conditions for accessing it;
- the charging principles, including likely changes over the next five years;
- the principles and criteria for capacity allocation (characteristics, restrictions, procedures and deadlines).

With regard to infrastructure charges, Member States are required to establish a charging framework while respecting the management independence and specific charging rules or delegate such powers to the infrastructure manager. The determination of the charge for the use of infrastructure and its collection must be performed by the infrastructure manager, which must also grant the non-discriminatory application of the charging schemes.

Under Article 30, infrastructure managers must be given incentives to reduce the costs of providing infrastructure and the level of access charges: such incentives may be implemented through a contractual agreement between the competent authority and the infrastructure managers or through regulatory measures or through a combination of incentives to

reduce costs in the contractual agreement and the level of charges through regulatory measures.

Charges for the use of railway infrastructure and of service facilities must be paid to the infrastructure manager and to the operator of service facility (*i.e.* any public or private entity responsible for managing service facilities or supplying services to railway undertakings referred to in Annex II) respectively and used to fund their business. However Member States may require the infrastructure manager and the operator of service facility to provide all necessary information on the charges imposed.

The charges for the minimum access package and track access to service facilities must be set at the cost that is directly incurred as a result of operating the train service. The infrastructure charge may include a charge which reflects the scarcity of capacity of the identifiable segment of the infrastructure during periods of congestion and may be modified to take account of the cost of the environmental effects caused by the operation of the train.

Moreover the Directive provides that charges may be levied for capacity used for the purpose of infrastructure maintenance: in this case, such charges cannot exceed the net revenue loss to the infrastructure manager caused by the maintenance.

Also some exceptions to charging principles are provided by the Directive, according to which, in order to obtain full recovery of the costs incurred, infrastructure managers may be allowed by the Member State to levy mark-ups, if the market can bear this, on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimum competitiveness of rail market segments.

Under Article 33, subject to certain conditions, railway undertakings may be granted discounts on charges:

«1. (…) any discount on the charges levied on a railway undertaking by the infrastructure manager, for any service, shall comply with the criteria set out in this Article.

2. With the exception of paragraph 3, discounts shall be limited to the actual saving of the administrative cost to the infrastructure manager. In determining the level of discount, no account may be taken of cost savings already internalised in the charge levied.

3. Infrastructure managers may introduce schemes available to all users of the infrastructure, for specified traffic flows, granting time-limited discounts to encourage the development of new rail services, or discounts encouraging the use of considerably underutilised lines.

4. Discounts may relate only to charges levied for a specified infrastructure section.
5. Similar discount schemes shall apply for similar services. Discount schemes shall be applied in a non-discriminatory manner to any railway undertaking.»

2.4.2. Allocation of infrastructure capacity

The allocation of infrastructure capacity is assigned to the infrastructure manager, which is required to ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law. Once allocated to an applicant, capacity may not be transferred by the recipient to another undertaking or service. Any trading in infrastructure capacity is prohibited and leads to exclusion from the further allocation of capacity (Article 38).

It is worth mentioning that «applicant» is defined as *«a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation (EC) No 1370/2007 and shippers, freight forwarders and combined transport operators, with a public service or commercial interest in procuring infrastructure capacity»* (Article 3).

The rights and obligations of the infrastructure manager and of the authorised applicants are laid down in contracts or in Member States' legislation. When an applicant intends to use some infrastructure capacity to operate international passenger services, the regulatory bodies must ensure that all of the authorities concerned are informed.

Member States may establish a framework for the allocation of infrastructure capacity while respecting management independence. However the Directive requires that specific capacity allocation rules must be established. Infrastructure managers are also required to cooperate to enable the efficient creation and allocation of infrastructure capacity which crosses more than one network (this may include the establishment of international train paths).

With regard to the applicant's characteristics, the infrastructure manager may set requirements with regard to applicants to ensure that its legitimate expectations about future revenues and utilisation of the infrastructure are safeguarded. Such requirements must be appropriate, transparent and non-discriminatory and may only include the provision of a financial guarantee that must not exceed an appropriate level which must be proportional to the contemplated level of activity of the applicant, and assur-

ance of the capability to prepare compliant bids for infrastructure capacity (Article 41).

An instrument provided by the Directive is the famework agreement, which can be concluded between an applicant and infrastructure manager and specifies the characteristics of the infrastructure capacity required by and offered to the applicant over a period of time exceeding one working timetable (*i.e.* all planned train and rolling-stock movements) period. The agreement may not specify a train path in detail but should meet the commercial needs of the authorised applicant. In principle, the framework agreement covers a period of five years, renewable for a period equal to this original duration. However, for services using specialised infrastructure, the framework agreement may be for a period of 15 years, which may be extended only in exceptional cases. Such agreement may not preclude use of the infrastructure by other railway undertakings and may be amended (Article 42).

With regard to scheduling, the infrastructure manager is required to meet as far as is possible all requests for infrastructure capacity including requests for train paths crossing more than one network, and must take account of all constraints on applicants, including the economic effect on their business (Article 45). In case of congested infrastructures (*i.e.* where after coordination of the requested paths and consultation with applicants the infrastructure manager cannot satisfy requests for capacity adequately, or in case of infrastructure which it can be foreseen will suffer from insufficient capacity in the near future), the infrastructure manager must carry out a capacity analysis and may employ priority criteria (taking account of the importance of a service to society, relative to any other service which will consequently be excluded). Within six months of the completion of a capacity analysis, the infrastructure manager must produce a capacity enhancement plan (Articles 47-51).

Article 52 provides that infrastructure managers are also required to lay down conditions whereby it will take account of previous levels of utilisation of train paths in determining priorities for the allocation process. In the case of congested infrastructure, the infrastructure manager may require the surrender of any train path which, over a period of at least one month, has been used less than a threshold quota to be laid down in the network statement, unless this was due to non-economic reasons beyond the applicant's control.

The directive allows the option of a dispute resolution system (to be set

out in the network statement in addition to the currently available appeal procedures) in the event of any dispute over the allocation of infrastructure capacity.

2.4.3. Regulatory body

Member States are required to establish a national regulatory body for railway sector. It must be «a stand-alone authority which is, in organizational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity», *i.e.* from infrastructure managers, railway undertakings or any other authority involved in the award of a public service contract (Article 55).

Any undertaking which considers that it has been unfairly treated or discriminated against may appeal to this body. In particular, appeal may concern: the network statement in its provisional and final versions; the criteria set out in it; the allocation process and its result; the charging scheme; the level or structure of infrastructure charges which it is, or may be, required to pay; access to infrastructure and services. The regulatory body must also be entitled to monitor the competitive situation in the rail services markets, without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, and it must cooperate closely with the national safety authority within the meaning of Directive 2008/57/EC (see para. 2.6) and the licensing authority (Article 56).

2.4.4. Licensing

Chapter III of the Directive 2012/34 concerns the criteria applicable to the issue, renewal or amendment of operating licences by Member States to railway undertakings established in the Community.

Member States must designate the body responsible for issuing railway operating licences and for carrying out the obligations imposed by the Directive. In particular the Directive requires that the task of issuing licences shall be carried out by a body which does not provide rail transport services itself and is independent of bodies or undertakings that do so.

A railway undertaking has the right to be entitled to apply for a licence in the Member State in which it is established. Such a licence must be valid throughout the territory of the Community as long as the undertaking fulfils the obligations provided by the Directive.

Conditions for obtaining a licence is the compliance with the condi-

tions laid down in the Directive on requirements relating to good repute, financial fitness, professional competence and cover for civil liability (Articles 19-22).

Member States are responsible for defining the conditions under which the requirement of good repute is met to ensure that an applicant railway undertaking or the persons in charge of its management:

- have not been convicted of serious criminal offences, including offences of a commercial nature,
- have not been declared bankrupt,
- have not been convicted of serious offences against specific legislation applicable to transport,
- have not been convicted of serious or repeated failure to fulfil social or labour law obligations, including obligations under occupational safety and health legislation, and customs law obligations in the case of a company seeking to operate cross-border freight transport subject to customs procedures (Article 19).

The requirements relating to financial fitness must be met when an applicant railway undertaking can demonstrate that it will be able to meet its actual and potential obligations, established under realistic assumptions, for a period of twelve months.

2.5. UNBUNDLING OF RAILWAY ACTIVITIES

The concept of unbundling is common to many sectors subject to liberalization processes, in particular to network industries, traditionally vertically-integrated. In a nutshell, whereas vertical integration implies that both networks and services are owned and operated by a single incumbent, unbundling requires the separation of operations from infrastructure management. Vertical separation in the railway sector is the separation of track infrastructure from operational transport services: this means that the infrastructure remains under the control of a regulated public or private monopolist, and one or more railway firms are able to operate rail services.

EU legislation has gradually introduced provisions requiring management independence and separation of accounts. With regard to management independence, the following provisions of the current Directive 2012/34 are worth mentioning:

- Article 4: *«1. Member States shall ensure that, as regards management, administration and internal control over*

administrative, economic and accounting matters, railway undertakings directly or indirectly owned or controlled by Member States have independent status in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the State.
2. While respecting the charging and allocation framework and the specific rules established by the Member States, the infrastructure manager shall be responsible for its own management, administration and internal control.»

- Article 5: *«1. Member States shall enable railway undertakings to adjust their activities to the market and to manage those activities under the responsibility of their management bodies, in the interests of providing efficient and appropriate services at the lowest possible cost for the quality of service required.*
Railway undertakings shall be managed according to the principles which apply to commercial companies, irrespective of their ownership. This shall also apply to the public service obligations imposed on them by Member States and to public service contracts which they conclude with the competent authorities of the State. (…)»

With regard to separation of infrastructure management and transport operations, the main principles are set out in Article 6 and 7:

- Article 6: *«1. Member States shall ensure that separate profit and loss accounts and balance sheets are kept and published, on the one hand, for business relating to the provision of transport services by railway undertakings and, on the other, for business relating to the management of railway infrastructure. Public funds paid to one of these two areas of activity shall not be transferred to the other.*
2. Member States may also provide that this separation shall require the organization of distinct divisions within a single undertaking or that the infrastructure and transport services shall be managed by separate entities.
3. Member States shall ensure that separate profit and

loss accounts and balance sheets are kept and published, on the one hand, for business relating to the provision of rail freight transport services and, on the other, for activities relating to the provision of passenger transport services. Public funds paid for activities relating to the provision of transport services as public-service remits shall be shown separately in accordance with Article 7 of Regulation (EC) No 1370/2007 in the relevant accounts and shall not be transferred to activities relating to the provision of other transport services or any other business.
4. The accounts for the different areas of activity referred to in paragraphs 1 and 3 shall be kept in a way that allows for monitoring of the prohibition on transferring public funds paid to one area of activity to another and the monitoring of the use of income from infrastructure charges and surpluses from other commercial activities.»

- Article 7: *«1. Member States shall ensure that the essential functions determining equitable and non discriminatory access to infrastructure, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of organizational structures, this objective shall be shown to have been achieved.The essential functions shall be:*
(a) decision-making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths; and
(b) decision-making on infrastructure charging, including determination and collection of the charges, (…).
Member States may, however, assign to railway undertakings or any other body the responsibility for contributing to the development of the railway infrastructure, for example through investment, maintenance and funding.
2. Where the infrastructure manager, in its legal form, organization or decision-making functions, is not independent of any railway undertaking, the functions referred to in Sections 2 and 3 of Chapter IV [*i.e.* determination and collection of charges and allocation capacity] *shall be performed respectively by a charging body and by an*

> *allocation body that are independent in their legal form, organization and decision-making from any railway undertaking.*
> *3. When the provisions of Sections 2 and 3 of Chapter IV refer to the essential functions of an infrastructure manager, they shall be understood as applying to the charging body or the allocation body for their respective powers.»*

Morerover, Article 8 regulates the financing of the infrastructure manager, in particular providing that:

- *«Member States shall ensure that, under normal business conditions and over a reasonable period which shall not exceed a period of five years, the profit and loss account of an infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities, non-refundable incomes from private sources and State funding, on the one hand, including advance payments from the State, where appropriate, and infrastructure expenditure, on the other hand»*(para. 4).

The principle of accounts separation is the prerequisite for determining the costs of transport activities and of infrastructure management activities. The Commission has affirmed that: *«[i]t aims to enhance the transparency of the financial management of railway undertakings. It concerns not only the separate accounting of different rail businesses but also the public funding provided for these businesses. In particular, the separation of funding for public service contracts and ensuing obligations (PSO funding) from all other forms of funding, as well as the prohibition of cross-subsidy between different rail businesses have major significance. The separation of accounts requires railway undertakings to have a clear and precise system to illustrate revenues and costs of railway undertakings and infrastructure managers. Moreover, it helps ensure that railway undertakings provide efficient and appropriate services at the lowest possible cost for the quality of service required in the railway market (…)»* [7].

The fundamental issue is the question of ensuring that the infrastructure manager is impartial when it comes to allocating capacity and charging for

[7] European Commission, *Annexes to the Communication on the implementation of the railway infrastructure package Directives ('First Railway Package')*, Staff Working Document, COM(2006) 189 final.

infrastructure use. The Commission considers that the party which regulates infrastructure use is in possession of all the information, including sensitive commercial information, about the users: *«If the infrastructure manager is part of a group that is managed in a unified fashion and includes one or more railway undertakings, this group has, de facto, a competitive advantage over competing railway undertakings. Unless it takes appropriate measures, there is a high risk of collusion. Moreover, there could be a temptation for this group to manage the infrastructure according to its own interests, for example by not making it interoperable for neighbouring railway undertakings or by developing the network according to its own needs rather than those of competing railway undertakings»*[8].

With regards to the criteria used for the Commission's assessment of the independence of infrastructure management functions, there are three basic variants of the corporate structure for the infrastructure manager:

- a legally, organizationally and institutionally independent rail infrastructure manager;
- an integrated rail infrastructure manager working alongside an independent capacity allocation and charging body [this option may include the variant of a fully independent infrastructure manager which delegates particular tasks (*e.g.* daily traffic management, infrastructure maintenance works) to the (incumbent) railway undertaking], and
- a legally and organizationally independent infrastructure manager which is part of a railway holding structure or any other structure controlled by a railway undertaking.
- a fourth variant is where the infrastructure manager in charge of allocating capacity and a railway undertaking are still integrated, but it must be considered no longer compatible with Community legislation.

In practice, the Commission in the document mentioned above has listed the models adopted by Member States in order to achieve the required minimum separation set by the Directives on rail infrastructure unbundling. These are mainly:

- ownership separation: the infrastructure manager and the railway operator are autonomous entities with se-

[8] *Ibid.*

parate ownership, balance sheets and staff (UK, Spain, Finland, Denmark, Netherlands, Portugal);
- organizational separation: separate business units are created with a large degree of operational freedom either operating as part of the railway operator or organized within a holding company framework (Italy, Germany).

A third hybrid model of separation of key powers is called operational separation, under which the infrastructure manager is responsible for some specific activities (*e.g.* capacity allocation and charging), but daily administration of the network (*e.g.* maintenance) is devolved to the major undertaking (France).

Unbundling is not a simple issue as there is no unanimous point of view on its positive and negative effects. In general, advantages of vertical separation are identified in the increase of transparency, cost efficiencies, neutrality and competition in the market concerned, but in the rail sector there are other elements that may challenge these goals in terms of transitional costs, loss of economies of scope, increased risk of insufficient investments in infrastructure and coordination problems. It has been stressed that the railways sector is an area where the trade-offs between structural separation and vertical integration are quite difficult to disentangle, also considering that the higher cost of regulation under vertical separation needs to be balanced with the positive effect on competition vertical separation may produce[9].

2.6. SAFETY

Safety in the railway sector implies the regulation of several aspects that are the object of different legislations.

First of all, in order to be granted access to the railway infrastructure, a railway undertaking must hold a safety certificate.

Four major aspects are regulated by Directive 2004/49/EC (as amended):
- the setting up, in each Member State, of an authority responsible for supervising safety;
- the mutual recognition of safety certificates delivered in the Member States;
- the establishment of common safety indicators (CSIs) in order to assess that the system complies with the

[9] OECD, *Report on experiences with structural separation*, 2006, p. 16.

common safety targets (CSTs) and facilitate the monitoring of railway safety performance;
- the definition of common rules for safety investigations.

Then, under Directive 2007/59/EC, all train drivers are required to have the necessary fitness and qualifications to drive trains and hold the following documents:

- a licence identifying the driver and the authority issuing the certificate and stating the duration of its validity. The licence is the property of the driver and is issued, on application, to drivers meeting the minimum requirements as regards medical and psychological fitness, basic education and general professional skills;
- a harmonised complementary certificate as evidence that the holder has received additional training under the railway undertaking's safety management system. The certificate should state the specific requirements of the authorised service (rolling stock and infrastructure) for each driver and its validity will therefore be restricted.

Directive 2008/57/EC (as amended) regulates the interoperability, meaning the ability of a rail system to allow the safe and uninterrupted movement of trains which accomplish the required levels of performance for these lines. This ability depends on all the regulatory, technical and operational conditions which must be met in order to satisfy the essential requirements (*i.e.* all the conditions set out in the Directive which must be met by the rail system, the subsystems, and the interoperability constituents, including interfaces). In order to understand the provisions of this Directive, it is necessary to recall some fundamental definitions contained in it:

- «interoperability constituents», meaning any elementary component, group of components, subassembly or complete assembly of equipment incorporated or intended to be incorporated into a subsystem, upon which the interoperability of the rail system depends directly or indirectly. The concept of a «constituent» covers both tangible objects and intangible objects such as software;
- «technical specification for interoperability»' (TSI), meaning a specification adopted in accordance with the Directive by which each subsystem or part subsystem is

covered in order to meet the essential requirements and ensure the interoperability of the rail system.

This directive establishes the conditions to be fulfilled to achieve interoperability within the EU rail system at the design, construction, placing into service, upgrading, renewal, operation and maintenance stages. The gradual implementation of interoperability of the rail system is pursued through the harmonisation of technical standards. Thus this directive covers:

- essential requirements with regard to safety, reliability, human health, environmental protection, technical compatibility and operation of the system (Annex III);
- the technical specifications for interoperability (TSIs) adopted for each subsystem or part of subsystem pursuant to this directive;
- the corresponding European specifications.

It is worth mentioning that the provisions of this Directive comply with Directive 2004/45/EC on railway safety and the health and safety of workers.

Other legislation linked to such matters are:

- Commission Regulation (EU) No 201/2011 on the model of declaration of conformity to an authorised type of railway vehicle;
- Commission Decision 2009/107/EC amending Decisions 2006/861/EC and 2006/920/EC concerning technical specifications of interoperability relating to subsystems of the trans-European conventional rail system.

The centrality of these issues in the EU rail transport policy has led to the creation of a proper entity devoted to them, *i.e.* the European Railway Agency, whose main declared objectives are to increase the safety and to improve the level of interoperability of the European railway system. It is also intended to contribute towards establishing a European certification system of vehicle maintenance workshops and setting up a uniform training and recognition system for train drivers.

The Agency must provide the necessary technical assistance to implement Directive 2004/49/EC. To this end, its main tasks are to:

- prepare and propose common safety methods and targets;
- draw on the support of groups of experts in the sector

placed under its responsibility;
- consult social partners and organizations representing rail freight customers and passengers at European level;
- ensure safety performance is continuously monitored;
- produce a public report every two years;
- keep a database on railway safety;
- ensure the networking of and cooperation between national rail safety and investigation authorities, with the aim of encouraging the exchange of experience and developing a common rail safety culture.

With regard to interoperability objectives, the Agency is required to contribute to the development and implementation of rail interoperability in accordance with the principles and definitions laid down in Directives 96/48/EC and 2001/16/EC. Its main tasks are to:

- organize and conduct, on a mandate from the Commission, the work of the working parties on drafting the TSIs and forward the draft TSIs to the Commission;
- ensure that the TSIs are adapted to technical progress and market trends and to the social requirements and propose to the Commission the amendments to the TSIs which it considers necessary;
- ensure coordination between the development and updating of the TSIs on the one hand and the development of the European standards which prove necessary for interoperability on the other and maintain the relevant contacts with the European standardization bodies;
- assist the Commission in organizing and facilitating the cooperation of notified bodies;
- advise and address recommendations to the Commission relating to the working conditions of all staff executing safety-critical tasks.

With regard to the composition of the Agency, the ERA comprises an Administrative Board which meets at least twice a year, which includes representatives from each Member State, the Commission and six categories of professionals from the sector: railway undertakings, infrastructure managers, railway industry, worker unions, passengers and freight customers. The Agency is led by a Chairperson appointed by the Administrative Board: the Chairperson's role is mainly to prepare and implement the work

programme and is also responsible for managing the budget of the Agency.

The European Railway Agency is an independent body and does not have decision-making powers as such, but it can present opinions, recommendations and proposals to the Commission.

2.7. STATE AID FOR RAILWAY UNDERTAKINGS

As mentioned before, the common feature of railways throughout Europe is the high level of subsidization.

«The relative decline in Europe's railway industry is largely due to the way transport supply has been organized historically, essentially on national and monopolistic lines. First of all, in the absence of competition on the national networks, railway undertakings had no incentive to reduce their operating costs and develop new services. Their activities did not bring in sufficient revenue to cover all the costs and investments necessary. These essential investments were not always made and sometimes the Member States forced the national railway undertakings into making them when they were not in a position to finance them adequately from their own resources. The result was heavy indebtedness for these undertakings, which itself had a negative impact on their development.»[10]

Community legislation on EU rail transport comprises:

- Council Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway;
- Council Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway;
- Council Regulation (EEC) No 1192/69 on common rules for the normalisation of the accounts of railway undertakings (providing that certain compensation may be granted by Member States to railway undertakings).
- Regulation (EC) No 1370/2007 ('the PSO Regulation'), repealing Regulations (EEC) No 1191/69 and (EEC) No 1107/70.

[10] European Commission, *Community guidelines on State aid for railway undertakings* (2008/C 184/07).

In addition, in 2008 the Commission released the Community guidelines on State aid for railway undertakings (2008/C 184/07), concerning the application of Articles 93 and 107 TFEU and their implementation with regard to public funding for railway undertakings within the meaning of Directive 91/440/EEC. In more detail, the Guidelines cover:

a) public financing of railway undertakings by means of infrastructure funding (Chapter 2);
b) aid for the purchase and renewal of rolling stock (Chapter 3);
c) debt cancellation by States with a view to the financial rejuvenation of railway undertakings (Chapter 4);
d) aid for restructuring railway undertakings (Chapter 5);
e) aid for the needs of transport coordination (Chapter 6);
f) State guarantees for railway undertakings (Chapter 7).

They do not cover the aspect relating to public service compensation (treated by the PSO Regulation, see the next paragraph).

With regard to a), these guidelines apply only to railway undertakings: their aim is therefore not to define, in the light of State aid rules, the legal framework which applies to the public financing of infrastructure, but they only examine the effects of public financing of infrastructure on railway undertakings. This type of funding may constitute aid if it allows undertakings to benefit indirectly from an advantage by lightening the burden of charges that encumber their budget. Where infrastructure use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with Community legislation in force, the Commission considers that public financing of the infrastructure does not constitute State aid. However if such financing is considered as an aid, it may nevertheless be authorised if the infrastructure in question meets the needs of transport coordination.

With regard to b), the Commission stresses the necessity of investing in the modernisation and/or renewal of the fleet of locomotives and carriages used for passenger transport with the view of keeping rail transport competitive with other modes of transport which cause more pollution and of enhancing the interoperability of national networks.

The compatibility assessment of aid for the purchase and renewal of rolling stock should be made according to the common-interest objective to which the aid is contributing. Aid categories are:

- aid for coordination of transport (Article 93 of the Treaty),

- aid for restructuring railway undertakings in difficulty,
- aid to small and medium-sized enterprises,
- aid for environmental protection,
- aid relating to Public Service Obligations, regional aid.

With regard to c), it is worth considering that at the beginning of the 1990s, following the entry into force of Directive 91/440/EEC, the Member States considerably reduced the debts of railway undertakings. The debt restructuring took different forms:

- the transfer of all or part of the debt to the body responsible for managing the infrastructure, thus enabling the railway undertaking to operate on a sounder financial footing. It was possible to make this transfer when transport service activities were separated from infrastructure management;
- the creation of separate entities for the financing of infrastructure projects (for example, high-speed lines), making it possible to relieve railway undertakings of the future financial burden which the financing of this new infrastructure would have meant;
- the financial restructuring of railway undertakings, notably by the cancellation of all or part of their debts.

These three types of action have helped to improve the financial situation of railway undertakings in the short term, but, according to the Commission, the level of indebtedness of many railway undertakings continues to give cause for concern[11].

Now aid of this kind must generally be examined on the basis of the 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty.

Under the following conditions, aid may be declared compatible with Article 107 TFEU in so far as it seeks to ease the transition to an open rail market:

- the aid must serve to offset clearly determined and individualised debts incurred prior to 15 March 2001, the date on which Directive 2001/12/EC entered into force;
- the debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure;

[11] European Commission, *Community guidelines,* cited at fn 10.

- the cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial management;
- the aid must not go beyond what is necessary for the purpose;
- cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition on the market (*e.g.* by deterring outside undertakings or new players from entering certain national or regional markets). In particular, aid intended for cancelling debts cannot be financed from levies imposed on other rail operators.

With regard to d), the extent to which State aid is compatible with restructuring firms in difficulty in the railway industry is assessed also on the basis of the 2004 guidelines on aid for restructuring. Although these do not provide for derogations for railway undertakings, the Commission considers that given the difficulties of the European rail freight sector, it is in the common interest that aid granted to railway undertakings in difficulty might, under certain circumstances, be considered compatible with the Treaty. Thus some derogations are provided under certain conditions, but only to the freight divisions of railway undertakings, and only for restructurings notified before 1 January 2010.

With regard to e), several forms of coordination of transport are considered, *i.e.*:

- aid for infrastructure use, *i.e.* aid granted to railway undertakings which have to pay charges for the infrastructure they use, while other undertakings providing transport services based on other modes of transport do not have to pay such charges;
- aid for reducing external costs, designed to encourage a modal shift to rail because it generates lower external costs than other modes such as road transport;
- aid for promoting interoperability, and, to the extent to which it meets the needs of transport coordination, aid for promoting greater safety, the removal of technical barriers and the reduction of noise pollution in the rail transport sector («interoperability aid»);
- aid for research and development in response to the ne-

eds of transport coordination.

The Commission has presented in detail the method to determine eligible costs, as well as the conditions making it possible to ensure that this aid meets the conditions of compatibility with the Treaty.

Finally, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State can be seen by the Commission as aid in the form of a guarantee.

Unlimited guarantees in a sector open to competition are considered incompatible with the Treaty. Several railway undertakings are still enjoying unlimited guarantees which are generally a legacy of special cases of historic monopolies set up for railway undertakings before the Treaty entered into force or before the rail transport services market was opened up to competition: these guarantees do, to a large extent, constitute existing aid.

2.8. PUBLIC SERVICE OBLIGATIONS IN RAIL TRANSPORT

First legislation on PSOs in the railway sector comprises Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, which does not deal with the way public service contracts are to be awarded in the EU, and in particular the circumstances in which they should be the subject of competitive tendering. More recently, updated legislation has been provided through Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, and repealing Council Regulations No 1191/69 and No 1107/70. It applies to regular and non-limited access, national and international public passenger transport services by road, rail and other track-based modes, whereas it does not cover freight transport.

Regulation 1370/2007 provides that where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract. It is worth mentioning that public service contract is defined as one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport ser-

vices subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:

- taking the form of an individual legislative or regulatory act, or
- containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator [Article 2(i)].

According to the Regulation, obligations which aim to establish maximum tariffs for all or certain categories of passengers may be subject to general rules. The competent authority grants compensation for the net positive or negative financial impact on costs and revenue occasioned by compliance with the pricing obligations established in the general rules.

The public service contracts and general rules define:

- the PSO to be fulfilled by the operator and the areas concerned;
- the parameters based on which compensation must be calculated and the nature and scope of all exclusive rights granted to avoid any overcompensation;
- the means of distributing the costs linked to service supply (staff costs, energy, infrastructure, maintenance, etc.);
- the means of distributing income from the sale of transport tickets between the operator and the competent authority.

The duration of public service contracts is limited and must not exceed ten years for bus and coach services, and fifteen years for passenger transport services by rail or other track-based modes. However this period may be extended by up to 50% under certain conditions.

Subject to certain reservations detailed in Article 5 of the Regulation, unless prohibited under national law, local authorities may provide public transport services themselves or award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments («in-house» entity).

Any competent authority which uses a third party other than an internal operator must award public service contracts by means of transparent and non-discriminatory competitive procedures which may be subject to

negotiation.

Exceptions are provided for awarding certain passenger transport services by bus or tram, for which the procedures of Directives 2004/17/EC and 2004/18/EC apply.

The obligation to implement competitive procedures does not apply to:

- low level contracts, the average annual value of which is estimated at less than EUR 1 million or which supply less than 300,000 kilometres of public passenger transport services;
- where emergency measures are taken or contracts are imposed in response to actual or potential service interruptions;
- regional or long distance rail transport.

Rules require each competent authority to publish a global annual report on the public service obligations incumbent on them and the resultant compensation received. Moreover one year prior to any competitive procedure, the competent authority must ensure that detailed information is published in the Official Journal of the European Union (this information includes name and contact details of the competent authority, type of allocation proposed and services and territories likely to be affected).

The Member States are required to gradually come into line with the Regulation, with the end of the transition period fixed at 3 December 2019.

2.9. THE PROTECTION OF RAIL WORKERS

In the rail transport sector particular attention is dedicated to workers and their working conditions.

On 27 January 2004 the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) concluded an Agreement on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services. The Council Directive 2005/47/EC of 18 July 2005 has given effect to this Agreement. The Directive complies with the fundamental rights and principles set out in the Charter of Fundamental Rights of the European Union and is designed to ensure full compliance with Article 31 CFREU, which provides that all workers have the right to healthy, safe and dignified working conditions, to a limit on their maximum working time and to weekly and daily rest

periods and an annual period of paid holidays.

Fundamental provisions are contained in Article 2:

«1. Member States may maintain or introduce more favourable provisions than those laid down by this Directive.

2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This shall be without prejudice to the rights of Member States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are complied with.»

The Directive is part of the overall framework for interoperability in the European rail system. The aim of the Agreement is to find a balance between the need to ensure adequate protection of the health and safety of mobile workers in interoperable cross-border services and the need for flexibility in running rail transport enterprises in an integrated European railway network. The Agreement grants workers a daily rest period of 12 consecutive hours and breaks of between 30 and 45 minutes; it limits daily driving time to 9 hours on a day shift and 8 hours on a night shift and gives employers greater flexibility as, under exceptional circumstances, they are allowed to shorten the daily rest periods to 9 hours instead of to 11 as provided for in the Working Hours Directive (Directive 2003/88/EC concerning certain aspects of the organization of working time).

Following Directive 2005/47/EC, the Commission presented a socio-economic analysis of the development of working conditions in the railway sector in the Communication of 15 December 2008[12] clarifying the regulatory and political framework in which this legislation was implemented:

«During the discussions concerning the Directive, particular attention was given to Clause 4 of the Agreement, according to which a daily rest period away from home must be followed by daily rest at

[12] European Commission, *Economic and social impact of the Agreement appended to Directive 2005/47/EC concluded on 27 January 2004 between the social partners on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector* [COM(2008) 855 final].

home, with the option for the social partners of negotiating a second consecutive rest period away from home at railway company or national level. Some national delegations expressed fears that this provision would act as a brake on development in the sector in view of the length of certain routes and the time necessary for their operation. Pursuant to Clause 4 of the Agreement, the social partner organizations which signed the Agreement at European level have initiated negotiations on the number of consecutive rests away from home and compensation for rests away from home. In order to monitor the impact of the Agreement and Clause 4 thereof on the development of the market, the Commission undertook in a declaration made at the time of the adoption of the Directive to submit a report to the Council, taking account of the economic and social impact of the Agreement on companies and workers and of the discussions between social partners on all the relevant topics, including Clause 4. The Commission has declared itself willing to take any measures necessitated by any new agreement between the social partners, by proposing an amendment to the Directive.»

Moreover, the Commission acknowledges that the working conditions of mobile workers (drivers and inspectors) in the cross-border rail transport sector may give rise to a number of occupational health and safety risks:

«This sector is characterised by long shifts, night work and irregular working hours. The risks incurred include disruption of the biological clock and social life, and many other physical and psychological illnesses described in the specialist literature.

A large number of factors must be taken into account, in addition to driving and working time and rests, in order to organize working time in such a way as to avoid placing the health and safety of mobile workers at risk.

A number of factors directly relating to working time are covered by the Agreement between the social partners: length of shifts, weekly working time, break time during a shift, the amount and quality of sleep before a shift, day or night work, the starting time of a shift, working time regularity and predictability, the number of consecutive shifts and the way in which working time is organized.

Other features of working conditions include monotony of tasks, physical and psychological stress and environmental factors (noise,

light, weather). It is also necessary to take account of workers' scope for organizing their own working time (use of time and breaks). Finally, the characteristics of the workers themselves (age, sex, lifestyle, etc.) are a crucial factor.
The following occupational risks are most frequently cited in existing studies and the field quality survey (interviews with employers and trade unions): long driving times followed by long working hours; lack of breaks during and between shifts; unpredictable rostering; and working during the night, early in the morning and at weekends. In addition, the cross-border transport sector in particular also has poor working conditions, severe time pressure to meet deadlines and monotony of tasks.»

As explained in the 2008 Communication, the Commission monitors developments in the rail transport market and in particular the negotiations between the social partners in order to adapt the rest conditions of workers to the developing needs of this sector while at the same time ensuring a high level of health and safety for workers.
To support this development, the Commission has undertaken to:
«- encourage the social partners to continue with their negotiations on Clause 4 and to achieve a well-balanced result that reflects companies' need for flexibility in the running of operations, particularly in the freight market, and the need to protect the health and safety of mobile workers and respect the balance between work and private life;
- draw the attention of the social partners to the importance of taking an integrated approach which incorporates all aspects of significance to the health and safety of mobile workers, including the quality of rest away from home, and which can encourage workers to be more involved and more independent in the organization of their working time, whether at collective or individual level;
- carefully monitor how the Member States implement the European Agreement under national law. Special attention must be given to monitoring the length of shifts and the length of the working week;
- take care to encourage an improvement in the conditions and quality of work for mobile workers in the rail sector, which can help to preserve the appeal of the profession in a labour market context which is likely to be strained in the coming years.»
It is also for the Member States to guarantee a balance between work

and family life, especially by reaching a consensus with the social partners on the question of rest days at home.

THIRD MODULE
PORT SERVICES

3.1 MARITIME TRANSPORT AND PORT SERVICES

Maritime transport is another fundamental area in which the EU law has intervened introducing its liberalization policy. After the landmark judgments given in the *French Seamen's*[1] and *Corsica Ferries*[2] cases, sea transport has been subjected to the general rules of the Treaty and specific legislation has been adopted starting from the 1986 maritime package, which included four Regulations, Nos 4055/86, 4056/86, 4057/86 and 4058/86, aimed at applying the principles of freedom to provide services, competition, prohibition of unfair pricing and free access to the market in sea transport. Subsequently a fundamental step in the liberalization process was taken in 1992 with the adoption of Regulation 577/92, which applies the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

Seaports constitute the fundamental infrastructures for maritime transport and play a crucial role in the EU economy. According to the data released by the European Commission in the guidelines on the trans-European transport network (TEN-T), approximately 96% of all freight and 93% of passengers passing through EU ports transits through the EU's 329 main seaports, which enable about 74% of imports and exports of cargo and 37% of EU trade. In addition to their commercial and economic role, they are also essential to grant the EU's territorial continuity, linking islands and peripheral areas with the mainland, and represent a great social value, considering that 1.5 million workers are employed in European ports, with the same amount again employed indirectly throughout the maritime Member States[3].

Differently from maritime transport services, the access to port services (*i.e.* the services of commercial value that are normally provided against payment in a port) is an area in which EU law still finds considerable difficulty in becoming the legal point of reference and in achieving Liberal-

[1] ECJ, case 167/73, *Commision v French Republic*

[2] ECJ, case C-49/89, *Corsica Ferries France v Direction générale des douanes françaises*.

[3] European Commission, *Ports: an engine for growth*, COM (2013) 0295 final. One should consider that five Member States (Luxembourg, Austria, Czech Republic, Slovakia and Hungary) do not have an access to the sea.

ization. In fact, the results over the decades have been much less rewarding than in other transport sectors.

The Commission has clarified that the attractiveness of maritime transport is dependent on the availability, efficiency and reliability of port services and has stressed the necessity of addressing questions regarding the transparency of public funding and port charges, administrative simplification efforts in ports and reviewing restrictions on the provision of services at ports. The 2011 White Paper on Transport and the Single Market Act II[4] emphasize the need for well-connected port infrastructures, efficient and reliable port services and transparent port funding. Nevertheless there are several challenges that the sector is facing in terms of hinterland congestion, traffic growth and investment. This section aims at providing a brief overview of the structure of the ports industry and the main issues in the access to port services.

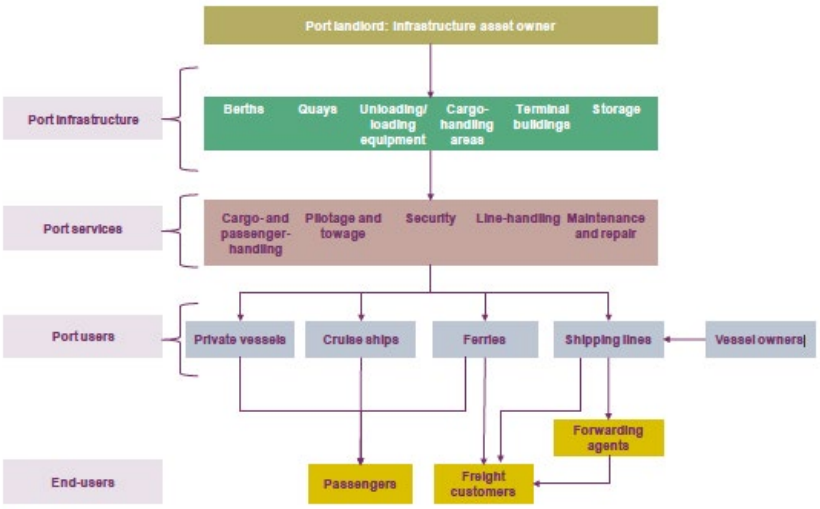
3.2 THE STRUCTURE OF THE PORTS INDUSTRY AND PORT SERVICES

There is no uniform model for the structure of the port industry ~~over~~ throughout the EU Member States as it is strongly influenced by the historical features of each individual port, with rules and traditions that sometimes reach way back to the Middle Ages. Differences exist as to the ownership, organization and financing of ports in Europe.

As the whole system of activities within ports is very complex, it can be helpful to provide some fundamental notions concerning the main parties and types of activity relevant in the ports organization.

[4] European Commission, *Single Market II – Together for new growth*, COM(2012) 573 final.

Figure 1 Maritime sector value chain



Source: Oxera.

Source: OECD, *Competition in Ports and Port Services,* 2011, p. 22

The port authority is the organization responsible for the planning, authorisation, coordination and control of services within the port (in some instances, it also provides services). The port landlord is the entity that owns the land on which the port is constructed and usually owns the essential infrastructure (*e.g.*, the quays and breakwaters). Typically, the port authority is also the port landlord, although the landlord may be a separate entity (*e.g.* the State).

The core port infrastructure (*e.g.* maritime access channels, quays) is owned by the port landlord. Operational and other infrastructures (*e.g.* buildings, cranes, etc.) may be owned and provided by the port landlord

or by a different entity. The main elements of the port infrastructure are:

- berths, *i.e.* the specific part of a quay where a vessel can be moored;
- quays (or wharfs), *i.e.* the structure in a port where a ship docks and may contain one or more berths;
- loading and unloading equipment (*e.g.* lifting cranes and pumps used to move cargo from a ship to the quayside and vice versa);
- terminal buildings, *i.e.* the structures at a port that are used to handle passengers and freight;
- storage areas, *i.e.* designated parts of a port for the storage of cargo before or after its waterborne transportation.

Ports have a wide range of users, including:

- private vessels;
- cruise ships, which typically provide services for leisure passengers and tend to operate on a pre-specified schedule;
- ferries, typically providing regular services between a specific port of origin and port of destination, catering for both passenger and freight traffic;
- shipping lines for both passenger and freight traffic;
- end-users, such as passengers and freight customers and freight forwarders (*i.e.* companies that specialize in arranging shipping services for their customers).

With regard to port services, which can be provided by the port itself or by independent intermediary parties, the main services can be identified as follows:

- Pilotage, which is a service provided by a pilot with local knowledge and skills which enable him to conduct the navigation and manoeuvring of the vessel in and approaching/leaving the harbour.
- Towage is a service provided by tug boats which move larger ships that either should not or cannot power themselves.
- Cargo-handling involves the movement of cargo in and around a port, including marshalling services (the receipt, storage, assembly and sorting of cargo in preparation for delivery to a ship's berth) and stevedoring ser-

vices (the loading of cargo onto and discharging cargo from ships)[5].

Historically, the dominant model for ports has been public ownership combined with vertical integration of the port landlord and port operator. One must consider, however, that this interacts with a generally very complex regulation of manpower in ports (mainly dockers, but not only). Currently several types of organization may occur: in some ports the landlord owns only the basic infrastructure and private companies own and operate other parts of the infrastructure; in others, the landlord owns all the infrastructure, but leases out certain facilities; moreover there are ports where the integrated port authority owns all the assets and provides all the services.

The main port models existing in the EU are:

- Tool ports: the port authority owns the infrastructure and superstructure, and rents it to operators which carry out commercial operations, but retains all regulatory functions.
- Landlord ports: it is the most widespread model used in the EU; in this case the port authority owns only the basic infrastructure and retains all regulatory functions, but leases the infrastructure out to private operators (generally on a long-term concession basis), which provide and maintain their own superstructure, including buildings and cargo-handling equipment at the terminals.
- Fully privatised ports: this model is not widely used, except in the UK; in this case, port land is privately owned, with both infrastructure and superstructure privately managed.

As ports share the nature of limited capacity infrastructure ("essential facilities"), such as the infrastructures examined in other modes of transport, the usual competition concerns over the existence of market power and the potential abuses of that power exist. However the Commission's practice in the field of port activities is less advanced as compared to other sectors of the transport industry, having many cases been solved at national level. The main problem that was dealt with in port antitrust cases before the Commission and the Court of Justice has been the difficulties in access

[5] For a broader analysis on port industry and port services, see OECD, *Competition in Ports and Port Services,* 2011.

to services within a port, that are usually operated within a framework characterised by exclusive rights or *de facto* monopolies of a public or private nature established by the State.

This case law includes mainly situations in which an undertaking holding monopoly in an upstream market of port services distorts downstream competition (*e.g.*, a port authority also active in the provision of ferry services discriminates between its own ferry operations and a competitor's operations in port fees[6]) or thwarts a competitor's plan to open a new ferry service[7] or a company holding a monopoly in a certain port service abuses of its dominant position[8]. It is worth mentioning that in such ports case-law the Commission has defined the ports as essential facilities, giving rise to the homonymous doctrine[9].

3.2.1. A legislative framework for port services

The compliance of national port policies and of individual ports' commercial strategies with competition rules is strictly linked to the establishment of a framework regulating funding and charging of port infrastructures and port services according to the usual principles of transparency, fairness and non-discrimination. The introduction of such rules has faced resistance and difficulties, so that currently the EU authorities are still working on the drafting of this framework in order to reach an agreement shared by Member States.

In 2001 and 2004 the Commission proposed two draft directives (known as "first port services package" and "second port services package"), but they were finally rejected by the Parliament. The main controversy regarded self-handling, *i.e.* the option for a shipping company to provide certain port services, normally provided by the port, using its own land-based personnel. Self-handling was strongly opposed by dock workers, whose trade unions or guilds played a strong role in the rejection of the two packages.

[6] *E.g.*, ECJ, Case C-242/95, *GT-Links v DSB*.

[7] *E.g.*, European Commission, decision 94/119/EC of 21 December 1993, concerning a refusal to grant access to the facilities of the port of Rodby (Denmark), 94/119/EC.

[8] *E.g.*, ECJ, case C-266/96, *Corsica Ferries France v Gruppo Antichi Ormeggiatori di Porto di Genova*, and; case C-179/90, *Merci convenzionali porto di Genova v Siderugica Gabrielli*.

[9] For a broader analysis of such case law, see the contribution of the European Commission to the OECD Policy Roundtable cited at fn 5.

The first proposal was aimed at granting freedom to Community providers of port services and access to port installations through the liberalization of three types of services: a) technical nautical services (pilotage, towage and mooring); b) cargo handling; c) passenger services. In the second proposal self-handling was modified and allowed for cargo and passenger operations. For short-sea shipping (short-distance transport) and "motorways of the sea" (designed to move long-distance transport off roads onto the sea, to fight congestion), self-handling could be performed by land-based staff of the company and also by the ship's crew, allowing crews to load and unload their own ships. In both cases, after lengthy negotiations, finally the Commission withdrew its proposals.

In 2013 the Commission presented a new package of measures aimed at liberalizing port services, containing a communication[10] and a proposal for a Regulation ("Port Transparency Regulation")[11]. As the rejection of the first two packages was influenced by the controversy over their social/labour market aspects, the latest initiative combines a legislative and a 'soft' approach introducing a partial opening of port services. First of all, the regulation does not affect the social and labour rules of the Member States: the Commission has this time opted for a non-legislative approach to the social component and for the promotion of discussions, launching a European social dialogue on ports, bringing together representatives of employees to address the most crucial topics (such as training and qualifications, health and safety at work, etc.).

With regards to the opening up of the market, the new rules aim at ensuring financial transparency of eight port services: *i.* bunkering (refuelling); *ii.* dredging (clearing sand away from access paths); *iii.* mooring (the operations for connecting the ship to the quay); *iv.* port reception facilities (including waste collection); *v.* pilotage (where a vessel is guided into and out of port by a pilot); *vi.* towage (assisting a vessel in manoeuvring in and out of a port using a tug); *vii.* cargo handling; *viii.* passenger services. Open access is provided for six of them, excluding cargo handling and passenger services that are not subject to the rules on free market access but fall under Directive 2014/23/EU on the award of concession contracts. However, for those services opened to the market, the new rules provide that a port managing body may cite scarcity of land and public service

[10] European Commission, cited at fn 3.

[11] European Commission, *Proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports*, COM(2013)0296.

obligations to limit the number of providers of a service and to impose minimum requirements on them (the obvious parallel is with ground-handling services in airports).

The proposal also contains rules on the consultation of users on port charges and independent supervision. Port authorities retain the autonomy to set port infrastructure charges, provided this is done in compliance with the principle of transparency. However the Commission may set common charging principles for port infrastructure charges by means of delegated acts. In the view of increasing transparency over the use of public funds, port authorities will not be required to publish detailed accounts, but they will have to be able to provide this information to the national and EU monitoring authorities. The proposed new rules also provide for the establishment of a port users' advisory committee in every port to be consulted on the structure and level of port charges. Also, port stakeholders should be consulted on issues related to the coordination of port services, hinterland connections and administrative procedures. According to the proposal, monitoring and supervision activity should be carried out by an independent supervisory body.

The adoption of the new Regulation is also intended as a fundamental means to enable the effective application of the general state aid rules. However the Commission is also considering whether to establish specific sector guidelines for state aid in ports.

FOURTH MODULE
PASSENGERS' RIGHTS

SUMMARY: 4.1. Consumer protection in the transport sector - 4.2. The 90/314 Directive on package tours: i) Pre-contractual duty to inform and content of information; ii) Content of contract is determined (also) by advertising; iii) Information pending contractual relationship; iv) Form of contract and assignment; v) Pricing and refunding; vi) Cancellation and changes in the tour; vii) Liability of tour operators - 4.3. Denied boarding, cancellation and delay of flights: i) Denied boarding; ii) Cancellation and delay of flights; iii) Further provisions - 4.4. Liability of air carriers: Compensation in the case of death or injury; ii) Advance payments; iii) Passenger delays; iv) Destruction, loss or damage to baggage; v) Liability of contracting and actual carriers; vi) Time limit for action - 4.5. The prevention and investigation of accidents: i) Assistance to the victims of air accidents and their relatives - 4.6. 'Black list' airlines - 4.7. The protection of rail passengers' rights: i) A comparison between the CIV and Regulation 1371/07; ii) Delays in service; iii) Passengers with disabilities; iv) Service quality standards - 4.8. The protection of sea and cruise passengers: i) Regulation 2009/392 on death and injury of passengers; ii) The provisions for injury and death; iii) The provisions for loss of or damage to luggage; iv) The provisions concerning insurance; v) Time limits; vi) Rights of sea passengers; vii) Cancellations and delays; viii) Further provisions of Reg. 1177/10; ix) Cruises - 4.9. Bus & coach passengers: i) Right to compensation for death, personal injury, loss or damage to luggage; ii) Duty to inform; iii) Chartered coach services- 4.10. Unfair commercial practices in the transport sector: i) Misleading commercial practices; ii) Aggressive commercial practices; iii) Misleading and comparative advertising

4.1. CONSUMER PROTECTION IN THE TRANSPORT SECTOR

One of the most distinctive features of EU transport law is the overall protection of passengers, not only from injury and death, but also protection of their economic and non-economic interests when they enter a contractual relationship which includes some mode of transport.

There is a reciprocal relationship between passenger protection and the development of consumer protections policies in the EU. On the one hand, protection of passengers is the result of consumer policies. But consumer policies have been greatly enhanced by the specificity of the protection of passengers.

The history of passenger protection is grounded in the awareness –

which starts to develop in the 1970s – of the significant unbalance which is created by the widespread use, in commercial practices, of standard contracts which exonerate the business party from most cases of contractual and extra-contractual liability.

If one looks back to how civil code provisions were interpreted in continental Europe and case-law had developed on both sides of the Channel, one sees an extremely formalistic approach which in fact deprives consumers (and passengers) of effective remedies. The cornerstones of this system are the sanctity of contractual freedom, the self-binding effect of consent and the efficiency of unilaterally set general terms and conditions of contract.

However it is not until the mid-1980's that the gates are opened to an incremental flow of legislation in the form of Directives, but also, especially and significantly in the field of passengers' rights, of (directly enforceable) Regulations.

The process starts with Directives 85/374 on liability for defective products and 85/577 on contracts negotiated away from business premises and rapidly gains momentum in the '90s: Directive 90/314 on package tours; Regulation 91/295 on over-booking (which will be analyzed in detail further on); Directives 93/13 on unfair terms in consumer contracts; 94/47 on timesharing contracts; 97/7 on distance contracts; 99/44 on sale of consumer goods; 02/65 on distance marketing of financial services; and many more. What should be noted is that all these texts create what is known as an *acquis communautaire* and should be read in the context which now is explicitly stated in article 169 of the Lisbon Treaty on the Functioning of the EU:

«*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests*».

However one point stands out: as we shall soon see, the notion of «passenger», since Regulation 91/295, transcends that of «consumer», (usually defined as «*any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*») encompassing any traveller, whether for pleasure, necessity or business, and irrespective of his/her purpose, and of who is paying the price of the ticket.

This is a tendency which one finds also in other sectors (*e.g.* telecom

users) but it emerged first in the travel sector, and is having spillover effects in those cases in which one party – even if not a natural person – is at a disadvantage when entering into a contract with another party.

In the field of passenger protection these are the relevant provisions

- Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.
- 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.
- Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air
- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations.
- Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway.
- Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport

4.2. THE 90/314 DIRECTIVE ON PACKAGE TOURS

In its recitals Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours sets out its aims:

- Stimulate the tourism industry through a clear and uniform regulation of the sector.
- Eliminate the significant disparities between national legislations and case law on the nature of package tours and on the applicable provisions.
- Promote intra-community sales of tourist packages, therefore widening the market for these services.
- Protect tourists from abusive contracts.

It should be noted that before the Directive, the legal regime of package tours was highly debated. Clearly the tour operator's standpoint was that, in general, he was a mere agent acting on behalf of the providers of the various services (transport, accommodation, catering, tourist entertainment, etc.) and therefore was not liable in the case that some of them remained unfulfilled.

This approach clearly frustrated any effective remedy for the tourist who in no way could bring a claim against an entity often established in a distant country.

There was a further legal complexity in the regulation of package tours, and which is set out in the recitals of the Directive. Inasmuch as package tours comprise a series of different transport services it may be necessary to coordinate provisions contained in several international conventions: the 1929 Warsaw convention on air transport; the 1961 Berne Convention on rail transport; the 1962 Paris Convention on the liability of hotels; the 1974 Athens Convention on sea transport.

This confirms a very important aspect of the EU intervention in the field of transport which has been seen in the previous chapters: its relationship with the considerable amount of international conventions that Member States are parties to but to which the EU is not bound.

The definition of package tour is extremely important: it is the pre-arranged combination of not fewer than two of the following services when sold or offered for sale at an inclusive price and when the service covers a period of more than 24 hours or includes overnight accommodation.

These services are:

- Transport
- Accommodation
- Other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

This definition clearly excludes day trips and arrangements in which the tourist looks after his or her own travel or accommodation.

We shall see, further on, the relationship of this definition with Regulation 2009/1177 which introduces forms of protection for purchasers of cruise packages.

Once the notion of package tour is set, there are four substantial

and essential aspects to be highlighted:

i) Pre-contractual duty to inform and content of information

Before the enactment of the package tour Directive problems in the relationship between consumer and travel agent/tour operator arose from, on the one hand, informational asymmetry and on the other, the considerable freedom of the agent/operator to change services that were offered in the catalogue and contained in the contract signed by the consumer.

The Directive is extremely detailed and aims at eliminating both the lack of information and the abuse of contractual freedom.

Therefore any descriptive matter concerning a package and supplied by the organizer or the retailer to the consumer, the price of the package and any other conditions applying to the contract must not contain any misleading information.

In particular, the brochure must indicate the price and offer in a legible, comprehensible and accurate manner adequate information concerning:

i. the destination and the means, characteristics and categories of transport used;

ii. the type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned;

iii. the meal plan;

iv. the itinerary;

v. general information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay;

vi. either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;

vii. whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.

ii) Content of contract is determined (also) by advertising

In order to avoid the discrepancies between what is presented to the tourist and the contract actually signed, the information contained in the brochure is binding on the organizer unless:

i. changes in such particulars have been clearly commu-

nicated to the consumer before the conclusion of the contract, in which case the brochure shall expressly state so;

ii. changes are made later following an agreement between the parties to the contract.

At any rate, the Directive, following the model of mandatory terms in consumer contracts, determines that the following elements must be included in the contract if relevant to the particular package:

- the travel destination(s) and, where periods of stay are involved, the relevant periods, with dates;
- the means, characteristics and categories of transport to be used, the dates, times and points of departure and return;
- where the package includes accommodation, its location, its tourist category or degree of comfort, its main features, its compliance with the rules of the host Member State concerned and the meal plan;
- whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation;
- the itinerary;
- visits, excursions or other services which are included in the total price agreed for the package;
- the name and address of the organizer, the retailer and, where appropriate, the insurer;
- the price of the package, an indication of the possibility of price revisions and an indication of any dues, taxes or fees chargeable for certain services (landing, embarkation or disembarkation fees at ports and airports, tourist taxes) where such costs are not included in the package;
- the payment schedule and method of payment;
- special requirements which the consumer has communicated to the organizer or retailer when making the booking, and which both have accepted;
- the periods within which the consumer must make any complaint concerning failure to perform or improper performance of the contract.

iii) Information pending contractual relationship

After the conclusion of the contract, the informational duties of the tour operator are not ended. The organizer must provide further information in good time before the start of the journey concerning:

- times and places of intermediate stops and transport connections as well as details of the place to be occupied by the traveller, *e.g.* cabin or berth on ship, sleeper compartment on train;
- name, address and telephone number of the organizer's and/or retailer's local representative or, failing that, of local agencies on whose assistance a consumer in difficulty could call, or emergency telephone number .
- in the case of journeys or stays abroad by minors, information enabling direct contact to be established with the child or the person responsible at the child's place of stay;
- Information on the option of an insurance policy to cover the cost of cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness.

iv) Form of contract and assignment

The Directive establishes that all the terms of the contract must be set out in writing or such other form as is comprehensible and accessible to the consumer and must be communicated to him before the conclusion of the contract.

Responding to one of the most common complaints of tourists unable to leave owing to unforeseen circumstances, the Directive provides that the consumer may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package.

v) Pricing and refunding

The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in:

- transportation costs, including the cost of fuel;

- dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports;
- the exchange rates applied to the particular package.
- However, during the twenty days prior to the departure date stipulated, the price stated in the contract cannot be increased.

vi) Cancellation and changes in the tour

If the organizer is constrained to alter significantly any of the essential terms, such as the price, he must notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular:

- either to withdraw from the contract without penalty,
- or to accept a rider to the contract specifying the alterations made and their impact on the price.

If the consumer withdraws from the contract owing to an increase in price, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled:

- either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organizer must refund the difference in price to the consumer;
- or to be repaid as soon as possible all sums paid by him under the contract.

Where, after departure, a significant proportion of the services contracted for is not provided, the organizer must make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the package, and, where appropriate, compensate the consumer for the difference between the services offered and those supplied.

If it is impossible to make such arrangements or these are not accepted by the consumer for good reasons, the organizer must, where appropriate, provide the consumer, at no extra cost, with equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed and shall, where appropriate, compen-

sate the consumer.

vii) Liability of tour operators

Finally, the Directive sets out the fundamental principle – which was usually set aside by the existing (at the time) standard terms – that the organizer is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer or by other suppliers of services. From this point of view, a «package tour» creates a bundle of obligations for the tour operator who cannot avoid liability by simply outsourcing the various services to third parties who are in no legal relationship with the tourist.

Furthermore, to support at least partially, liability towards the tourist, the organizer must provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.

Materials: C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG; joined cases C-178-9/94, 188-190/94, Dillenkofer and others v. Federal Republic of Germany

4.3. DENIED BOARDING, CANCELLATION AND DELAY OF FLIGHTS

Shortly after the approval of the «package tour» directive, the EU enacted another important piece of legislation concerning the protection of air passengers' rights.

Regulation 91/295 introduced a complex set of rules on compensation of passengers in the case of denied boarding. What were the reasons for this intervention?

In those – pre-Internet and pre-low cost – times most air tickets could be cancelled by the passenger and transferred, generally at no cost, to another flight on the same route.

The result was that, commonly, many passengers holding a ticket cancelled their reservation for a certain flight shortly before departure or simply did not show up for check-in.

As a result, airlines – on the basis of the data concerning cancellations and no-shows – started to sell more tickets than seats available on that flight. Generally this did not result in any inconvenience.

However on certain occasions (typically, Friday afternoons, the begin-

ning or end of long weekends, summer or winter holidays) more passengers showed up holding a regular ticket than there were available seats.

As check-in was, and still is, made on a first-come-first-served basis, some passengers holding a regular ticket, although on time with check-in procedures, were denied boarding, creating considerable inconvenience, especially if the flight was the last of the day or if they had connecting flights to take on arrival at their destination.

This occurrence, quite common up to the end of the '90s, has been considerably reduced owing to various factors. On the one hand ticket purchase and check-in procedures have moved away from travel agencies and airport desks to the Internet, putting all the procedures in the hands of passengers on a 24/7 basis. But most importantly all airlines – not only low-cost ones – have introduced pricing policies which generally do not allow passengers to cancel their reservation without forfeiting the whole price already paid. The difference in price between refundable and non-refundable tickets is so high that only very few passengers – mostly professionals and corporate travellers – actually cancel. Statistically therefore over-booking is a rather rare occurrence and as a consequence the importance of the provision has declined.

However the original Regulation has been subsequently replaced by Regulation 2004/261 with a much wider scope: «Establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights».

The scope of the new Regulation is set out in its recitals: to strengthen the rights of passengers and ensure that air carriers operate under harmonized conditions in a liberalized market.

One must, in fact, consider the dramatic – in a positive sense – changes that air transport underwent in Europe between the beginning of the 1990s and the new Millennium: the end of national monopolies and of special and exclusive rights, the opening of markets to internal cabotage, the role of small regional airports allied with aggressive low cost companies.

A very important aspect of the new Regulation is its ambit.

- The Regulation applies to all flights departing from the EU and to all flights, of a Community carrier, departing from a third country towards an EU destination
- Passenger must have a confirmed reservation and must present him/herself in time for check-in
- The Regulation does not apply in cases where a package tour

is cancelled for reasons other than cancellation of the flight
- It does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public (except 'Frequent Flyers').

Therefore it applies also to non-EU carriers when departing from an EU airport, whatever their destination. But it does not apply to non-EU carriers when departing, for Europe, from a non-EU airport.

This implies that there may be some gaps in the protection of passengers, typically in the case of a round trip on a non-EU carrier: passengers are covered by the Regulation on their onward flight, but not on their return one.

However, after a decade of its enactment, this misalignment does not seem to have created major problems for passengers.

i) Denied boarding

If an air carrier reasonably expects to deny boarding to some passengers on a flight, it must first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier.

If an insufficient number of volunteers come forward to allow the remaining passengers with a reservation to board the flight, the operating air carrier may then deny boarding to passengers against their will.

The Regulation sets out general criteria to select passengers who will be boarded preferentially:

- Premium and full-price passengers
- Passengers with connecting flights
- Unaccompanied minors
- Passengers with children or with disabilities

For passengers who are not boarded the Regulation establishes compensation and assistance obligations:

- € 250 for flights up to 1500 km
- € 400 for flights over 1500 km and up to 3500 km
- € 600 for extra-EU flights over 3500 km

Compensation can be reduced to 50% if the subsequent flight on which the passenger is boarded arrives at its destination within 2 hours for flights up to 1500 km; within 3 hours for flights up to 3500 km and within 4 hours for extra-EU flights above 3500 km.

Passengers who are denied boarding are entitled to receive:

- meals and refreshments in a reasonable relation to the

waiting time;
- hotel accommodation when a stay of one or more nights becomes necessary,
- transport between the airport and place of accommodation
- two telephone calls, telex or fax messages, or e-mails free of charge

If passengers are boarded in a different class, upgrading (*e.g.* from economy to business) must be at no cost. If instead they are downgraded this implies compensation of:

- 30% of ticket price for flights up to 1500 km
- 50% of ticket price for flights over 1500 km and up to 3500 km
- 75 % of ticket price for extra-EU flights over 3500 km
- In the case of denied boarding passengers may ask for:
- Reimbursement of the full cost of the ticket
- Payment of a return flight to first point of departure
- Re-routing to final destination at the earliest opportunity or at a later date at the passenger's convenience.
- The right to reimbursement applies also for package tour travellers, unless they are already covered by Directive 90/314

ii) Cancellation and delay of flights

The most important innovation of the 2004/261 Regulation is the introduction of a uniform regime in the cases – quite frequent – of delay and cancellation of flights.

It should be pointed out that these events may occur for a variety of reasons, some completely out of the control of the airline, but others due to its own operational liability. The most typical reason for delays is airport congestion, which on a 'spoke-and-hub' model has wide repercussions. The delay of one flight generally entails further and even longer delays for those flights which are using the same aircraft. There are also adverse weather conditions which have to be considered (snow, storms, freezing temperatures, etc.) which although typical cases of *force majeure* do not entirely (as we shall see) relieve airlines of their obligations towards stranded passengers. There may be strikes by the airline's own personnel, or by those of ground-handling services that should be provided for that airline. Finally one should consider disruption in airline services due to political occur-

rences (threat of terrorist attacks, conflicts, no-fly zones, embargoes etc.).

In other cases delays and cancellations are due to bad organization, under-staffing and inability to solve unforeseen problems. And in other times it is simply the result of 'slot-hoarding': an airline that has a valuable slot and does not want to surrender it to its competitors, offers tickets on that flight and subsequently cancels it, shifting the passengers on to a previous or following flight.

Regulation 2004/261 sets out the relevant definitions:

- «Cancellation» means the non-operation of a flight which was previously planned and on which at least one place was reserved
- «Delay» is departure beyond scheduled time
  - of two hours for flights up to 1500 km
  - of three hours for flights over 1500 km and up to 3500 km
  - of four hours for extra-EU flights over 3500 km

The remedies set out by the Regulation in the case of cancellation are:

- Reimbursement of full cost of ticket and/or return flight to the first point of departure
- Re-routing to final destination at the earliest opportunity or at a later date at the passenger's convenience
- Provide care at conditions similar to those of denied boarding

Compensation in the case of cancellation is tightly associated with compliance, by the airline, with its duty to inform its passengers.

In general compensation for cancellation is the same as in the case of denied boarding, unless:

- Passengers are informed of cancellation at least two weeks before departure date
- Passengers are informed at least one week before departure date and are offered re-routing allowing them to leave not more than two hours before and arrive not more than four hours later than scheduled
- Passengers are informed less than a week before and are offered re-routing allowing them to leave not more than one hour before and arrive not more than two hours later than scheduled.

The burden of proof as to whether and when the passenger has been informed of the cancellation of the flight is on the operating air carrier.

However no compensation is owed if the air carrier can prove that the cancellation was due to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

In any case, when the delay is of 5 hours or more passengers have the right to reimbursement and return ticket as in the case of cancellation.

This last provision indicates the uneasy distinction between cancellation and delay. In fact, owing to different compensation regimes airlines try to present cases of cancellation (which would entail monetary compensation) as cases of delay (for which no compensation is due). And in other cases airlines try to include «extraordinary circumstances» much more than typical circumstances of *force majeure*. The ECJ has taken the same position in several decisions, generally inspired by a rigorous interpretation of the duties owed by airlines, rejecting attempts to avoid compensation obligations. And at the same time it has expanded certain obligations to provide care to air passengers even in cases in which cancellation or significant delays of the flight are due undoubtedly to causes of force majeure. The issue arose in the case of the eruption of an Icelandic volcano which brought considerable disruption in Northern European air traffic for several weeks. The ECJ ruled that although passengers could not claim compensation, they were, however, entitled to receive from the air company the assistance set out in Articles 5 and 9 of Regulation No 261/2004.

iii) Further provisions

The Regulation contains a series of further provisions aimed at protecting passengers:

- Air carriers must display at check-in counters the following notice: «*If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance*».
- When denying boarding or cancelling a flight air carriers must provide each passenger affected with a written notice setting out the rules for compensation and assistance.
- Passengers' rights may not be limited or waived, espe-

cially through clauses in contract of carriage.
- Remedies offered by the Regulation do not preclude passengers' rights to further compensation (within the limits set out by Regulation 97/2027: see the following paragraph).
- Air carrier may act against third parties liable for the delay or the cancellation asking for compensation.
- Member States must designate a body responsible for the enforcement of the Regulation.

Materials: cases C-549/07, Wallentin-Herman v. Alitalia; C-83/10, Sousa Rodríguez and Others v Air France; C-321/11, Rodríguez Cachafeiro and Others v Iberia; C-12/11, Denise McDonagh v Ryanair Ltd

4.4. LIABILITY OF AIR CARRIERS

The topic of liability of air carriers for death and injury to passengers and for loss or destruction of their baggage is one of the most complex in the field of aviation law, because of an apparently inextricable relationship between the customary principle of limitation of liability in contracts of carriage, international conventions, and domestic law.

One must consider that the history of commercial aviation starts after World War I. Aeroplanes were still highly unsafe, and the typical policy measure to enhance the developing industry (both manufacturers and air carriers) was to adopt a standard of limited liability.

The 1929 Warsaw Convention reflects this attitude and its articles 17 ff. – which apparently establish a strict liability regime, putting the burden of the proof of exonerating causes on the air carrier – explicitly set out a limit in the amount of damages.

According to article 22

«*1. In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.*

2. In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has

made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger".

The only exception to that limit was in the case of «*wilful misconduct*» by the airline or its personnel (Article 25). The French text is even more explicit as it refers to «*dol ou faute équivalente au dol*». This was a practically impossible standard to reach for the victims of air accidents.

One should add to this a very short time limit to bring an action (two years) if compared with the ordinary 10 or even 20 year term set out for ordinary contractual claims.

Subsequently the Convention was amended substituting French Francs with 'Special Drawing Rights' – a conventional monetary standard. However, from the beginning and even after post-war amendments the sums awarded were ridiculously low:

- In the case of death a maximum of 16.600 'Special Drawing Rights' (SDR) equivalent to approximately 14.000
- In the case of loss of baggage 17 SDR per kg (14)

This extreme limitation of liability brought considerable controversy and repeated actions before the Courts in order to obtain full compensation. Many of them declared that the provision of the Warsaw Convention was against the national Constitution inasmuch it did not grant adequate protection to the fundamental right to life and to physical integrity.

The consequence, at least from the '80s, was a growing pressure on Member States and on the EU to change the system. The response, however, was very weak as national governments were at the same time legislators and owners of the 'flag carriers' and therefore would have sustained higher costs for insurance and compensation. Furthermore a significant amendment to the Warsaw Convention, such as that on carriers' liability, required a wide international consensus, extremely difficult to reach.

In the recitals of Regulation 97/2027 the EU set out the reasons for its intervention:

- The necessity to improve protection of passengers
- The consideration that the amounts of compensation

set by the Warsaw Convention were «*too low by today's economic and social standards"*

- The fact that several Member States, mostly through Court decisions, had increased the limit, creating difformity within the 'internal aviation market'
- Within the EU there was no longer a distinction between national and international transport, the latter regulated by the Warsaw Convention, with the consequence that in many countries there were two regimes of liability
- The acknowledgment that the review process of the Warsaw Convention was very slow
- It was therefore necessary to resort to the principle of subsidiarity, also imposing an action at a EU level in order to set «*a guideline for improved passenger protection on a global scale"*
- There was a significant risk of distortion of competition between EU carriers (subject to more stringent liability) and non-EU carriers (bound only by the Warsaw Convention)

It should be noted that the enactment of Regulation 97/2027 had an immediate effect on the outcome of the review of the Warsaw Convention. Only two years later, the 1999 Montreal Convention substantially accepted the principles set out by the EU Regulation, adding amended rules on liability for loss and damage to baggage.

Subsequently, in 2001 the European Council approved the Montreal Convention and with Regulation 2002/889 modified Regulation 2027, adapting it to the Convention. The whole process is extremely interesting from the point of view of the EU's external policy, and how its internal harmonization powers were used in order to modify an international agreement to which it was not part.

What is the main content of the combined Regulations 2027 and 889?

i) Compensation in the case of death or injury

The main limitation set by the Warsaw Convention is swept away. There are no financial limits to the liability for injury or death of passengers. For damages up to 100,000 SDRs (84,000) the air carrier cannot contest claims for compensation. Above that amount, the air carrier can defend

itself against a claim by proving that it was not negligent or otherwise at fault. This shifts significantly the burden of proof – which before was on the victim (and only if he was able to prove 'wilful misconduct') – and creates an indirect link with Regulation 2010/996 on the investigation of air accidents.

ii) Advance payments

Experience in coping with the dramatic consequences of air disasters has shown the need of urgent and interim relief measures in favour of the relatives of the victims, whose lives have been suddenly and violently changed. Therefore, if a passenger is killed or injured, the air carrier must make an advance payment, to cover immediate economic needs, within 15 days of the identification of the person entitled to compensation. In the event of death, this advance payment shall not be less than 16,000 SDRs (13,000).

iii) Passenger delays

Regulation 2004/261 tackles the issue of delays through the award of lump sum compensation related to the amount of the delay and the length of the voyage, as has already been illustrated. Those provisions should be considered in the light of the further – and previous – amendments to the Warsaw (now Montreal) Convention. In case of passenger delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. The liability for passenger delay is limited to 4 150 SDRs (3,500). However it is up to the passenger to prove that he suffered such damage (*e.g.* impossibility to participate in a business meeting, to take a further connecting flight, to assist an event, etc.). Experience tells us that generally this is not a common occurrence, and at any rate the risk is covered by insurance.

iv) Destruction, loss or damage to baggage

The air carrier is liable for destruction, loss or damage to baggage up to 1 000 SDRs (840). In the case of checked baggage, it is liable even if not at fault, unless the baggage was defective. In the case of unchecked baggage (*i.e.* hand luggage), the carrier is liable only if at fault.

However a passenger can benefit from a higher liability limit by making a special declaration at the latest at check-in and by paying a supplementary fee.

If the baggage is damaged, delayed, lost or destroyed, the passenger must write and complain to the air carrier as soon as possible. In the case

of damage to checked baggage, the passenger must write and complain within seven days and, in the case of delay, within 21 days, in both cases from the date on which the baggage was placed at the passenger's disposal.

v) Liability of contracting and actual carriers

As has been shown, establishing which business entity is liable for damages may cause some problems. When a passenger buys a ticket – and therefore enters into a contractual relationship with the vendor – there are several chances for the service to be provided by a different company, such as in the case of code sharing or of subsidiary airlines. The Regulation establishes that if the air carrier actually performing the flight is not the same as the contracting air carrier, the passenger has the right to address a complaint or to make a claim for damages against either. If the name or code of an air carrier is indicated on the ticket, that air carrier is the contracting air carrier.

vi) Time limit for action

The only aspect which has not been innovated by Regulations 2027 and 889 is that of the time limit of actions against the air carrier. Any action in court to claim damages must be brought within two years of the date of arrival of the aircraft, or of the date on which the aircraft ought to have arrived.

Materials: Cases C-63/09, Walz v Clickair; C-301/08, Bogiatzi v Deutscher Luftpool and Others

4.5. THE PREVENTION AND INVESTIGATION OF ACCIDENTS

European air space is surely one of the safest (if not the safest) in the world. This is due to the fact that the liberalization of the market has been accompanied by stringent regulation on the safety of aircrafts and infrastructures; qualification of personnel; technical and financial requirements to enter the market.

It is very clear therefore that one of the main aims of the whole system is to make flying not only easier and more convenient, but also safer. In this context one can easily understand Regulation 2010/996 (updating and strengthening the previous Directive 94/56) on the investigation and prevention of accidents and incidents in civil aviation, whose aims are to:

- Improve aviation safety by ensuring a high level of effi-

ciency, expediency, and quality of European civil aviation safety investigations.
- Provide rules concerning the timely availability of information relating to all persons and dangerous goods on board an aircraft involved in an accident.
- Improve assistance to the victims of air accidents and their relatives

i) Assistance to the victims of air accidents and their relatives

In order to ensure a more comprehensive and harmonised response to accidents at EU level, Member States must establish a civil aviation accident and emergency plan at national level. The emergency plan must also cover assistance to the victims of civil aviation accidents and their relatives.

Member States must ensure that all airlines established in their territory have a plan for assistance to the victims of civil aviation accidents and their relatives. Each State must audit the assistance plans of the airlines established in their territory.

Each Member State concerned by an accident (by virtue of fatalities or serious injuries to its citizens) must appoint a person as a point of contact and information for the victims and their relatives. As it is quite common for an accident to happen to citizens of one Member State in the territory of another Member State, each State concerned may appoint an expert who shall have the right to:

- visit the scene of the accident and examine the wreckage
- suggest lines of enquiry and obtain witness information;
- participate in the read-outs of recorded media, except cockpit voice or image recorders;
- participate in off-scene investigative activities such as component examinations, tests and simulations, technical briefings and investigation progress meetings;
- Receive information on the progress of the investigation as well as relevant factual information, approved for public release by the Safety Investigation Authority (SIA) in charge;
- Receive a copy of the final report.

It should be noted that the Regulation clearly sets out in its recitals

and its provisions that «*the sole objective of safety investigations should be the prevention of future accidents and incidents without apportioning blame or liability*». In order to do that safety investigations must be conducted or supervised, without external interference, by a permanent national civil aviation safety investigation authority to which full and independent powers must be given, so that it may fulfil its mission without obstacles and interference by other, national, investigating authorities, such as the judiciary. The Regulation, in fact, states that «*notwithstanding any judicial investigation*» the «investigator-in-charge» may:

- have immediate unrestricted and unhampered access to the site of the accident or incident as well as to the aircraft, its contents or its wreckage;
- ensure an immediate listing of evidence and controlled removal of debris or components for the purpose of examination or analysis;
- have immediate access to and control over the flight recorders, their contents and any other relevant recordings;
- request, and contribute to, a complete autopsy examination of the bodies of the fatally injured persons and to have immediate access to the results of such examinations or to tests made on samples taken;
- request the medical examination of the people involved in the operation of the aircraft or request tests to be carried out on samples taken from such people.

In practice, over the years it has been seen that both police and judicial authorities generally rely heavily on such investigations, which require highly specialized personnel and technical instruments: the typical case is that of the decoding of the so-called «black box». Once the facts and the data have been collected, it will be up to the competent authorities, both regulatory and judiciary, to take the relevant decisions.

4.6. 'BLACK LIST' AIRLINES

The liberalization of the EU air transport sector has been seen to bring about enhanced regulatory control over air carriers operating in the EU market. However the technical, financial and ownership requirements set out in Chapter 1.5, could be easily circumvented if these services were

provided by non-EU carriers not compliant with the same stringent requirements.

Therefore, notwithstanding the fact that the EU has a clear interest in developing international transport, not least as a means to open up new routes to European carriers, a series of precautionary measures have to be taken, also to avoid a competitive advantage of airlines which do not have to bear the heavy costs of safety, training and maintenance.

In this framework one can easily place Regulation 2005/2111 «on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier».

The aim of the Regulation is that of ensuring a high level of protection for passengers from safety risks.

Therefore the EU provides, on a regular basis, a list of air carriers that do not meet relevant safety requirements. The air carriers included in the Community list are subject to an operating ban which prevents them from flying to and from EU airports.

In addition, the operating ban also applies to the aircrafts on the 'black list' leased by a company which holds traffic rights in the European air space.

Therefore air carriers must inform passengers on all safety-related issues and must communicate the identity of the operating air carrier, especially if an EU carrier sells a comprehensive ticket that includes segments outside the EU which might be served by a carrier on the 'black list'.

In that case passengers have the right to reimbursement of the price or re-routing.

4.7. THE PROTECTION OF RAIL PASSENGERS' RIGHTS

The full protection of air passengers' rights took approximately 15 years from the opening of the various connected markets. From this point of view it is easy to relate the two aspects: the stronger the competition, the stronger the consumer protection. This process explains why, for other means of transport, the introduction of passenger protection did not arrive until much later, when the wind of liberalization started to blow.

One has seen the importance of rail transport in EU transport policies and the considerable amount of legislation that has ensued. Regulation 2007/1371 on rail passengers' rights and obligations should be read in this

context.

The main aims of this piece of legislation are to:

- Improve the quality and effectiveness of rail passenger services
- Increase the share of rail transport in relation to other modes of transport

And the measures enacted offer:

- More information
- Increase in safety and security
- Liability and insurance of carriers
- Compensation and assistance for delays and cancellations
- Protection of passengers with special needs
- Service quality standards
- Handling of complaints

There is a strong inter-connection between EU legislation and existing (European) conventions in the field of rail transport, namely the 1952 *Convention Internationale des Voyageurs par Voie Ferrée* (CIV, subsequently and repeatedly amended) and the 1980 *Convention relative aux transport internationaux ferroviaires* (COTIF). At present the CIV Convention has been incorporated as Appendix A to the COTIF Convention.

Regulation 1371 implements these conventional texts, with two main, significant, differences: firstly, it extends protection from international passengers to domestic passengers, who were not considered by the two Conventions, with the possibility of a 15 year exemption for domestic rail passenger services and a further, general, exemption for urban, suburban and regional rail services.

Secondly, while the various European governments negotiated the two Conventions with the interests of their (monopolistic) railway companies in mind, Regulation 1371 falls within the liberalization process and the general protection of consumers, whatever contract they enter into, and therefore should be read in that light.

i) A comparison between the CIV and Regulation 1371/07

For convenience's sake it is useful to compare the provisions of the two Conventions (which are extremely long: over 60 articles) focusing, in particular, on the rules on liability for death or injury of passengers, loss or damage to their baggage, delayed arrival.

CIV	Reg. 1371/07
▪ Ticket is transferable ▪ Lack of ticket entails surcharge ▪ Animals that do not cause annoyance allowed ▪ Cumbersome articles allowed if they do not inconvenience	▪ CIV rules automatically applied except if Regulation has special provisions ▪ Obligations towards passengers may not be reduced ▪ Bicycles allowed
Information to passengers: *No provisions*	Information to passengers: • Discontinuation of services • Pre-journey information ➢ General conditions ➢ Time schedules and conditions for the fastest trip and lowest fares ➢ Accessibility and facilities for disabled persons ➢ Accessibility for bicycles ➢ Availability of seats in smoking and non-smoking ➢ Any activities likely to disrupt or delay services ➢ Availability of on-board services ➢ Procedures for reclaiming lost luggage ➢ Procedures for the submission of complaints.

Information to passengers: *No provisions*	• Information during the journey ➢ On-board services ➢ Next station ➢ Delays ➢ Main connecting services ➢ Security and safety issues
➢ Liability for death, injury or physical or mental harm ➢ Exoneration of liability: ➢ Accident caused by external unavoidable circumstances ➢ Fault of passenger ➢ Unavoidable behaviour of third party	➢ Adequate insurance against liability ➢ In case of death of passenger advance payment of 21,000 ➢ Duty to assist passenger in his claim against third parties
➢ Damages in case of death include funeral expenses, medical treatment, loss of maintenance ➢ In case of injury damages include medical treatment, transport, financial loss for incapacity to work, increased needs	*As in CIV*
➢ Further bodily harm determined by national laws ➢ Damages must be awarded in a lump sum ➢ Maximum award: 175,000 SDR (166,000)	*As in CIV*

➢ In case of death or injury liability also for loss or damage to baggage and animals ➢ Limit to liability: 1,400 SDR (1,200) ➢ For registered baggage limit to liability: 1,200 SDR (1,000) ➢ For non-registered baggage: liability only if carrier is at fault ➢ For vehicles limit of 8,000 SDR (6,700)	*As in CIV*
➢ No limitation in damages if they are caused «recklessly and with knowledge that such loss or damage would probably result» ➢ Notice of the accident must be given by the damaged person within 12 months ➢ Right of action for death or injury extinguished after 3 years ➢ Right of action for loss or damage to baggage extinguished after 1 year	*As in CIV*

ii) Delays in service

Regulation 1371 introduces further measures for the protection of passengers, in line with what we have seen for air transport, especially in the case of delays.

If the expected delay is more than 1 hour passengers may ask for reimbursement or re-routing at the earliest opportunity or at their convenience

The railway company must pay compensation in the case of delays:

- between 60 and 119 minutes: 25% of the price of the journey
- of 120 minutes or more: 50% of price of the journey

Furthermore, railway companies have a duty to inform passengers about delays and give them assistance.

If the delay is more than 1 hour passengers have the right to:

- Meals and refreshments in relation to the waiting time
- Hotel accommodation if delay is overnight
- If train is blocked on the track, transport to railway station or to final destination

iii) Passengers with disabilities

In line with all the latest legislation in the field of transport, Regulation 1371 pays particular attention to the needs of passengers with disabilities. Therefore the principle of non-discrimination for disabled persons and persons with reduced mobility is affirmed.

To this must be added the obligation of free assistance in stations to enable boarding and disembarking of disabled persons and free assistance on board for disabled persons

iv) Service quality standards

But perhaps the most important aspect of Regulation 1371 is that it introduces – as is quite common for other public services regulated by EU law – the requirement that each provider of passenger railway services should adopt public service quality standards. Control is given to an independent body for enforcing the Regulation and managing complaints.

The main issues which must be defined in the standards are:

- Information and tickets
- Punctuality of services, and general principles to cope with disruptions to services
- Cancellation of services
- Cleanliness of rolling stock and station facilities (air quality in carriages, hygiene of sanitary facilities, etc.)
- Customer satisfaction survey
- Complaint handling, refunds and compensation for non-compliance with service quality standards
- Assistance provided to disabled persons

To this it should be added that infrastructure and station managers must take adequate measures to ensure personal security and to manage risk in railway stations and on trains. This is a significant provision inasmuch it tends to consider railway stations as infrastructures of a similar nature to air terminals which need be controlled in order to ensure the safety and security of passengers.

Materials: cases C-136/11, Westbahn Management GmbH v ÖBB-Infrastruktur AG; C-509/11, ÖBB-Personenverkehr AG.

4.8. THE PROTECTION OF SEA AND CRUISE PASSENGERS

The next move towards the protection of passengers was to consider those travelling by ship. Although the number of accidents has significantly diminished over the years, partly as a consequence of the shift towards other means of transprt, there were some tragedies (noticeably the sinking in 1987 of the ferry-boat *Free Enterprise* in a Dutch port) which caused significant distress to the public and led to a demand for more protection, both technical and legal.

The EU intervention has been through two pieces of legislation: the first on compensation for death or injury of passengers (Regulation 2009/392), the second on the rights of passengers (Regulation 2010/1177). Also in this case we have a significant inter-relation between international conventions and EU law.

i) Regulation 2009/392 on death and injury of passengers

Compensation for death, injury, loss or damage to baggage is regulated by the 2002 Protocol to the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. The Athens Convention was incorporated in EU law by Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents and in December 2011 the EU Council accessed to the 2002 Protocol.

The aims of the Regulation are to:

- Enhance safety in maritime transport
- Establish liability rules for damage caused to passengers

The Regulation points out that – as we have already seen in the field of air transport – the Athens Convention applies only to international transport, but within the internal market the distinction between national and international transport has been eliminated and it is therefore appropriate and necessary to have the same level of protection.

The Regulation applies to transport within a Member State on board ships of Classes A (large ships) and B (ships that are never more than 20 miles from shore). It is proposed that in the future it should be extended to ships of Classes C and D (smaller ships).

The Regulation applies when:

- the ship is flying the flag of or is registered in a Member State;
- the contract of carriage has been made in a Member

State; or
- the place of departure or destination, according to the contract of carriage, is in a Member State.

ii) The provisions for injury and death

Liability of the carrier is regulated by 2002 Protocol and International Maritime Organization (IMO) Guidelines.

These are the most relevant definitions:

- «Shipping incident»: shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship;
- «Fault or neglect of the carrier» includes the fault or neglect of the servants of the carrier, acting within the scope of their employment;
- «Defect in the ship»: any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life saving appliances;
- «Loss» does not include punitive or exemplary damages.

In case of death of or personal injury to a passenger caused by a shipping incident, the carrier shall be liable for up to 250,000 SDR (€ 210,000), unless the carrier proves that the incident:

- Resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- Was wholly caused by an act or omission done with the intent to cause the incident by a third party.

If and to the extent that the loss exceeds the limit of 250,000 SDR, the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier, but in any case liability cannot exceed 400,000 SDR (€ 336,000).

There is, however, no limitation of damages if it is proved that damage resulted from an act or omission of the carrier done with the intent to

cause such damage, or recklessly and with knowledge that such damage would probably result. This principle applies also to damage to baggage and other possessions.

If the death of, or the personal injury to, a passenger was not caused by a shipping incident, the carrier is liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect lies with the claimant.

In addition to the provisions of 2002 Protocol, Regulation 2009/392 states that when the death of, or personal injury to, a passenger is caused by a shipping incident, the carrier must make an advance payment sufficient to cover immediate economic needs on a basis proportionate to the damage suffered within 15 days of the identification of the person entitled to damages. In the event of the death, the payment shall not be less than € 21,000. The advance payment does not constitute recognition of liability.

iii) The provisions for loss of or damage to luggage

In the case of loss of or damage to cabin luggage the carrier is liable if the incident which caused the loss was due to the fault or neglect of the carrier. The fault or neglect of the carrier shall be presumed if the loss was caused by a shipping incident.

In the case of loss of or damage to luggage other than cabin luggage the carrier is liable unless it proves that the incident which caused the loss occurred without its fault or neglect (strict liability).

However, the carrier shall not be liable for the loss of or damage to monies, negotiable securities, gold, silverware, jewellery, ornaments, works of art, or other valuables, except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping. In that case the liability for deposited valuables is up to a maximum of 3375 SDR (2800).

There are further limitations:

- For loss of or damage to cabin luggage limit of 2250 SDR (€ 1900)
- For loss of or damage to vehicles including all luggage carried in or on the vehicle limit of 12,700 SDR (€ 10,000) per vehicle
- For loss of or damage to other luggage limit of 3375 SDR (€ 2800)

iv) The provisions concerning insurance

Regulation 2009/392 renders mandatory the International Maritime Organization (IMO) guidelines on liability and insurance. Therefore:

- The insurance arrangements required under the Athens Convention must take into consideration the financial means of ship-owners and insurance companies.
- Ship-owners must be in a position to manage their insurance arrangements in an economically acceptable way and, particularly in the case of small shipping companies operating national transport services, account must be taken of the seasonal nature of their operations.
- When setting insurance arrangements account should be taken of the different classes of ship
- Account should be taken of the consequences for fares and the ability of the market to obtain affordable insurance coverage at the level required against the policy background of strengthening passengers' rights and the seasonal nature of some of the traffic.

The compulsory insurance or other financial security must cover the carrier for not less than 250,000 SDR per passenger on each distinct occasion or, if lower, 340 mln SDR (€ 285 mln) per ship.

A very important provision – which was lacking in the previous Regulations concerning other modes of transport – is that any claim for compensation covered by insurance or other financial security may be brought directly against the insurer or other person providing financial security ('*action directe*').

The sums provided by insurance shall be available exclusively for the satisfaction of claims under the Convention.

v) Time limits

Actions for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage are time-barred after a period of 2 years.

Even if there is suspension or interruption of prescription, the time-limit is of 3 years from the date when the claimant knew or ought reasonably to have known of the injury, loss or damage caused by the incident.

vi) Rights of sea passengers

Shortly after having introduced Regulation 392, the EU completed the legal protection of sea passengers by Regulation 2010/1177 concerning the rights of passengers when travelling by sea and inland waterways.

The aims of the Regulation are:

- Ensuring a high level of protection for passengers comparable with other modes of transport
- Compliance with the requirements of consumer protection in general.
- Establishing a minimum level of protection

It is important to note that the Regulation applies also to passenger services between EU ports and non-EU ports.

The Regulation sets rules on cancellations, delays, compensation, care and assistance.

The Regulation does not apply to:

- Ships for not more than 12 passengers
- Ships with not more than 3 crew members
- If the travel is less than 500 metres
- Excursions and sightseeing tours other than cruises
- Sail ships and replicas of historical ships for not more than 36 passengers

It is possible to make an exception for sea-ships of less than 300 tons and for passenger services covered by public service obligations provided that the rights of passengers are comparably guaranteed under national law.

What are the main rights set out by the Regulation?

- Principle of non-discrimination based on the nationality of the passenger
- Compatibility of social tariffs for tickets
- Rights and obligations set out by the Regulation cannot be waived or restricted
- Right to transport for disabled persons
- Carriers and terminal operators must provide assistance free of charge to disabled persons and persons with reduced mobility.

The carrier owes a duty to inform passengers and in particular:

- Information on cancellation or delay of passenger service or a cruise must be given as soon as possible and

no later than 30 minutes after the scheduled time of departure, together with the estimated departure time and estimated arrival time.

- Information on connections and alternative services.

vii) Cancellations and delays

- In the case of cancellation or delay in departure above 90 minutes passengers must be offered free snacks, meals or refreshments in reasonable relation to the waiting time.
- If an overnight stay is required as consequence of cancellation or delay the carrier must offer accommodation for a maximum of 3 nights at a maximum cost of € 80 per night.
- In the case of cancellation or delay in departure above 90 minutes passengers have the right to reimbursement of their tickets or re-routing to their final destination.
- Compensation is 25% of the price of the ticket for delays of:
  - 1 hour in journeys up to 4 hours
  - 2 hours in journeys from 4 to 8 hours
  - 3 hours in journeys from 8 to 24 hours
  - 6 hours in journeys of more than 24 hours
- If the delay is more than double, compensation is 50% of the ticket.
- However, no compensation is owed if the carrier proves that the cancellation or the delay was caused by weather conditions endangering the safe operation of the ship or by extraordinary circumstances hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken.
- The Regulation expressly establishes that there is no obligation to provide meals and to accommodate passengers if the carrier proves that cancellation or delay is caused by weather conditions endangering the safe operation of the ship.

viii) Further provisions of Reg. 1177/10

Further provisions in Regulation 2010/1177 include:

- Carriers and terminal operators must provide swift procedures to handle complaints
- Member states must put into place a national enforcement body for passenger rights and for complaints handling
- Member states should promote integrated tickets for interoperability of various transport modes

ix) Cruises

The cruise business is of increasing importance in the tourist sector, not only for the number of passengers but also for the importance it has for the ship-building industry and the thousands of workers who directly or indirectly work on board or on shore. The market is also extremely interesting because the leading group, Carnival, holds nearly 50% of the world market share (in passengers), while its main competitor, Caribbean, holds around 27%. It is therefore a highly concentrated market in which Carnival undoubtedly holds a dominant position that could lead to abuses not only towards competitors and suppliers but also consumers.

In theory, cruise passengers should be protected by the package tour Directive (90/314). However the situations in which cruise passengers find themselves are peculiar and deserve special regulation. The present legal regime is one in which both the package tour Directive and the sea passenger Regulation apply.

The definition sets the ambit of the Regulation: «Cruise» is a transport service by sea or inland waterway, operated exclusively for the purpose of pleasure or recreation, supplemented by accommodation and other facilities, exceeding two overnight stays on board.

The Regulation applies in general when the ports of embarkation and disembarkation are in the EU, but also, in part, also to cruises where the port of embarkation is situated in the territory of a Member State but that of disembarkation is outside the EU.

The rights set out in Regulation 2010/1177, which have been illustrated above, apply to cruises with some exceptions:

- In case of cancellation or delay there is no duty to inform on alternative connections
- In case of cancellation or delay there is no right to re-routing and reimbursement
- There is no compensation for delay in arrival to final destination

4.9. BUS & COACH PASSENGERS

The latest EU intervention in the field of passenger protection is Regulation 2011/181 concerning the rights of passengers in bus and coach transport

The aims of the Regulation are in common with the regulation we have previously analyzed:

- The need to ensure a high level of protection for passengers, comparable with other modes of transport.
- The enforcement of requirements of consumer protection in general.
- The introduction of a minimum level of protection.

However, in comparison with other sectors, the Regulation takes into account that the bus & coach sector is largely composed of small- and medium-sized undertakings.

The Regulation needs to be read in connection with two other important pieces of EU legislation:

- With Directive 2009/103 on insurance against civil liability in respect of the use of motor vehicles.
- With the Rome I and Rome II Regulations on the applicable law to contractual and non-contractual obligations.
- The main principles and content of the Regulation are:
- The principle of non-discrimination between passengers with regard to transport conditions offered by carriers;
- The rights of passengers in the event of accidents arising out of the use of the bus or coach resulting in death or personal injury or loss of or damage to luggage;
- The principle of non-discrimination and of mandatory assistance for disabled persons and persons with reduced mobility;
- The rights of passengers in cases of cancellation or delay;
- The minimum information to be provided to passengers;
- The handling of complaints;
- Setting general rules on enforcement of the Regulation.

The Regulation applies to passengers travelling with regular services for non-specified categories of passengers where the boarding or the alighting

point of the passengers is situated in the territory of a Member State and where the scheduled distance of the service is 250 km or more.

If, instead, the distance is less than 250 km only some provisions of the Regulation apply.

Some provisions of the Regulation apply also to chartered coach services**.**

The definitions are essential because they determine the scope of application of the Regulation:

«Regular services»: services which provide for the carriage of passengers by bus or coach at specified intervals along specified routes, passengers being picked up and set down at predetermined stopping points;

«Occasional services»: services which do not fall within the definition of regular services and the main characteristic of which is the carriage by bus or coach of groups of passengers constituted on the initiative of the customer or the carrier himself.

Carriers and national legislation may not, directly or indirectly, discriminate among passengers on the basis of their nationality or the place of establishment of the carrier

i) Right to compensation for death, personal injury, loss or damage to luggage

As in the other passenger regulations, the main purpose of Regulation 181 is to establish that passengers should be compensated in the case of death, injury, loss or damage to their baggage. The amount of compensation is established by national law but may not be less than:

- € 220,000 per passenger (one should note the sharp difference in respect of the €84,000 for airline passengers)
- € 1,200 per item of luggage

In the case of an accident the carrier shall provide reasonable and proportionate assistance to passengers' immediate practical needs.

Assistance shall include, where necessary, accommodation, food, clothes, transport and the facilitation of first aid. However, assistance provided shall not constitute recognition of liability.

For each passenger, the carrier may limit the total cost of accommodation to € 80 per night and for a maximum of 2 nights.

In case of cancellation or expected delay in departure of over 2 hours passengers have the right to:

- Reimbursement of ticket and return service, or
- Re-routing at no additional cost

- If passengers are not offered re-routing, the have the right to reimbursement plus 50% of the ticket price
- If the service becomes inoperable during the journey, the carrier must provide the service with another vehicle
- In case of cancellation or delay in departure the carrier must provide appropriate information to passengers within 30 minutes after scheduled departure time
- For journeys of more than 3 hours, in case of cancellation or delay above 90 minutes carrier must offer:
- snacks, meals or refreshments in reasonable relation to the waiting time or delay
- hotel accommodation in cases where a stay of 1 or more nights becomes necessary (max € 80 per night for a maximum of 2 nights)

ii) Duty to inform

Carriers and terminal managing bodies must provide passengers with adequate information throughout their travel.

Carriers and terminal managing bodies must ensure that passengers are provided with appropriate and comprehensible information regarding their rights.

Carriers must set up a complaint handling mechanism for passenger rights

Member States must designate a new or existing body or bodies responsible for the enforcement of the Regulation.

iii) Chartered coach services

What is particularly important is that the provisions on death or personal injury to passengers and loss of or damage to luggage apply also to chartered coach services («occasional services»). Considering the vast amount of such services throughout the EU, and the millions of passengers who are served, each year, by such chartered services, the provision is extremely important because it goes well beyond the previous compulsory insurance schemes.

4.10. UNFAIR COMMERCIAL PRACTICES IN THE TRANSPORT SECTOR

As has been pointed out numerous times the protection of passengers is an important aspect of EU consumer protection legislation, and has influenced and is influenced by the whole context.

It is therefore necessary to recall the relevant general provisions in consumer protection which are usually applied to affirm passengers' rights, in particular when they fall within the notion of unfair commercial practices regulated by Directive 2005/29.

The rationale of the Directive is that disparities between national legislations cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions (Recital 4).

The Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products without prejudice to individual actions brought by those who have been harmed by such a practice (Recitals 7-9).

The Directive indirectly protects legitimate businesses from their competitors who do not play by the rules in the Directive itself and thus guarantees fair competition in fields coordinated by it (Recital 8).

The Directive sets out the notion of the «average consumer», who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors; and aims at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, the impact of the commercial practice should be assessed from the perspective of the average member of that group (Recital 18).

As usual the Directive sets out a series of key terms:

- «professional diligence»: means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;

- «undue influence»: means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;
- «transactional decision»: means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.

According to Article 5 a commercial practice is considered unfair (and consequently is prohibited) if:

a) it is contrary to the requirements of professional diligence, and
b) it materially distorts or is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

These practices are divided into two groups: misleading and aggressive.

i) Misleading commercial practices

- *Misleading actions*: when a commercial practice contains false information and is therefore untruthful or deceives – or is likely to deceive - the average consumer, even if the information is factually correct, in relation to some specific elements, and causes – or is likely to cause – him to take a transactional decision that he would not have taken otherwise.
- *Misleading omissions*: when a commercial practice, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

- Such information relates to:
- the existence or nature of the product;
- the main characteristics of the product (such as its availability, benefits, composition, date of manufacture, geographical origin, the results to be expected from its use, etc.);
- the price, the trader's commitments and the nature of the sales process;
- the need for a service or repair;
- the trader (its identity, qualifications, code of conduct, etc.);
- the consumer's rights on aspects of the sale of consumer goods.

The practice may also be considered misleading when marketing and advertising activities are used which create confusion with another product or with a competitor's trademark.

ii) Aggressive commercial practices

A commercial practice is regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

iii) Misleading and comparative advertising

One of the main ways to distort informed decisions by the consumer is through advertising practices, to which Directive 2006/114 (which supersedes the first consumer protection Directive 84/450) is devoted.

Misleading advertising is the advertising which, potentially or actually, misleads or affects the judgment of the consumer or which, for these reasons, is detrimental to a competitor. In order to establish its misleading nature one should consider the characteristics of the goods or services; the price; the conditions governing the supply of the goods or the provision of services; the nature, qualities and rights of the advertiser.

The Directive allows also comparative advertising, *i.e.* any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. It is permitted if the following conditions are met: it is not misleading; it compares goods or services meeting the

same needs or intended for the same purpose; it objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include price; it does not create confusion in the market place between the advertiser and a competitor; it does not discredit or denigrate the trademarks, trade names or other distinguishing signs of a competitor; for products with designation of origin, it relates to products with the same designation; it does not take unfair advantage of the trademark or other distinguishing sign of a competitor; and it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name.

Margherita Colangelo - Vincenzo Zeno-Zencovich

INTRODUCTION TO EUROPEAN UNION TRANSPORT LAW

Cases and Materials

1.

European Court of Justice 19 July 2012, Case C-112/11.
ebookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV.
Reference for a preliminary ruling: Oberlandesgericht Köln - Germany.
(omissis)
1 This reference for a preliminary ruling concerns the interpretation of Article 23(1) of 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).
2 The reference has been made in proceedings between, on the one hand, ebookers.com Deutschland GmbH ('ebookers.com'), which sells air travel through an online portal which it operates, and, on the other, the Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV (federal union of consumer organisations and associations; the 'BVV'), concerning the lawfulness of the manner in which that travel is sold.
Legal context
3 As recital 16 in the preamble to Regulation No 1008/2008 states:
'Customers should be able to compare effectively the prices for air services of different airlines. Therefore the final price to be paid by the customer for air services originating in the Community should at all times be indicated, inclusive of all taxes, charges and fees. ...'
4 Article 2(18) of that regulation defines 'air fares', for the purposes of that regulation, as being:
'the prices expressed in euro or in local currency to be paid to air carriers or their agents or other ticket sellers for the carriage of passengers on air services and any conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services'.
5 Similarly, Article 2(19) of Regulation No 1008/2008 defines 'air rates', for the purposes of that regulation, as being:
'the prices expressed in euro or in local currency to be paid for the carriage of cargo and the conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services'.
6 Under the heading 'Information and non-discrimination', Article 23 of Regulation No 1008/2008 provides in paragraph 1 thereof:
'Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:
(a) air fare or air rate;
(b) taxes;

(c) airport charges; and
(d) other charges, surcharges or fees, such as those related to security or fuel;
where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an "opt-in" basis.'

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

7 ebookers.com organises air travel through an online portal which it itself operates. When a customer has selected a specific flight during the booking process accessible through that portal, the costs relating to the reservation are listed in the top right-hand corner of the internet page of ebookers.com, under the heading 'your current travel costs' ('Ihre aktuellen Reisekosten'). In addition to the actual price of the flight, that list also contains amounts in respect of 'taxes and fees' ('Steuern und Gebühren') and 'travel cancellation insurance' ('Versicherung Rücktrittskostenschutz'), calculated automatically. The total of those costs represents the 'total price of travel' ('Gesamtreisepreis').

8 On finalisation of the booking, the customer must pay that total price of travel in a single sum to ebookers.com. The latter then pays the flight costs arising to the air carrier concerned and the costs of the cancellation insurance to an insurance company, which is legally and economically separate from the air carrier. Likewise, ebookers.com passes on the taxes and fees to their recipients. Should the customer not wish to take out cancellation insurance, there is a notice at the bottom of the internet page of ebookers.com indicating how the customer should proceed, namely by means of an opt-out.

9 The BVV takes the view that this method of selling air travel infringes Article 23(1) of Regulation No 1008/2008 and has called upon ebookers.com to refrain from presetting the taking out of travel cancellation insurance in the procedure for booking flights set up on its internet portal. On 28 December 2009, the BVV made an application to that effect to the Landgericht Bonn (Regional Court, Bonn), which decided to uphold that application in its entirety by decision of 19 July 2010.

10 In the context of the appeal lodged by ebookers.com on 23 August 2010 against that decision, the Oberlandesgericht Köln (Higher Regional Court, Cologne) seeks clarification as to whether the offer of ebookers.com at issue in the main proceedings falls within the scope of Article 23(1) of Regulation No 1008/2008. Taking the view that the outcome of the main proceedings depends on the interpretation of that provision, but that neither the wording nor origin of that provision show unambiguously whether it is applicable to the present dispute, the Oberlandesgericht Köln decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 23(1) of [Regulation No 1008/2008], according to which optional price supplements are to be communicated in a clear, transparent and unambiguous way at the start of any booking process and are to be accepted by the customer on an opt-in basis, also apply to costs connected with air travel arising from services provided by third parties (in this case, an insurer offering travel cancellation insurance) and which are charged to the air traveller by the company organising the air travel together with

the air fare as part of a total price?'

The question referred for a preliminary ruling

11 By its question, the Oberlandesgericht Köln asks, in essence, whether the concept of 'optional price supplements', referred to in the last sentence of Article 23(1) of Regulation No 1008/2008, must be interpreted as meaning that it covers costs, connected with the air travel, arising from services, such as the travel cancellation insurance at issue in the main proceedings, supplied by a party other than the air carrier and charged to the customer by the company selling that travel, together with the air fare, as part of a total price.

12 In that regard, it should be borne in mind that, according to the Court's settled case-law, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case C-34/05 *Schouten* [2007] ECR I-1687, paragraph 25; and Case C-433/08 *Yaesu Europe* [2009] ECR I-11487, paragraph 24).

13 As is evident from both the title and the wording of Article 23(1) of Regulation No 1008/2008, that provision seeks to ensure that there is information and transparency with regard to the prices for air services and, consequently, it contributes to safeguarding protection of customers having recourse to those services.

14 In particular, the last sentence of Article 23(1) of Regulation No 1008/2008 refers to 'optional price supplements', which are not unavoidable, in contrast to air fares or air rates and other items making up the final price of the flight, referred to in the second sentence of Article 23(1) of that regulation. Those optional price supplements therefore relate to services which, supplementing the air service itself, are neither compulsory nor necessary for the carriage of passengers or cargo, with the result that the customer chooses either to accept or refuse them. It is precisely because a customer is in a position to make that choice that such price supplements must be communicated in a clear, transparent and unambiguous way at the start of any booking process, and that their acceptance by the customer must be on an opt-in basis, as laid down in the last sentence of Article 23(1) of Regulation No 1008/2008.

15 That specific requirement in relation optional price supplements, within the meaning of the last sentence of Article 23(1) of Regulation No 1008/2008, is designed to prevent a customer of air services from being induced, during the process of booking a flight, to purchase services additional to the flight proper which are not unavoidable and necessary for the purposes of that flight, unless he chooses expressly to purchase those additional services and to pay the corresponding price supplement.

16 The requirement in question corresponds, moreover, to the general requirement concerning consumer rights in the sphere of additional payments, laid down in Article 22 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). In accordance with that provision, before the consumer is bound by an offer, the trader must seek his express consent to any extra payment in addition to the remuneration agreed upon for the trader's main

contractual obligation, and that consent cannot be inferred by the trader by using default options which the consumer is required to reject in order to avoid the additional payment.

17 In that connection, as the Advocate General observed in point 39 of his Opinion, it would be at odds with the purpose of protecting a customer for air services — pursued by the last sentence of Article 23(1) of Regulation No 1008/2008 — if that protection were to depend on whether the optional additional service, connected with the flight itself, and the corresponding price supplement offered during the process of booking that flight originate from an air carrier or from another party which is legally and economically separate from it. If it were permissible to make that protection dependent on the status of the provider of that additional service, by granting protection only where the service was provided by an air carrier, that protection could easily be circumvented and, consequently, the objective in question certainly compromised. In any event, such a procedure would be incompatible with Article 22 of Directive 2011/83.

18 In follows that, contrary to what ebookers.com claims, for the purposes of granting the protection referred to in the last sentence of Article 23(1) of Regulation No 1008/2008, what matters is not that the optional additional service and the corresponding price supplement are offered by the air carrier concerned or by a service provider linked to it, but that that service and the corresponding price are offered in relation to the flight itself during the flight booking process.

19 In addition, it must be noted that, contrary to what ebookers.com claims, that interpretation is not incompatible with the scope of Regulation No 1008/2008. Although, in accordance with Article 1(1) thereof, the purpose of the regulation is defined by reference to air carriers — since Article 1(1) provides that the regulation regulates the licensing of Community air carriers and their right to operate intra-Community air services — the fact remains that the purpose of the regulation also includes, in the words of Article 1(1) thereof, 'the pricing of intra-Community air services'. Likewise, it is clear from the wording of the last sentence of Article 23(1) of Regulation No 1008/2008, which is drafted in general terms, and from its objective of providing protection, that, as established in paragraph 17 above, the requirement for protection laid down in that provision cannot depend on the status of the provider of the optional additional service connected with the flight.

20 In the light of all of the foregoing considerations, the answer to the question is that the concept of 'optional price supplements', referred to in the last sentence of Article 23(1) of Regulation No 1008/2008, must be interpreted as meaning that it covers costs, connected with the air travel, arising from services, such as the flight cancellation insurance at issue in the main proceedings, supplied by a party other than the air carrier and charged to the customer by the person selling that travel, together with the air fare, as part of a total price.

(omissis)

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

The concept of 'optional price supplements', referred to in the last sentence of Article 23(1) of 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, must be interpreted as meaning that it covers costs, connected with the air travel, arising from services, such as the flight cancellation insurance at issue in the main proceedings, supplied by a party other than the air carrier and charged to the customer by the person selling that travel, together with the air fare, as part of a total price.

2.

European Court of Justice 18 September 2014, Case C-487/12.
Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia.
(omissis)
1 This request for a preliminary ruling concerns the interpretation of Article 22(1) of 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).
2 The request has been made in proceedings between Vueling Airlines SA ('Vueling Airlines') and the Instituto Galego de Consumo de la Xunta de Galicia (Galician Consumer's Institution, established by the Autonomous Community of Galicia, the 'Instituto Galego de Consumo') concerning the imposition on Vueling Airlines by that body of a fine penalising the content of its contracts of carriage by air.
Legal context
International law
3 The Convention for the Unification of Certain Rules for International Carriage by Air ('the Montreal Convention'), concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 1999 L 194, p. 38).
4 Articles 17 to 37 of the Montreal Convention constitute Chapter III thereof, entitled 'Liability of the carrier and extent of compensation for damage'.
5 Article 17 of that convention, entitled '…damage to baggage', provides:
'…
2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.
3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of 21 days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.
4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.'
EU law
6 Regulation No 1008/2008 was adopted on the basis of Article 80(2) EC, which

corresponds to Article 100(2) TFEU, falling within Chapter VI of the FEU Treaty, entitled 'Transport', and which enables the appropriate provisions to be laid down for, inter alia, air transport. That regulation constitutes a recasting of several regulations, including Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15).

7 Recital 16 in the preamble to Regulation No 1008/2008 states:

'Customers should be able to compare effectively the prices for air services of different airlines. Therefore the final price to be paid by the customer for air services originating in the Community should at all times be indicated, inclusive of all taxes, charges and fees. …'

8 Under Chapter I of the regulation, entitled 'General Provisions', Article 1, entitled 'Subject matter', provides at paragraph (1):

'This Regulation regulates … the pricing of intra-Community air services.'

9 Under the same Chapter, Article 2, entitled 'Definitions', provides:

'For the purposes of this Regulation:

…

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

…

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

…

15. "seat only sales" means the sale of seats, without any other service bundled, such as accommodation, directly to the public by the air carrier or its authorised agent or charterer;

…

18. "air fares" means the prices expressed in euro or in local currency to be paid to air carriers or their agents or other ticket sellers for the carriage of passengers on air services and any conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services;

19. "air rates" means the prices expressed in euro or in local currency to be paid for the carriage of cargo and the conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services;

…'

10 Under Chapter IV of Regulation No 1008/2008, entitled 'Provisions on pricing', Article 22 entitled 'Pricing freedom' provides at paragraph (1):

'Without prejudice to [paragraph (1) of Article 16, which is entitled "General principles for public service obligations"], 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.'

11 Under the same Chapter, Article 23 of the regulation, entitled 'information and non-discrimination', provides at paragraph (1):

'Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies.

The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:
(a) air fare or air rate;
(b) taxes;
(c) airport charges; and
(d) other charges, surcharges or fees, such as those related to security or fuel;
where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an "opt-in" basis.
…'

Spanish law

12 Article 97 of Law 48/1960 on air navigation (Ley 48/1960 sobre Navegación Aérea) of 21 July 1960 (BOE No 176, of 23 July 1960, p. 10291), as amended by Law 1/2011 establishing the security programme of the State as regards civil aviation and amending Law 21/2003 of 7 July on air security (Ley 1/2011 por la que se establece el Programa Estatal de Seguridad Operacional para la Aviación Civil y se modifica la Ley 21/2003, de 7 de julio, de Seguridad Aérea) of 4 March 2011 (BOE No 55, of 5 March 2011, p. 24995, 'the LNA') provides:
'As part of the price of the ticket, the carrier is required to carry passengers and their baggage, subject to weight limits established by regulation, irrespective of the number of items and their size.
Separate provisions shall govern excess baggage.
For these purposes, baggage does not include objects and items of hand baggage carried by passengers themselves. The carrier is required to carry free of charge in the cabin, as hand baggage, objects and items carried by passengers themselves, including items purchased in airport shops. The carrier may refuse to allow such objects and items on board only on grounds of security, weight or size of the object in relation to the characteristics of the aircraft.'

13 According to Article 82, entitled 'The concept of unfair contract terms', of the consolidated version of the general law concerning the protection of consumers and users and other related laws (Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias) of 16 November 2007 (BOE No 287, of 30 November 2007, p. 49181, 'the law on consumer protection'):
'1. All terms not individually negotiated and all practices not expressly agreed to which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer and user, shall be regarded as unfair terms.
…
4. Notwithstanding the provisions of the foregoing paragraphs, in accordance with the provisions of Article 85 to 90 inclusive, the following shall in any event be unfair:
a. …

b. terms that restrict the rights of the consumer and user,
c. terms that result in a lack of reciprocity in the contract,
...'

14 Article 86 of the law on consumer protection, entitled 'Terms that are unfair because they restrict the basic rights of the consumer and user', provides:

'In any event, terms that restrict or deprive the consumer and user of rights granted under non-mandatory or mandatory legal provisions or under provisions that apply in default of agreement between the parties are unfair and, in particular, those that:

...

7. impose any other waiver or restriction on the rights of the consumer and user.'

15 Article 87 of that law, entitled 'Terms that are unfair by reason of lack of reciprocity', provides:

'Terms that result in a lack of reciprocity in the contract, contrary to good faith and to the detriment of the consumer and user are unfair and, in particular, those that:

...

6. impose onerous or disproportionate conditions on the exercise of rights granted to the consumer and user under the contract, particularly in the case of contracts for the supply of goods or services on an ongoing or continuous basis, or impose excessively long durations, waive or restrict the right of the consumer and user to terminate such contracts by excluding such right or interfering with it or making it difficult to exercise such right using the agreed procedures, as is the case where terms introduce formalities that are different from those required for entering into a contract or stipulate that amounts paid in advance are to be forfeited or that services not actually provided are to be paid for, or which confer on the undertaking the unilateral right to apply any contractual penalties or specify compensation that does not correspond to the losses actually suffered.'

16 Article 89 of the law on consumer protection entitled 'Unfair terms affecting the conclusion and performance of the contract', provides:

'The following shall, in any event, be regarded as unfair terms:

...

5. price increases in respect of additional services, financing, time extensions, surcharges, compensation or penalties that do not correspond to additional services that can be accepted or rejected in each instance and that are separately and clearly expressed.'

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

17 In August 2010, Ms Arias Villegas bought, on the Internet, plane tickets from the airline Vueling Airlines. She purchased four return tickets in order to fly with three other persons from La Coruña (Spain) to Amsterdam (the Netherlands) on 18 October 2010, returning on 23 October 2010. Ms Arias Villegas checked in a total of two suitcases for the four passengers, as a result of which Vueling added a surcharge of EUR 40, namely EUR 10 per suitcase per flight, to the base price of the tickets, which amounted to EUR 241.48.

18 After the journey in question, Ms Arias Villegas lodged a complaint against Vueling with the Ourense municipal council, claiming that the airline had included an unfair term in the contract of carriage by air concerned. According to Ms Arias Villegas, that term is incompatible with the applicable Spanish legislation, under which air

passengers are entitled to check in a suitcase without incurring an additional charge. That complaint was referred to the Instituto Galego de Consumo, which set in motion proceedings for imposing a penalty on Vueling Airlines at the end of which a fine of EUR 3 000 was imposed on that company. The grounds given for the penalty were the breach of Article 97 of the LNA and of a certain number of other provisions of Spanish legislation on consumer protection, in particular Articles 82, 86, 87 and 89 of the law on consumer protection.

19 Having first brought an unsuccessful appeal against that penalty, Vueling Airlines then brought an action before the Juzgado de lo Contencioso-Administrativo No 1 de Ourense (Court for Contentious Administrative Proceedings No 1, Ourense). Before that court, it submitted that EU law, in particular Article 22 of Regulation No 1008/2008, lays down a principle of freedom to set prices, according to which air carriers may set a base price for tickets that does not include checking in baggage and add to that price, subsequently, if the customer wishes to check in baggage. The Instituto Galego de Consumo contended, by contrast, that EU legislation on freedom to set air fares does not preclude the provisions of Spanish law which, by regulating the content of contracts of carriage by air, entitles passengers, automatically, as part of the air carriage service, to check in baggage of a specific description.

20 According to the referring court, Spanish law clearly entitles the consumer always to check in a suitcase of a specific description at no extra cost over and above the base price of the plane ticket. Such a right constitutes a logical and reasonable measure for the protection of the consumer, concerning the very dignity of the passenger. Given that this right forms part of the legal definition of a contract of carriage by air, being one of the standard services that all companies engaged in such activity must provide, it is not contrary to the principle of freedom to set air fares.

21 In this respect, the referring court observes that it is up to the passenger to decide whether or not to check in baggage and that carrying checked-in baggage also affects the fuel and administration costs of the flight. However, so does the specific weight of a passenger or the use of the aircraft's toilets during the flight, but that does not mean that a surcharge can be imposed as a consequence, because that would, in the opinion of the referring court, affect the dignity of the passenger and his or her basic rights as a consumer.

22 The referring court explains that, in the present case, Ms Arias Villegas was attracted by the low price of the ticket advertised on Vueling Airlines' website. During the process of buying the ticket, she discovered that the advertised price did not include the possibility of checking in baggage, even though the trip planned would obviously require her to do so. Thus, according to the referring court, the consumer was obliged to relinquish not only the right recognised in Spanish law for each passenger to check in a suitcase, but that consumer was also required to pay a surcharge, which was not advertised at the outset on the website of the airline concerned, in order to check in baggage.

23 It is against that background that the Juzgado de lo Contencioso-Administrativo No 1 de Ourense decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 22(1) of [Regulation No 1008/2008] to be interpreted as precluding a na-

tional rule (Article 97 of [the LNA]) that requires passenger airlines to grant passengers the right always to check in a suitcase without paying a supplement or surcharge on top of the base price of the ticket purchased?'

The question referred for a preliminary ruling

24 By its question, the referring court asks, in essence, whether Article 22(1) of Regulation No 1008/2008 precludes a national law that requires air carriers to carry, in all circumstances, not only the passenger, but also baggage checked in by him, provided that the baggage complies with certain requirements as regards, in particular, its weight, for the price of the plane ticket and without it being possible to charge any price supplement to carry such baggage.

25 It should be noted, at the outset, that the Spanish Government submitted, both in its written observations and at the hearing before the Court, that the referring court interprets incorrectly the national law at issue in the main proceedings. According to that government, the legislation concerns the content of the contract of carriage by air and refers in particular to the obligation, on the part of the airlines, to ensure the carriage of passengers' baggage. Thus, the provision does not regulate the price of the plane ticket nor does it in any way oblige the airlines to carry checked-in baggage free of charge.

26 In that regard, it should be noted that it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct (see, in particular, judgments in *Corsten*, C-58/98, EU:C:2000:527, paragraph 24; *Dynamic Medien*, C-244/06, EU:C:2008:85, paragraph 19; *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 48; and *Samba Diouf*, C-69/10, EU:C:2011:524, paragraph 59).

27 In those circumstances, the question for a preliminary ruling must be considered on the understanding, which is that of the referring court, that the law at issue in the main proceedings requires air carriers to carry, in all circumstances, baggage checked in by passengers, provided that the baggage complies with certain requirements as regards, in particular, its weight, for the price of the plane ticket and without it being possible to charge any price supplement in that respect.

28 It must be observed that Regulation No 1008/2008 governs, in particular, the pricing of air services operated within the European Union. In this respect, under Article 22(1) of the regulation, air carriers may freely set 'air fares', which are defined at Article 2(18) as meaning, in particular, the price to be paid to air carriers for the carriage of passengers on air services and the conditions under which those prices apply. Regulation No 1008/2008 therefore provides, expressly, for the freedom to set prices for the carriage of passengers, without, however, dealing, expressly, with prices charged for the carriage of baggage checked in by those passengers.

29 As regards the expression 'air fares', which appears at Article 2(18) of Regulation No 1008/2008, it must be noted that there is some disparity between the different language versions. While, as in the French language version, the expression 'passenger fares' ('tarifs des passagers') is used in, amongst others, the Swedish language version ('passagerarpriser'), 'air fares' is the expression used in the English and Spanish ('tarifas aéreas') language versions and 'flight prices' is the expression used in the German

('Flugpreise') and Finnish ('lentohinnat') language versions; meanwhile, 'ticket prices' is the expression used in the Danish ('flybilletpriser') and Estonian ('piletihinnad') language versions of the regulation.

30 In that respect, it must be observed that according to the Court's settled case-law, the need for a uniform interpretation of the provisions of EU law makes it impossible for the text of a provision to be considered in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages (see, inter alia, judgments in *Stauder*, 29/69, EU:C:1969:57, paragraph 3; *EMU Tabac and Others*, C-296/95, EU:C:1998:152, paragraph 36; and *Profisa*, C-63/06, EU:C:2007:233, paragraph 13).

31 Where there is divergence between the various language versions of a European Union legal text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, in particular, judgments in *Bouchereau*, 30/77, EU:C:1977:172, paragraph 14; *Italy* v *Commission*, C-482/98, EU:C:2000:672, paragraph 49; and *Eleftheri tileorasi and Giannikos*, C-52/10, EU:C:2011:374, paragraph 24).

32 In those circumstances, it must held that, in Chapter IV of Regulation No 1008/2008, which contains provisions on pricing, Article 22(1) relating to pricing freedom is complemented by Article 23(1), which seeks to ensure, in particular, that there is information and transparency with regard to prices for air services from an airport located in a Member State and which thereby contributes to safeguarding protection of customers having recourse to those services (see, to that effect, judgment in *ebookers.com Deutschland*, C-112/11, EU:C:2012:487, paragraph 13). In that respect, Article 23(1) lays down information and transparency obligations as regards, in particular, the conditions applicable to air fares, the final price to be paid, the air fare and the unavoidable and foreseeable items that are added to the fare, and the optional price supplements relating to services that supplement the air service itself.

33 Notwithstanding the fact that Article 23(1) of Regulation No 1008/2008 does not expressly refer to the prices to be paid for carrying baggage, it must be held that the obligations laid down in that provision also cover such prices, having regard, in particular, to the objective that it should be possible effectively to compare prices for air services, set out at recital 16 in the preamble to the regulation.

34 Furthermore, as the Advocate General has emphasised in particular at point 46 of his Opinion, it must be held that the price supplement linked to checking in baggage constitutes a condition of application of the price to be paid to the air carrier for the carriage of passengers on air services, within the meaning of Article 2(18) of Regulation No 1008/2008.

35 Consequently, it must be held that Regulation No 1008/2008 applies to the setting of prices relating to the carriage of baggage.

36 As regards the manner in which those prices must be set, Article 23(1) of Regulation No 1008/2008 requires, in particular, on the one hand, that the unavoidable and foreseeable items included in the price of the air service are always specified as elements of the final price to be paid, and, on the other hand, that the price supplements, which relate to services that are neither compulsory nor necessary for the air service itself, are communicated in a clear, transparent and unambiguous way at the start of any book-

ing process, and that their acceptance by the customer must be on an opt-in basis (see, to that effect, *ebookers.com Deutschland*, EU:C:2012:487, paragraph 14).

37 Thus, in order to answer the question whether Regulation No 1008/2008 permits a separate price to be charged for the service of carrying checked-in baggage, it is necessary to determine whether the price to be paid for the carrying of such baggage constitutes an unavoidable and foreseeable item included in the price of the air service or whether it is an optional price supplement in respect of a complementary service.

38 In that respect, airlines' commercial practices have traditionally consisted of allowing passengers to check in baggage without incurring supplementary charges. However, given that airlines' business models have evolved considerably with the increasingly popular use of air transport, it must be observed that certain companies now follow a business model that consists of offering air services at the lowest price. In those circumstances, the costs relating to carrying baggage, as a component of the price of those services, has, in relative terms, greater significance than before and the airlines concerned may accordingly wish to require a price supplement to be paid for that service. Furthermore, it cannot be ruled out that some air passengers prefer to travel without checking in baggage, on the basis that doing so will reduce the price of their plane ticket.

39 Having regard to those considerations, it must be held that the price to be paid for the carriage of air passengers' checked-in baggage constitutes an optional price supplement, within the meaning of Article 23(1) of Regulation 1008/2008, given that such a service cannot be considered to be compulsory or necessary for the carriage of those passengers.

40 By contrast, as regards baggage that is not checked in, namely hand baggage, it must be observed, in order to give a complete response to the referring court, that such baggage must be considered, in principle, as constituting a necessary aspect of the carriage of passengers and that its carriage cannot, therefore, be made subject to a price supplement, on condition that such hand baggage meets reasonable requirements in terms of its weight and dimensions, and complies with applicable security requirements.

41 It is appropriate to have regard, as the Advocate General did at points 54 and 55 of his Opinion, to the differences that exist between the nature of the service of carrying checked-in baggage, on the one hand, and the service of carrying hand baggage, on the other hand. In that respect, when checked-in baggage is entrusted to the airline, the latter takes responsibility for processing and storing it, which is likely to lead to additional costs for the airline. That is not the case with the carriage of baggage that is not checked in, such as, in particular, personal items that a passenger keeps with him.

42 This distinction between the carriage of checked-in baggage and that of hand baggage is also reflected in the legislation on airlines' liability for damage caused to baggage, as may be seen in the obligations set out in the Montreal Convention, to which the European Union is a contracting party. In accordance with Article 17(2) of that Convention, the air carrier is liable for damage to checked-in baggage, if the event causing the damage took place on board the aircraft or during any period within which the checked-in baggage was in the charge of the carrier, whereas as regards unchecked baggage, the carrier is liable only if the damage resulted from its fault or that of its

servants or agents.

43 As regards a national law, such as that at issue in the main proceedings, that requires air carriers to carry, in all circumstances, not only the passenger, but also baggage checked in by him, provided that the baggage complies with certain requirements as regards, in particular, its weight, for the price of the plane ticket and without it being possible to charge any price supplement for the carriage of such baggage, it must be observed that such a law clearly does not allow air carriers separately to charge a price supplement for carrying checked-in baggage and, therefore, freely to set a price for the carriage of passengers.

44 In this respect, it should be observed that EU law does not preclude, without prejudice to the application, in particular, of rules enacted in the field of consumer protection (see, to that effect, judgment in *ebookers.com Deutschland*, EU:C:2012:487, paragraph 17), Member States from regulating aspects of the contract of carriage by air, in order, in particular, to protect consumers against unfair practices. Nevertheless, such a national law cannot be contrary to the pricing provisions of Regulation No 1008/2008.

45 A national law that requires the price to be paid for the carriage of checked-in baggage to be included, in all circumstances, in the base price of the plane ticket, prohibits any means of setting a price differently for a ticket to travel that includes the right to check in baggage and for a ticket that does not offer that possibility. Consequently, that law contravenes not only the right of air carriers freely to set fares payable for the carriage of passengers on air services and the conditions under which those fares apply, in accordance with Articles 2(18) and 22(1) of Regulation No 1008/2008, but is also likely to call into question, in particular, the objective pursued by that regulation, which is to enable the effective comparison of such fares, in that air carriers affected by such a national law are not permitted to apply separate charges for the service of carrying checked-in baggage, while airlines subject to the legislation of another Member State are permitted to do so.

46 Furthermore, given that the achievement of the objective of enabling effective comparison of fares for air services presupposes strict observance of the requirements laid down in Article 23(1) of Regulation No 1008/2008, it should be noted that, as regards the compliance in practice with the information and transparency obligations to which Vueling Airlines was subject under that provision, it is for the national authorities to check, if necessary, whether those obligations were complied with.

47 Finally, when applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of EU law (judgments in *Engelbrecht*, C-262/97, EU:C:2000:492, paragraph 39; *ČEZ,* C-115/08, EU:C:2009:660, paragraph 138; and *Wall*, C-91/08, EU:C:2010:182, paragraph 70).

48 If the result required under EU law cannot be achieved by adopting a consistent interpretation of the domestic law, the national court is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (see, to that effect, judgments in *Simmenthal*, 106/77, EU:C:1978:49, paragraph 24; *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraph 72; *Pupino*, C-105/03, EU:C:2005:386, paragraph 43; and *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, para-

graph 43).
49 In the light of all the foregoing considerations, the answer to the question referred is that Article 22(1) of Regulation No 1008/2008 must be interpreted as precluding a national law that requires air carriers to carry, in all circumstances, not only the passenger, but also baggage checked in by him, provided that the baggage complies with certain requirements as regards, in particular, its weight, for the price of the plane ticket and without it being possible to charge any price supplement to carry such baggage.
(omissis)
On those grounds, the Court (Fifth Chamber) hereby rules:
Article 22(1) of Regulation 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 must be interpreted as precluding a national law that requires air carriers to carry, in all circumstances, not only the passenger, but also baggage checked in by him, provided that the baggage complies with certain requirements as regards, in particular, its weight, for the price of the plane ticket and without it being possible to charge any price supplement to carry such baggage.

3.

European Court of Justice 29 March 2001, Case C-163/99.
Portuguese Republic v Commission of the European Communities.
(omissis)
Grounds
1 By application lodged at the Court Registry on 4 May 1999, the Portuguese Republic brought an action under the first paragraph of Article 230 EC for the annulment of Commission Decision 1999/199/EC of 10 February 1999 relating to a proceeding pursuant to Article 90 of the Treaty (IV/35.703 Portuguese airports) (OJ 1999 L 69, p. 31, hereinafter the contested decision).
Portuguese law
2 Article 18 of Decreto-Lei (Decree-Law) No 102/90 of 21 March 1990 (Diário da República I, Series A, No 67, 21 March 1990) provides that airport charges are to be determined, at airports administered by Aeroportos e Navegação Aérea Empresa Publica (the public undertaking responsible for airports and air navigation, hereinafter ANA-EP), by ministerial order. Article 18(3) states that the charges may differ according to the category, function and utilisation of the airport in question.
3 Decreto Regulamentar (Implementing Decree) No 38/91 of 29 July 1991 (Diário da República I, Series A, No 172, 29 July 1991) lays down the conditions governing landing charges. Article 4(1) thereof provides that a landing charge is to be paid for each landing and is to be calculated on the basis of the maximum take-off weight stated in the airworthiness certificate. Article 4(5) provides that domestic flights are to be allowed a reduction of 50%.
4 Every year the government issues an order updating the charges. Under a system of discounts introduced by Portaria (Implementing Order) No 352/98 of 23 June 1998 (Diário da República I, Series B, No 142, 23 June 1998), which was adopted pursuant

to Article 3 of Decree-Law No 102/90, a 7.2% discount is allowed at Lisbon Airport (18.4% at other airports) after 50 landings each month. After 100 and 150 landings discounts of 14.6% and 22.5% respectively are allowed at Lisbon Airport (24.4% and 31.4% at other airports). A discount of 32.7% is allowed after 200 landings (40.6% at other airports).

5 ANA-EP is a public undertaking responsible for administering the three mainland airports (Lisbon, Faro and Oporto), the four airports in the Azores, aerodromes and air traffic control services. The airports of the Madeiran archipelago are administered by another public undertaking.

6 Article 3(1) of Decree-Law No 246/79 of 25 July 1979 (Diário da República I, Series A, No 170, 25 July 1979) creating ANA-EP makes that body responsible for operating and developing civil aviation support services on a public-service basis, as a commercial undertaking with responsibility for directing, guiding and controlling air traffic movements, and providing for the departure and arrival of aircraft, the boarding, disembarkation and transport of passengers, and the loading, unloading and transport of freight and mail.

Background to the action and the contested decision

7 By letter of 2 December 1996, the Commission informed the Portuguese Republic that it had begun an investigation into the way in which discounts were allowed on landing charges at the airports of the Member States. It asked the Portuguese authorities to send it all the information available on the Portuguese legislation on landing charges so that it could determine whether the discounts were compatible with the Community rules on competition.

8 Having acquainted itself with the information supplied by the Portuguese authorities, the Commission warned them, in a letter dated 28 April 1997, that it considered that the system of discounts on landing charges at Portuguese airports administered by ANA-EP was discriminatory. The Commission requested the Portuguese Government to inform it of the measures it intended to take in this connection and to submit its observations. The contents of the letter were communicated to ANA-EP and to the Portuguese airlines TAP and Portugalia so they could also submit their observations.

9 In its reply dated 3 October 1997, the Portuguese Republic asserted, first, that the differentiation of the charges according to the origin of the flight was justified by the fact that some domestic flights served island airports, for which there was no alternative to air transport, and that the other domestic flights involved very short distances and low fares. Secondly, the current system of landing charges was designed to meet overriding needs of economic and social cohesion. Lastly, for international flights the Portuguese airports were in competition with airports at Madrid and Barcelona (Spain), which employed the same type of charging mechanism. The current system was also intended to achieve economies of scale as a result of more intensive use of Portuguese airports and to promote Portugal as a tourist destination.

10 In its reply to the Commission, ANA-EP contended that the system of charges in question was justified by the need to apply a pricing policy similar to those in operation at Madrid and Barcelona airports, and the desire to reduce operating costs for the most frequent and regular users of the airports it administered.

11 Following a further exchange of letters between the Portuguese Republic and the

Commission, the Commission adopted the contested decision, in which it made essentially the following points:
ANA-EP is a public undertaking within the meaning of Article 90(1) of the EC Treaty (now Article 86(1) EC), which enjoys the exclusive right to administer the airports of Lisbon, Oporto and Faro and the four airports in the Azores;
ANA-EP's pricing policy is based on legislative and regulatory provisions which constitute a State measure within the meaning of Article 90(1) of the Treaty;
the relevant markets are those in services linked to access to airport facilities at each of the seven airports administered by ANA-EP;
as the great majority of the traffic at the three mainland airports (Lisbon, Oporto and Faro) is between Portugal and the other Member States, the charging system in question affects trade between Member States; however, this is not the case as regards the four airports in the Azores, where traffic is either entirely domestic or from third countries;
the three mainland airports have a considerable volume of traffic and cover the whole of mainland Portugal, so that, taken together, the three airports which operate intra-Community services can be regarded as a substantial part of the common market;
since ANA-EP holds an exclusive right in respect of each airport it administers it occupies a dominant position in the market for aircraft landing and take-off services, for which a charge is levied;
the system of landing charges in question has the effect of applying dissimilar conditions to airlines for equivalent operations, thereby placing them at a competitive disadvantage;
on the one hand, the system of discounts based on landing frequency gives the Portuguese companies TAP and Portugalia an average discount of 30% and 22% respectively on all their flights, whilst that rate varies between 1% and 8% for companies of other Member States. There is no objective justification for this difference in treatment, since aircraft require the same landing and take-off services regardless of the airline to which they belong and how many aircraft belong to the same company. Moreover, neither the fact that the competing airports at Madrid and Barcelona have themselves implemented this type of system, nor the objective of encouraging more intensive use of facilities and promoting tourism in Portugal can justify discriminatory discounts;
on the other hand, the 50% reduction enjoyed by domestic flights places airlines operating intra-Community services at a disadvantage which cannot be justified either by the objective of providing support for the flights between the Azores and the mainland or by the short distance of domestic flights. First, the contested decision does not apply to flights in or out of the Azores in any case. Second, the charge is calculated on the basis of the weight of the aircraft rather than the distance, although short-haul international flights do not enjoy the reduction in question;
for an undertaking occupying a dominant position like ANA-EP to apply the abovementioned conditions with regard to its trading partners constitutes abuse of a dominant position within the meaning of subparagraph (c) of the second paragraph of Article 86 of the EC Treaty (now subparagraph (c) of the second paragraph of Article 82 EC);
the derogation provided for in Article 90(2) of the Treaty, which was not in any case

invoked by the Portuguese authorities, does not apply;
since the charging system in question is imposed on ANA-EP by a State measure, that measure, as applied in the mainland Portuguese airports, constitutes an infringement of Article 90(1) of the Treaty read in conjunction with Article 86.
12 The Commission therefore decided that the system of discounts on landing charges differentiated according to the origin of the flight, provided for at the airports of Lisbon, Oporto and Faro by Decree-Law No 102/90, Implementing Decree No 8/91 and Implementing Order No 352/98, constituted a measure incompatible with Article 90(1) of the Treaty read in conjunction with Article 86 (Article 1 of the contested decision). The Portuguese Republic was directed to terminate the infringement and inform the Commission within two months of the date of notification of the contested decision of the measures it had taken to that end (Article 2 of the contested decision).
13 On 26 February 1999 the Commission brought an action against the Portuguese Republic before the Court of Justice concerning two other airport taxes, the passenger service tax and the security tax, which are higher for international flights than for domestic flights. The Commission considers that the difference between the two rates infringes the provisions of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community airlines to intra-Community air routes (OJ 1992 L 240, p. 8), and Article 59 of the EC Treaty (now, after amendment, Article 49 EC). That case was registered at the Court Registry as Case C-70/99.
Pleas in law relied on by the Portuguese Republic
14 The Portuguese Republic relies on four pleas in support of its application for annulment. The first is that the contested decision is vitiated by the Commission's failure to provide reasons, inasmuch as it does not state why it resorted to its powers under Article 90(3) of the Treaty instead of instituting proceedings for failure to act. The second is that the contested decision infringes the principle of proportionality in that the Commission, which had several courses of action open to it, opted for the one which was the least appropriate and the most onerous. The third is that the Commission committed an abuse of process by taking action against the Portuguese Republic on the basis of Article 90(3) of the Treaty rather than bringing proceedings for failure to act. The fourth is that the requirements for the existence of a breach of Article 90(1) read in conjunction with Article 86 of the Treaty are not met. The Portuguese system of landing charges does not discriminate on the ground of nationality, nor does it constitute abuse of a dominant position.
15 It is necessary first of all to consider the pleas alleging infringement of the principle of proportionality and abuse of process before considering, if appropriate, the allegation that the contested decision does not contain adequate reasons and the final plea submitted by the Portuguese Republic.
Infringement of the principle of proportionality
16 The Portuguese Republic contends that the Commission infringed the principle of proportionality laid down in the third paragraph of Article 3b of the EC Treaty (now the third paragraph of Article 5 EC) by choosing from among the courses of action open to it that which was the least appropriate and the most onerous. Since the majority of Member States differentiate between domestic and international flights when calculating their airport charges, the Commission should encourage the Council

to adopt Proposal for a Council Directive 97/C 257/02 of 20 June 1997 on airport charges (OJ 1997 C 257, p. 2), based on Article 84(2) of the EC Treaty (now, after amendment, Article 80(2) EC). A directive of that kind is the only instrument that could have brought about the necessary simultaneous harmonisation of the relevant national laws.

17 If the Court considers that the Commission was entitled to have recourse to Article 90(3) of the Treaty, the Portuguese Republic submits in the alternative that the Commission should, for the same reasons, have chosen a directive as the appropriate instrument.

18 The Commission for its part notes that the Court of Justice has held that under Article 90(3) of the Treaty the Commission has the power to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (Joined Cases C-48/90 and C-66/90 Netherlands and Others v Commission [1992] ECR I-565). The exercise of that power and the conditions for its use lie within the Commission's exclusive discretion.

19 It should be observed that Article 90(3) of the Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 90(1) and expressly empowers it to take action for that purpose by way of directives and decisions. The Commission is thus empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (see Netherlands and Others v Commission, cited above, paragraphs 25 and 28, and Case C-107/95 P Bundesverband der Bilanzbuchhalter v Commission [1997] ECR I-947, paragraph 23).

20 It is, moreover apparent from the wording of Article 90(3) and from the scheme of Article 90 as a whole that the Commission enjoys a wide discretion in the matters covered by paragraphs (1) and (3) as regards both the action which it considers necessary to take and the means appropriate for that purpose (Netherlands and Others v Commission, paragraph 27, and Bundesverband der Bilanzbuchhalter, paragraph 27).

21 That power of the Commission is in no way affected by the fact that in this case the Council could have adopted a directive on airport charges under Article 84(2) of the Treaty.

22 In the first place, the Portuguese Republic's argument that a directive of this type was the only way to bring about the simultaneous harmonisation of national systems of airport charges similar to the Portuguese system is immaterial. The effect of that argument is merely to deny that that Member State has an obligation to amend its system of landing charges to bring it into conformity with the Treaty whilst systems of a similar type remain in force in other Member States. It is settled law, however, that a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaty. In the Community legal order established by the Treaty, the implementation of Community law by the Member States cannot be made subject to a condition of reciprocity. Articles 226 EC and 227 EC provide the appropriate remedies in such cases (see Case C-38/89 Blanguernon [1990] ECR I-83, paragraph 7).

23 In the second place, the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission (Joined Cases 188/80 to 190/80 France and Others v Commission [1982] ECR 2545, paragraph 14, and Case C-202/88 France v Commission [1991] ECR I-1223, paragraph 26).
24 As for the Portuguese Republic's alternative argument to the effect that the Commission should have adopted a directive under Article 90(3) rather than a decision, it must be rejected from the outset for the reasons stated in paragraph 22 of this judgment.
25 It should also be noted that in Netherlands v Commission, cited above, the Court of Justice drew a distinction between the powers the Commission may exercise by means of directives and those it may exercise by means of decisions under Article 90(3).
26 With regard to directives, the Court noted that in Case C-202/88 France v Commission, cited above, it held that the Commission was empowered to specify in general terms the obligations arising for Member States under the Treaty with regard to the undertakings referred to in Article 90(1) (Netherlands and Others v Commission, paragraph 26).
27 With regard to the powers which Article 90(3) authorises the Commission to exercise by means of decisions, the Court of Justice also held that they differ from those which it may exercise by means of directives. A decision is adopted in respect of a specific situation in one or more Member States and necessarily involves an appreciation of that situation in the light of Community law; it specifies the consequences arising for the Member State concerned, regard being had to the requirements which the performance of that particular task assigned to an undertaking imposes upon it if it is entrusted with the operation of services of general economic interest (Netherlands and Others v Commission, paragraph 27).
28 It is clear from the foregoing that the choice offered by Article 90(3) of the Treaty between a directive and a decision is not determined, as the Portuguese Republic contends, by the number of Member States which may be concerned. The choice depends on whether the Commission's objective is to specify in general terms the obligations arising under the Treaty, or to assess a specific situation in one or more Member States in the light of Community law and determine the consequences arising for the Member State or States concerned.
29 It is common ground in this case that the contested decision was meant to indicate that the particular system of discounts on landing charges at some airports in Portugal, and the differentiation of those charges according to the origin of the flight, was incompatible with the Treaty and that the Portuguese Republic was to put an end to that infringement. The Commission cannot therefore be criticised for choosing to adopt a decision.
30 The Portuguese Republic's plea alleging infringement of the principle of proportionality must therefore be rejected.

Abuse of process
(omissis)

Failure to state adequate reasons
(omissis)

Absence of the conditions required in order to estabilsh the existence of an infringement of the provisions of article 90(1) read in conjunction with article 86 of the Treaty
Absence of discrimination on grounds of nationality
43 The Portuguese Republic contends that Article 90(1) of the Treaty refers more particularly to Article 6 of the EC Treaty (now, after amendment, Article 12 EC), concerning the prohibition of discrimination on grounds of nationality, and to the rules on competition laid down in Chapter 1 of Title V in Part Three of the Treaty. It denies that the system of discounts at issue infringes the principle that there must be no discrimination on grounds of nationality. The distinction drawn by Portuguese law between domestic and international flights for the purpose of calculating landing charges is not dependent on the nationality or origin of the aircraft. First, under Article 3(1) of Regulation No 2408/92, air carriers of other Member States are permitted to operate on Portuguese national routes and thus to enjoy the favourable arrangements applying to domestic flights. Second, the system of discounts based on the number of landings does not discriminate on grounds of nationality either.
44 The Commission replies that it has never claimed that the contested system of discounts creates direct discrimination based on the nationality of the aircraft. It notes, however, that application of Article 90(1) of the Treaty is not limited to cases where the State measure at issue infringes Article 6 of the Treaty. Article 90(1) also refers expressly to Article 86 of the Treaty, which does not make any reference to the existence of discrimination on grounds of nationality, since the discriminatory provisions referred to in subparagraph (c) of the second paragraph of Article 86 cover all the differences in treatment that may be imposed, without objective justification, by an undertaking in a dominant position. However, the graduated discounts and the reduction for domestic flights in practice favour the national airlines TAP and Portugalia.
45 It should be noted that the Portuguese Republic does not dispute the points made by the Commission in paragraphs 11 to 23 of the grounds of the contested decision to the effect that ANA-EP is the holder of an exclusive right, within the meaning of Article 90(1) of the Treaty, in respect of each of the airports it administers and therefore occupies a dominant position in the market for aircraft landing and take-off services.
46 It should also be noted that subparagraph (c) of the second paragraph of Article 86 of the Treaty prohibits any discrimination on the part of an undertaking in a dominant position which consists in the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, irrespective of whether such discrimination is linked to nationality.
47 Consequently, since the measures in question are capable of falling within the combined provisions of Article 90(1) and Article 86 of the Treaty, the Portuguese Republic's argument that the discounts do not discriminate on grounds of nationality (it should be noted that the Commission did not in any event state such discrimination as a ground for the contested decision) does not make it possible, even if that argument

is proved correct, to rule on the validity of that decision at this particular stage. It is necessary, however, to consider whether the various discounts at issue lead to the application of dissimilar conditions to equivalent transactions with other trading parties within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty.

The absence of abuse of a dominant position with regard to discounts granted on the basis of the number of landings

48 The Portuguese Republic contends that its system of discounts linked to the number of landings does not constitute abuse of a dominant position. First, allowing quantity discounts is a commercial practice which undertakings in a dominant position are perfectly entitled to employ. Second, in order to recoup the heavy investment made by airports, it is in their interest to encourage airlines to use their facilities to the maximum, in particular for refuelling stops. Last, the discounts are open to all Community carriers and no airline of any other Member State has complained to the Commission about it.

49 The Commission accepts that an undertaking in a dominant position is entitled to grant quantity discounts. Such discounts must, however, be justified on objective grounds, that is to say, they should enable the undertaking in question to make economies of scale. The Portuguese authorities have not mentioned any economy of scale in this case. It is common ground that aircraft require the same landing and take-off services, regardless of how many aircraft belong to the same company.

50 An undertaking occupying a dominant position is entitled to offer its customers quantity discounts linked solely to the volume of purchases made from it (see inter alia Case 322/81 Michelin v Commission [1983] ECR 3461, paragraph 71). However, the rules for calculating such discounts must not result in the application of dissimilar conditions to equivalent transactions with other trading parties within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty.

51 In that connection, it should be noted that it is of the very essence of a system of quantity discounts that larger purchasers of a product or users of a service enjoy lower average unit prices or which amounts to the same higher average reductions than those offered to smaller purchasers of that product or users of that service. It should also be noted that even where there is a linear progression in quantity discounts up to a maximum discount, initially the average discount rises (or the average price falls) mathematically in a proportion greater than the increase in purchases and subsequently in a proportion smaller than the increase in purchases, before tending to stabilise at or near the maximum discount rate. The mere fact that the result of quantity discounts is that some customers enjoy in respect of specific quantities a proportionally higher average reduction than others in relation to the difference in their respective volumes of purchase is inherent in this type of system, but it cannot be inferred from that alone that the system is discriminatory.

52 Nonetheless, where as a result of the thresholds of the various discount bands, and the levels of discount offered, discounts (or additional discounts) are enjoyed by only some trading parties, giving them an economic advantage which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors, a system of quantity discounts leads to the application of dissimilar conditions to equivalent transactions.

53 In the absence of any objective justification, having a high threshold in the system which can only be met by a few particularly large partners of the undertaking occupying a dominant position, or the absence of linear progression in the increase of the quantity discounts, may constitute evidence of such discriminatory treatment.
54 In this case, the Commission has established that the highest discount rate (32.7% at Lisbon Airport and 40.6% at other airports) was enjoyed only by the airlines TAP and Portugalia. The figures given by the Commission in the contested decision also show that the increase in the discount rate is appreciably greater for the highest band than for the lower bands (except for the lowest band for all airports apart from Lisbon Airport), which, in the absence of any specific objective justification, leads to the conclusion that the discount for the highest band is excessive in comparison with the discounts for the lower bands.
55 It is apparent that, in order to justify the system in question, the Portuguese Republic has submitted only general arguments relating to the advantage for airports of operating a system of quantity discounts on landing charges and has done no more than claim that the system was open to all airlines.
56 In a situation where, as the Commission has observed, the system of discounts appears to favour certain airlines, in this case de facto the national airlines, and where the airports concerned are likely to enjoy a natural monopoly for a very large portion of their activities, such general arguments are insufficient to provide economic reasons to explain specifically the rates chosen for the various bands.
57 In such circumstances the conclusion must be that the system in question discriminates in favour of TAP and Portugalia.
58 The Portuguese Republic maintains, however, that the contested decision infringes the principle of neutrality as regards property ownership in the Member States contained in Article 222 of the EC Treaty (now Article 295 EC). In its view, the contested decision precludes undertakings which operate franchises or enjoy exclusive rights, or are responsible for running public services, from employing the sales strategies normally used by other undertakings.
59 The Commission replies, quite correctly, that the provisions of Article 86 of the Treaty apply to all undertakings occupying a dominant position, irrespective of whether they belong to public or private entities, and that in this case it has in no way infringed the principle of neutrality as regards property ownership in the Member States by applying those provisions in respect of ANA-EP.
60 In the light of the foregoing, the plea concerning the absence of abuse of a dominant position with regard to discounts granted on the basis of the number of landings must be rejected.
The 50% reduction for domestic flights as opposed to international flights
61 The Portuguese Republic challenges the contested decision in this respect only in its arguments seeking to demonstrate the absence of discrimination on the ground of nationality. To that end, it submits that the reduction for domestic flights is allowed irrespective of the nationality or origin of the aircraft and that, according to Article 3 of Regulation No 2408/92, the airlines of other Member States are entitled to operate on Portuguese national routes and thus enjoy the favourable arrangements applying to domestic flights.

62 As noted in paragraph 46 of this judgment, it is not necessary for a measure to involve discrimination on grounds of nationality for it to be caught by the prohibition on abuse of a dominant position contained in Article 86 of the Treaty, in particular where it leads to discrimination between trading partners.
63 The Commission referred in the contested decision to Case C-18/93 Corsica Ferries [1994] ECR I-1783 (Corsica Ferries II), in which the Court held that the provisions of Article 90(1) and Article 86 of the Treaty prohibit a national authority from inducing an undertaking which has been granted the exclusive right to provide compulsory piloting services in a substantial part of the common market, by approving the tariffs adopted by it, to apply to maritime transport undertakings tariffs which differ depending on whether they operate transport services between Member States or between ports situated on national territory, in so far as trade between Member States is affected. The Commission transposed that assessment to airports, concluding that the direct effect of the system of reductions for domestic flights at issue is to place companies which operate intra-Community flights at a disadvantage by artificially modifying undertakings' costs depending on whether they operate on domestic or international routes.
64 The Commission also referred to the Opinion in Corsica Ferries II, cited above, of Advocate General Van Gerven, who stated that since piloting services were identical whether vessels came from another Member State or from a domestic port, the application of different tariffs for the same service meant that dissimilar conditions were being applied to equivalent transactions with other trading parties, which is prohibited under Article 86 of the Treaty since it places the maritime transport undertakings concerned at a competitive disadvantage.
65 In its application the Portuguese Republic did not deny that that approach could be transposed to the reduction of landing charges specifically for domestic flights and not international flights; it merely put forward arguments alleging the absence of discrimination on grounds of nationality in order to dispute the existence of discrimination.
66 In that connection, the Court of Justice has expressly held that where national legislation, though applicable without discrimination to all vessels whether used by national providers of services or by those from other Member States, operates a distinction according to whether those vessels are engaged in internal transport or in intra-Community transport, thus securing a special advantage for the domestic market and the internal transport services of the Member State in question, that legislation must be deemed to constitute a restriction on the freedom to provide maritime transport services (Case C-381/93 Commission v France [1994] ECR I-5145, paragraph 21). There is no disputing that a measure of this type also confers an advantage on carriers who operate more than others on domestic rather than international routes and so leads to dissimilar treatment being applied to equivalent transactions, thereby affecting free competition. In this case, the discrimination results from the application of a different tariff system for the same number of landings of aircraft of the same type.
67 However, the Portuguese Republic has put forward arguments which in its view justify treating airlines differently in this way.
68 The arguments to justify the reduction for links with airports in the Azores should be examined as regards the charges paid on movements at the airports of Lisbon,

Oporto or Faro in connection with flights to and from the Azores, since, although the operative part of the contested decision does not concern charges applied at airports in the Azores, it does concern without distinction all discounts on landing charges and the differentiation of those charges according to the origin of the flight applying at Lisbon, Oporto and Faro.

69 In that connection, the Portuguese Government has argued both during the administrative procedure and in the application that for political, social and economic reasons the cost of air links with the Azores should be adjusted to take account in particular of the absence of an alternative to air transport because they are islands.

70 In paragraphs 20 and 36 of the grounds of the contested decision the Commission stated that, since it excluded the airports in the Azores from the scope of its decision due to the absence in its view of any sufficiently appreciable effect on trade between Member States of the charges applied there, there was no need to formulate a response to that argument.

71 It appears, however, that the Portuguese Government's argument applies both to charges levied at airports in the Azores and to those that may be charged on flights to or from the Azores at the airports of Lisbon, Oporto or Faro.

72 The Commission was therefore wrong to maintain that there was no need to reply to the Portuguese Government's argument concerning the discounts in question. That error cannot, however, affect the legality of the contested decision on that point.

73 As can be seen inter alia from paragraph 66 of this judgment and as the Commission stated in the contested decision, the application of different tariffs for the same number of landings constitutes in itself a type of discrimination referred to in subparagraph (c) of the second paragraph of Article 86 of the Treaty. Consequently, since all the conditions mentioned in Article 86 are met, any justification there may be for applying such a system can only be made under Article 90(2) of the Treaty, which provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them and provided any derogation from the rules of the Treaty does not affect the development of trade to such an extent as to be contrary to the interest of the Community.

74 However, in this case, as the Commission noted in paragraph 41 of the grounds of the contested decision, the Portuguese Republic has not relied on the exception provided for in Article 90(2) of the Treaty.

75 Consequently, the contested decision must be upheld in so far as it relates to the reductions in landing charges linked to the domestic nature of the flights applying at the airports of Lisbon, Oporto and Faro on flights to or from the Azores.

76 As regards domestic links other than those with the Azores, the Portuguese Republic contends that the reductions linked to the domestic nature of the flights are justified by the short distance involved and the need to avoid burdening such flights with the proportionally over-high costs connected with the landing charges, which would make their total cost excessive in relation to the distance. The Portuguese Republic refers in that connection to the objective of economic and social cohesion laid down in Article 3(j) of the EC Treaty (now, after amendment, Article 3(k) EC).

77 The Commission replies that if the distance factor were to be taken into account international flights of the same distance as domestic flights, such as those between Portugal and Seville, Madrid and Malaga or Santiago de Compostella, should enjoy the same reductions, and it points out that at any event the landing charges are calculated on the basis of the weight of the aircraft and not the distance.
78 It is not necessary to go further into that line of argument, it being sufficient to note that, on the same grounds as those set out in paragraphs 73 and 74 of this judgment, the contested decision should also be upheld in so far as it relates to reductions on landing charges linked to the domestic nature of the flights applying to the airports of Lisbon, Oporto and Faro and concerning flights other than those to and from the Azores.
79 It follows from all the foregoing considerations that the action must be dismissed.
(omissis)

4.

European Court of Justice 12 May 2011, Case C-176/09.Grand Duchy of Luxemburg v European Parliament and Council of the European Union.
(omissis)
1 By its action, the Grand Duchy of Luxembourg requests the Court to annul Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ 2009 L 70, p. 11), on the ground that it constitutes an infringement of the principles of equal treatment, proportionality and subsidiarity.
Legal context
2 Directive 2009/12 was adopted on the basis of Article 80(2) EC.
3 According to the third sentence of recital (1) in the preamble to that directive, '[a]irport managing bodies providing facilities and services for which airport charges are levied should endeavour to operate on a cost-efficient basis'.
4 The first sentence of recital (2) in the preamble to that directive states that '[i]t is necessary to establish a common framework regulating the essential features of airport charges and the way they are set, as in the absence of such a framework, basic requirements in the relationship between airport managing bodies and airport users may not be met'.
5 With regard to the scope of Directive 2009/12, recitals (3) and (4) in the preamble thereto state:
'(3) This Directive should apply to airports … that are above a minimum size as the management and the funding of small airports do not call for the application of a Community framework.
(4) In addition, in a Member State where no airport reaches the minimum size for the application of this Directive, the airport with the highest passenger movements enjoys such a privileged position as a point of entry to that Member State that it is necessary to apply this Directive to that airport in order to guarantee respect for certain basic principles in the relationship between the airport managing body and the airport users, in particular with regard to transparency of charges and non-discrimination among airport users.'
6 Recital (15) in the preamble to Directive 2009/12 reads as follows:

'Airport managing bodies should be enabled to apply airport charges corresponding to the infrastructure and/or the level of service provided as air carriers have a legitimate interest to require services from an airport managing body that correspond to the price/quality ratio. However, access to a differentiated level of infrastructure or services should be open to all carriers that wish to avail of them on a non-discriminatory basis. If demand exceeds supply, access should be determined on the basis of objective and non-discriminatory criteria to be developed by an airport managing body. Any differentiation in airport charges should be transparent, objective and based on clear criteria.'

7 Recital (19) in the preamble to that directive states:

'Since the objective of this Directive, namely to set common principles for the levying of airport charges at Community airports, cannot be sufficiently achieved by the Member States as systems of airport charges can not be put in place at national level in a uniform way throughout the Community and can therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.'

8 According to Article 1(1) and (2) thereof, the directive 'sets common principles for the levying of airport charges at Community airports' and is to 'apply to any airport located in a territory subject to the Treaty and open to commercial traffic whose annual traffic is over 5 million passenger movements and to the airport with the highest passenger movement in each Member State'.

9 Under Article 2(4) of Directive 2009/12, 'airport charge' means 'a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight'.

10 The first sentence of Article 3 of that directive provides that 'Member States shall ensure that airport charges do not discriminate among airport users'.

11 To that end, Directive 2009/12 provides for the establishment by the managing body of the airport concerned of a compulsory procedure for consultation between the airport managing body and airport users or the representatives or associations of airport users and a claim procedure. With regard to those procedures, Article 6 of the directive provides:

'1. Member States shall ensure that a compulsory procedure for regular consultation between the airport managing body and airport users or the representatives or associations of airport users is established with respect to the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. Such consultation shall take place at least once a year, unless agreed otherwise in the latest consultation. Where a multi-annual agreement between the airport managing body and the airport users exists, the consultations shall take place as foreseen in such agreement. Member States shall retain the right to request more frequent consultations.

2. Member States shall ensure that, wherever possible, changes to the system or the

level of airport charges are made in agreement between the airport managing body and the airport users. To that end, the airport managing body shall submit any proposal to modify the system or the level of airport charges to the airport users, together with the reasons for the proposed changes, no later than four months before they enter into force, unless there are exceptional circumstances which need to be justified to airport users. The airport managing body shall hold consultations on the proposed changes with the airport users and take their views into account before a decision is taken. The airport managing body shall normally publish its decision or recommendation no later than two months before its entry into force. The airport managing body shall justify its decision with regard to the views of the airport users in the event that no agreement on the proposed changes is reached between the airport managing body and the airport users.

3. Member States shall ensure that in the event of a disagreement over a decision on airport charges taken by the airport managing body, either party may seek the intervention of the independent supervisory authority referred to in Article 11 which shall examine the justifications for the modification of the system or the level of airport charges.

4. A modification of the system or the level of airport charges decided upon by the airport managing body shall, if brought before the independent supervisory authority, not take effect until that authority has examined the matter. The independent supervisory authority shall, within four weeks of the matter being brought before it, take an interim decision on the entry into force of the modification of airport charges, unless the final decision can be taken within the same deadline.

5. A Member State may decide not to apply paragraphs 3 and 4 in relation to changes to the level or the structure of the airport charges at those airports for which:

(a) there is a mandatory procedure under national law whereby airport charges, or their maximum level, shall be determined or approved by the independent supervisory authority; or

(b) there is a mandatory procedure under national law whereby the independent supervisory authority examines, on a regular basis or in response to requests from interested parties, whether such airports are subject to effective competition. Whenever warranted on the basis of such an examination, the Member State shall decide that the airport charges, or their maximum level, shall be determined or approved by the independent supervisory authority. This decision shall apply for as long as is necessary on the basis of the examination conducted by that authority.

…'

12 On every occasion when consultations are to be held, pursuant to Article 7(1) of Directive 2009/12 the airport managing body is to provide each airport user, or the representatives or associations of airport users, with information on the components serving as a basis for determining the system or the level of all charges levied at each airport by the airport managing body.

13 As regards the establishment and operation of the independent supervisory authority, Article 11(1) to (3) and (5) of Directive 2009/12 provides:

'1. Member States shall nominate or establish an independent authority as their

national independent supervisory authority in order to ensure the correct application of the measures taken to comply with this Directive and to assume, at least, the tasks assigned under Article 6. Such an authority may be the same as the entity entrusted by a Member State with the application of the additional regulatory measures referred to in Article 1(5), including with the approval of the charging system and/or the level of airport charges, provided that it meets the requirements of paragraph 3 of this Article.
2. In compliance with national law, this Directive shall not prevent the independent supervisory authority from delegating, under its supervision and full responsibility, the implementation of this Directive to other independent supervisory authorities, provided that implementation takes place in accordance with the same standards.
3. Member States shall guarantee the independence of the independent supervisory authority by ensuring that it is legally distinct from and functionally independent of any airport managing body and air carrier. Member States that retain ownership of airports, airport managing bodies or air carriers or control of airport managing bodies or air carriers shall ensure that the functions relating to such ownership or control are not vested in the independent supervisory authority. Member States shall ensure that the independent supervisory authority exercises its powers impartially and transparently.
…
5. Member States may establish a funding mechanism for the independent supervisory authority, which may include levying a charge on airport users and airport managing bodies.'

14 By virtue of Article 12(1) of Directive 2009/12, the European Commission is to submit to the European Parliament and the Council, by 15 March 2013, a report on the application of the directive assessing progress made in attaining its objective.

15 In accordance with the first subparagraph of Article 13(1) of that directive, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 15 March 2011.

Forms of order sought by the parties and the procedure before the Court

16 The Grand Duchy of Luxembourg claims that the Court should:

– principally, annul Article 1(2) of Directive 2009/12 inasmuch as it provides that it applies to the airport with the highest passenger movement in each Member State;
– in the alternative, annul Directive 2009/12 in its entirety; and
– order the Parliament and the Council to pay the costs.

17 The Parliament and the Council contend that the Court should:

– principally, dismiss the application as unfounded, and
– order the Grand Duchy of Luxembourg to pay the costs, and
– in the alternative, in the event that the Court annuls Directive 2009/12, order that its effects be maintained until a new measure has been adopted.

18 By order of the President of the Court of 14 October 2009, the Slovak Republic and the Commission were granted leave to intervene in support of the forms of order sought by the Grand Duchy of Luxembourg and the Parliament and Council respectively.

The action

The first plea in law, alleging infringement of the principle of equal treatment

Arguments of the parties

19 The first plea in the action, alleging infringement of the principle of equal treatment, consists of two different parts. By the first part of that plea, the Grand Duchy of Luxembourg, supported by the Slovak Republic, submits that it is treated differently from the Member States in which large regional airports, with between 1 and 5 million passenger movements a year, do not fall within the scope of Directive 2009/12, despite the fact that they are in the same situation as the only Luxembourg commercial airport, namely Luxembourg-Findel, which has 1.7 million passenger movements per year. The airports of Hahn (Germany) and Charleroi (Belgium) which have around 4 million and 2.9 million passenger movements respectively, are located within the same catchment area as the Luxembourg airport, that is to say less than 200km away by road, and are in direct competition with it. There are, in addition, large regional airports located close to urban centres of a certain size or having a certain level of economic activity, such as the airports of Turin (Italy) or Bordeaux (France) with 3.5 million and 3.4 million passengers respectively.

20 By the second part of the first plea, the Grand Duchy of Luxembourg argues that it is being treated in the same way as Member States on whose territories there are airports with a passenger movement volume of over 5 million per year, such as, for example, the Federal Republic of Germany or the Kingdom of Belgium.

21 In the submission of the Grand Duchy of Luxembourg, it is appropriate, in this context, to refer to the classification which follows from the Communication from the Commission of 9 December 2005 on Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1) and to limit the scope of Directive 2009/12 to categories of airports which have passenger movements in excess of 5 million per year.

22 Neither the difference in treatment as regards the large regional airports which are excluded from the scope of Directive 2009/12 nor the identical treatment of the airport of Luxembourg-Findel to that of airports whose passenger movements exceed 5 million per year is justified. As rightly follows from recital (3) in the preamble to the directive, the management and the funding of small or medium-sized airports, with fewer than 5 million passenger movements per year, do not call for the application of a 'Community framework'. However, the assertion that the airport 'with the highest passenger movements enjoys such a privileged position as a point of entry to that Member State that it is necessary to apply [Directive 2009/12] to that airport' is in reality irrelevant to the objective thereof, namely the prevention of abuse of a dominant position by certain airports. The 'privileged position' can be taken into account only if it actually creates, as regards the operators, an advantage of the same order as that represented by the fact of handling more than 5 million passengers per year. That is not automatically the situation of the largest airport in each Member State.

23 So far as, in particular, the airport of Luxembourg-Findel is concerned, it does not enjoy such a position as a privileged point of entry to Luxembourg and there is no risk of an abuse of dominant position as regards the operators, having regard to the competitive situation in which that airport finds itself in relation to a number of nearby airports which handle low-cost airlines and in relation to airports which are hubs, such as those of Frankfurt (Germany) or Brussels (Belgium). Furthermore, in economic terms, the Luxembourg airport cannot be classified alongside airports with

more than 5 million passenger movements per year, even if it sells a greater proportion of business class tickets than those airports. Consequently, the strong position of its airport managing body cannot be regarded as equivalent to that of the management body responsible for an airport which handles more than 5 million passengers.

24 Conversely, the risk of abuse of a dominant position is more real in other larger regional airports which do not fall within the scope of Directive 2009/12, which are located close to urban centres of a certain size or have a certain level of economic activity, such as the airports of Turin and Bordeaux.

25 It is indeed the case that, in areas where the European Union legislature has to carry out complex economic assessments, only a manifest error of assessment by the latter can affect the legitimacy of its action. None the less, that principle presupposes that the legislature did indeed carry out a complex assessment in the dispute, which is not the case here. Even if the view were to be taken that, on certain points, the legislature did assess a complex situation, the assessment concerning the airport of Luxembourg-Findel, whose catchment area is particularly small, is not complex. It is, therefore, in the view of the applicant, evident that, by including that airport, whose number of passenger movements per year amounts to barely a third of the number above which it is regarded as necessary normally to apply the Community framework, the legislature has committed a manifest error of assessment.

26 The Slovak Republic adds that the data on the situation of the airport of Bratislava (Slovakia), which shares the same geographical area as the airport of Vienna (Austria), call into question the assertion that the largest airport of a Member State is the 'point of entry' which is always used by a large section of travellers. The fact that an airport is the largest in a Member State thus cannot be a decisive factor in assessing the competitive position of that airport in a given market.

27 In the submission of the Council, in the light of the objective of Directive 2009/12, the European Union legislature in effect regarded as obvious the fact that the main airports, that is to say, those like the airport of Luxembourg-Findel, which have the highest passenger movements per year in a Member State, enjoy a privileged position in the Member State in whose territory they are established, such that they are comparable to airports which have more than 5 million passenger movements per year.

28 However, the large regional airports, such as those of Charleroi and Hahn, do not enjoy the privileged position of the main airports in their respective Member States. Those airports do not constitute the main point of entry in their respective States in the same way as the airport with the highest passenger movements per year in its Member State, such as that of Luxembourg-Findel.

29 In the submission of the Parliament, the objectives of Directive 2009/12 are, as is apparent from recitals (1) and (2) in the preamble thereto, to make it possible for the airport managing bodies to endeavour to operate on a cost-efficient basis and to establish a common framework regulating the essential features of airport charges. The directive therefore seeks to ensure that airport users have access to airport services, on payment of charges which meet the conditions laid down in the directive, thus ensuring non-discrimination and transparency.

30 Referring to the Proposal for a Directive of the European Parliament and of the Council of 24 January 2007 on airport charges (COM(2006) 820 final; 'the Pro-

posal for a Directive'), the Commission submits that the objective of that common framework is to facilitate discussions on airport charges between airports and airlines. Directive 2009/12 seeks to avoid the possibility that an airport managing body might find itself in a position of strength vis-à-vis the airlines as regards the fixing of airport charges, having regard to an airport's 'privileged position'. Two categories of airport might find themselves in such a position, namely the main airports of each Member State, since they are, as a general rule, located near to the capital and constitute the 'points of entry' into that country, and airports which, because of their size, are in a situation comparable to that of airports in the first category. Airports in the first category clearly benefit, particularly because of their location immediately adjacent to densely populated urban areas, the quality of their infrastructures and the existence of business customers not over-sensitive to changes in ticket prices, but, conversely, unwilling to waste time travelling to airports located more than 100km from those urban areas.

Findings of the Court

31 The general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraphs 50 and 51; Case C-313/04 *Franz Egenberger* [2006] ECR I-6331, paragraph 33, and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23).

32 The comparability of different situations must be assessed with regard to all the elements which characterise them. These elements must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, paragraphs 25 and 26 and the case-law cited).

33 In that regard, it must be noted that Directive 2009/12 was adopted on the basis of Article 80(2) EC, which provides that the Council may decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

34 Thus, by empowering the Council to decide when, how and to what extent it should intervene as regards sea and air transport, the Treaty confers broad legislative powers on it as regards the adoption of appropriate common rules (see, to that effect, Case C-440/05 *Commission* v *Council* [2007] ECR I-9097, paragraph 58; see also, with regard to the legislative powers of the Council concerning the common transport policy, Case 97/78 *Schumalla* [1978] ECR 2311, paragraph 4, and Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 23).

35 When reviewing the exercise of such a power, the European Union Court may not substitute its own assessment for that of the European Union legislature, and must confine itself to examining whether the legislature's assessment contains a manifest error or constitutes a misuse of powers or whether the legislature clearly exceeded the bounds of its legislative discretion (see, to that effect, Case C-122/94 *Commis-*

sion v *Council* [1996] ECR I-881, paragraph 18; Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; *SAM Schiffahrt and Stapf*, paragraph 24; and Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 64).

36 The Court will examine, by reference to the criteria set out in paragraphs 31 to 35 above, the first plea relied on by the Grand Duchy of Luxembourg, which submits, by the first part of the plea, that comparable situations have been treated differently and, by the second part of the plea, that different situations have been treated in the same way.

The first part of the first plea in law, alleging different treatment of comparable situations

37 With regard to different treatment of comparable situations, the Grand Duchy of Luxembourg argues, in essence, that the airport of Luxembourg-Findel is treated differently from airports which are excluded from the scope of Directive 2009/12 and whose annual traffic is over 1 million but under 5 million passenger movements per year and which are, like the Luxembourg airport, included in the category of large regional airports under the guidelines laid down in the Commission Communication of 9 December 2005. In particular, it is treated differently from the airports of Charleroi and Hahn and from those which are located close to urban centres of a certain size or have a certain level of economic activity, such as the airports of Turin or Bordeaux.

38 In that regard, it is apparent from recitals (3) and (4) in the preamble to Directive 2009/12 that, when it was adopted, the European Union legislature considered that it was not necessary to include all European Union airports in its scope but that only two categories of airports should be covered by the directive, that is to say, those which exceed a certain minimum size and those with the highest passenger movements per year in Member States where no airport reaches that minimum size, such as that of Luxembourg-Findel.

39 Pursuant to Article 1(1) thereof, that directive 'sets common principles for the levying of airport charges' at airports. Its purpose is thus to govern the relationship between airport managing bodies and airport users as regards the fixing of airport charges.

40 The European Union legislature, by adopting a common framework, has sought to improve the relationship between airport managing bodies and airport users and to avoid a failure to meet certain basic requirements in that relationship, such as transparency of charges, consultation of airport users and non-discrimination among airport users, as is apparent from recitals (2), (4) and (15) in the preamble to Directive 2009/12.

41 The comparability of the airports referred to in paragraph 37 of the present judgment must therefore be assessed in the light, in particular, of their situation as regards the users of those airports, that is to say, the airlines.

42 As follows from recital (4) in the preamble to Directive 2009/12, the legislature considered that airports in Member States where no airport reaches the minimum size laid down in the directive and which have the highest passenger movements per year, such as that of Luxembourg-Findel, enjoy a privileged position as regards the airport users, inasmuch as they constitute the point of entry into those Member States. It thus

took the view, as the Council and Commission have pointed out in particular, that, in the case of those airports, there is a risk that their managing bodies might find themselves in a position of strength vis-à-vis the airport users and, accordingly, that there is a risk of abuse of that position as regards the fixing of airport charges.

43 Those airports can be regarded as the main airport in the Member States where they are established. As a general rule, as the Commission has pointed out, those airports are located near to large political and/or economic centres of the Member States and, to a great extent, attract business customers for whom the ticket price is only one criterion among others and who can be particularly sensitive to the location of the airport, to connections with other means of transport and to the quality of the services provided.

44 As the Advocate General has observed in point 64 of his Opinion, in particular as regards business customers and the average or top segment of the market, it is more strategically advantageous for airlines of other Member States and non-Member States to offer flights to and from a main airport such as that of Luxembourg-Findel, the amount of the airport charges or even the actual volume of passenger movements per year not being regarded as decisive criteria for those companies.

45 In addition, if it is strategically advantageous for an airline to offer flights to and from a certain Member State, the main airport is the sole point of entry for it into Member States which have only one airport, which is the case, inter alia, of the Grand Duchy of Luxembourg. In Member States where there are a number of airports, it clearly appears reasonable to consider that an airline interested in serving only one point of entry into a Member State will prefer the airport with the highest passenger movements per year.

46 Although the actual number of passenger movements per year and the amount of the airport charges can indeed be important criteria for airlines offering flights to or from a particular airport in a Member State, as a general rule there is a strategic interest for those airlines in offering such flights, so that those criteria cannot be regarded as decisive for those airlines when they choose the airports from which to fly.

47 In those circumstances, having regard to the broad legislative discretion enjoyed by the European Union legislature in matters of air transport policy, its assessment that, in Member States where no airport reaches the minimum threshold laid down in Directive 2009/12, the airport with the highest passenger movements per year must be regarded as the point of entry into the Member State concerned – which confers on it a privileged position as regards airport users – cannot be called into question.

48 However, airports which do not fall within the scope of Directive 2009/12 cannot, irrespective of the actual number of passenger movements per year, be regarded as the main airports of the Member States in which they are established. As the Advocate General also observed in points 65, 74 and 77 of his Opinion, such airports can be regarded as secondary airports of the Member States which, in principle, are of different strategic importance to airlines from the main airports, which puts them in a different situation as regards airport users when airport charges are fixed.

49 In particular, a secondary airport cannot, in principle, having regard to what has been stated in paragraph 45 of the present judgment, be regarded as the point of entry, within the meaning of that directive, into the Member State where it is established,

even if it is a large regional airport located near to an urban centre, like the airports of Bordeaux or Turin. What is more, those secondary airports, in particular those which are not located near to an urban centre, may be more attractive to so-called 'low-cost' airlines. Those airlines serve customers whose requirements are, in principle, different from those of business customers and who are more sensitive to ticket prices and more willing to travel farther between the airport and the city it serves. Such airlines, for which the amount of airport charges is decisive, can be regarded as being capable of exerting a certain pressure enabling them to influence the fixing of those charges.

50 In those circumstances, the exercise by the European Union legislature of its powers is not vitiated by a manifest error or by a misuse of power, and it has not manifestly exceeded the limits of its broad legislative discretion in this field by considering that Member States' secondary airports are not in the same situation, as regards airport users, as the main airports. In any event, it is open to the legislature to resort to categorisation according to objective criteria and on the basis of general findings in order to introduce a general and abstract system of rules (see, to that effect, Case C-485/08 P *Gualtieri* v *Commission* [2010] ECR I-0000, paragraph 81). That is even more the case where implementation by the European Union legislature of a common policy involves the need to evaluate a complex economic situation, as is generally the case in questions of air transport (see, to that effect, *SAM Schiffahrt and Stapf*, paragraph 25 and the case-law cited, and *Omega Air and Others*, paragraph 65).

51 In those circumstances, the first part of the first plea in law, alleging different treatment of comparable situations, must be rejected.

The second part of the first plea in law, alleging that different situations have been treated in the same way

52 With regard to the second part of the first plea in law, alleging that different situations have been treated in the same way, the Grand Duchy of Luxembourg submits, in essence, that the airports with the highest passenger movements per year in Member States where no airport reaches the minimum size of 5 million passenger movements per year are treated in the same way as airports which handle more than 5 million passengers per year, despite the fact that the former have neither the same position of strength as regards airport users nor the same economic power as the latter airports.

53 In that regard, it is common ground between the parties to the dispute that the airports whose annual traffic exceeds 5 million passenger movements per year, precisely because of that number of movements, have a privileged position as regards airport users and that inclusion of that category of airports in the scope of Directive 2009/12 was justified having regard to both the subject-matter and purpose thereof.

54 The fact that the situation of those airports is not the same as that of airports with the highest passenger movements per year in Member States where no airport reaches the number of 5 million of such movements does not mean, as the Advocate General observes in point 82 of his Opinion, that the inclusion of those airports in the scope of Directive 2009/12 is contrary to the principle of equal treatment. Those two categories of airports are, rightly, assumed to have a privileged position as regards users of those airports, as has been stated in paragraphs 47 and 53 of the present judgment, and thus are in comparable situations. The fact that the origin of that situation lies, in one case, in the strategic position of the airports concerned and, in the other, in the

volume of annual traffic is not, having regard to the subject-matter and purpose of the directive, a defect capable of vitiating the assessment carried out by the European Union legislature.

55 In those circumstances, the second part of the first plea in law, alleging that different situations are treated in the same way, must be rejected and, accordingly, that plea in law must be rejected in its entirety.

The second plea in law, alleging breach of the principle of proportionality

Arguments of the parties

56 In the submission of the Grand Duchy of Luxembourg, Article 1(2) of Directive 2009/12 constitutes a breach of the principle of proportionality, having regard to the fact that the criterion defining the scope of that directive is irrelevant to its objectives. In addition, although the application of the principles of cost-relatedness, non-discrimination and transparency to the airport of Luxembourg-Findel does not pose any problems, the administrative procedures and burdens and the formal procedures under that directive are excessive and disproportionate to the size of the airport. The procedures for consultation and supervision engender costs for the airport of Luxembourg-Findel and for the Luxembourg State. Thus, the cost of application of that directive to airport charges has been estimated at EUR 839 500 which, after having been passed on to passengers, entails an increase of 16% in the current charges for services to passengers.

57 In the submission of the Slovak Republic, the Parliament and the Council have failed to justify, by objective criteria proportionate to the objective pursued by Directive 2009/12, the inclusion in its scope of airports located in Member States where no airport reaches the threshold of 5 million passenger movements per year and which have the highest number of such movements in the Member State concerned. To include such an airport in the scope of that directive on the sole ground that it is the largest airport in that Member State does not assist in achieving the principal objective of the directive, which is to improve competition between airports and to limit abuse of dominant positions. Nor does the guarantee that, in each Member State, the directive will apply to at least one airport, regardless of whether or not that airport holds a dominant position on the market or whether its position is entirely insignificant, contribute to the achievement of that directive.

58 The Council refers to the case-law, which states that the legality of such a measure can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. In its submission, the application has not shown that Directive 2009/12 is manifestly inappropriate having regard to the objective which it pursues.

59 The Parliament submits that the fact that the European Union legislature merely adopted minimal rules and provided Member States with the tool of flexible application of those rules must be taken into account. In addition, the fact that Directive 2009/12 does not apply to all airports does not prove that the system laid down in the Directive is not necessary.

60 The Commission states that, when Directive 2009/12 was being drafted, a number of options were considered. It is apparent from both the Proposal for a Directive and the impact assessment (SEC(2006) 1688) that the most restrictive of the

options studied was rejected, in particular, because it would have caused a not-insignificant rise in administrative costs. The option finally adopted, being limited to laying down common principles, was preferred because of its smaller financial impact, despite its lower level of effectiveness.

Findings of the Court

61 It is settled case-law that the principle of proportionality is one of the general principles of European Union law and requires that measures implemented through provisions of European Union law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (Case C-58/08 *Vodafone and Others* [2010] ECR I-0000, paragraph 51 and the case-law cited).

62 As regards the judicial review of compliance with those conditions, in the fields in which the European Union legislature has a broad legislative power, such as air transport matters (see *Commission* v *Council*, paragraph 58), the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate, having regard to the objective which the competent institutions are seeking to pursue (see, to that effect, *Omega Air and Others*, paragraph 64).

63 However, even though it has such a power, the European Union legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators (*Arcelor Atlantique et Lorraine and Others*, paragraph 58, and *Vodafone and Others*, paragraph 53 and the case-law cited).

64 Accordingly, it is for the Court to examine, on the basis of the criteria referred to in the preceding three paragraphs, whether, as argued in particular by the Grand Duchy of Luxembourg, Directive 2009/12 infringes the principle of proportionality by including in its scope airports located in Member States where no airport reaches the minimum size laid down in that directive and which have the highest passenger movements per year, regardless of the actual number of such movements.

65 In that regard, it must be borne in mind that, before preparing the Proposal for a Directive, the Commission carried out an impact assessment, the options studied also being summarised in that proposal. It is apparent therefrom that it examined various options for that field, including, inter alia, the drafting and adoption by air operators of voluntary self-regulation measures, the adoption of a legal framework requiring compliance with common principles for the establishment of airport charges at national level and the introduction of a legal framework requiring receipt and fixing of the charges on the basis of a single method of calculation.

66 As regards whether the adoption of a framework requiring compliance with common principles for the establishment of airport charges at national level, which is the approach finally adopted in Directive 2009/12, is appropriate to achieve the objective of that directive, it is common ground between the parties that, where there is a risk that the airport managing bodies would find themselves in a privileged position in relation to airport users and, accordingly, a risk of abuse of that position in the fixing of airport charges, such a framework is likely, in principle, to prevent such a risk from becoming reality. That conclusion is also valid as regards airports located in

Member States where no airport reaches the threshold of 5 million passenger movements per year and which have the highest number of such movements.

67 As regards the necessary form of such a framework, it must be noted that the Grand Duchy of Luxembourg has not proposed any less restrictive measures which would ensure that this objective is attained as effectively as a framework laying down common principles on airport charges.

68 The proportionality of Directive 2009/12 is disputed on the ground that that directive imposes procedures and administrative burdens which are excessive and disproportionate to the size of airports located in Member States where no airport reaches the threshold of 5 million passenger movements per year and which have the highest number of such movements, such as that of Luxembourg-Findel.

69 In that regard, there is nothing to support a finding that the charges under the system introduced by Directive 2009/12, for the airports concerned or for Member States, are manifestly disproportionate to the advantages which that system brings.

70 Firstly, with regard to the effects of Directive 2009/12 on the functioning of the airports concerned, it must be held that Article 6 thereof provides only that Member States are to ensure that airport managing bodies institute a procedure for regular consultation between them and airport users, which is to take place, in principle, at least once a year, without stipulating the actual details of that consultation procedure. Thus, in principle, those airports are free to organise that procedure according to their size and financial and personnel resources. Article 6(5) states that Member States may decide, in certain circumstances, not to seek the intervention of the national independent supervisory authority referred to in Article 11 of that directive.

71 Secondly, as regards that authority, Article 11 of the directive merely places an obligation on Member States to nominate or establish such an authority and does not require them to provide for specific measures of organisation which imply that that authority must be of a certain size. Moreover, by virtue of Article 11(2), it is possible to delegate the implementation of the directive to other independent supervisory authorities. Finally, as the Advocate General observed in point 103 of his Opinion, it does not appear that the costs which would be engendered by the implementation of Directive 2009/12 would cause airlines to decide to abandon an airport such as that of Luxembourg-Findel.

72 It follows from the foregoing that the second plea in law raised by the Grand Duchy of Luxembourg in support of its action, alleging infringement of the principle of proportionality, must be rejected as unfounded.

The third plea in law, alleging infringement of the principle of subsidiarity

Arguments of the parties

73 By its third plea, the Grand Duchy of Luxembourg submits that the fact that a situation which could be regulated at national level is being regulated at European Union level, if the threshold of 5 million passenger movements per year is not reached, is incompatible with the principle of subsidiarity. That incompatibility is shown by the fact that airports which are in fact larger than that of Luxembourg-Findel are exempted from compliance with the obligations under Directive 2009/12.

74 In that regard, the Council submits that the application has not stated precisely

what constitutes the alleged infringement of the principle of subsidiarity. In its submission, it is necessary to examine whether the objective pursued by Article 1(2) of Directive 2009/12 could be better achieved at European Union level. The essential principles of that directive, in particular transparency, non-discrimination and consultation of airport users, directly facilitate the furtherance of the airlines' activities. The same is true of the airports, the position of which would be strengthened as regards the largest airlines, since those airlines would no longer be able to demand the advantage of preferential tariffs. In the light of those factors and of the inherent international nature of the aviation market, the Council submits that the objectives of that directive can be achieved only at European Union level.

75 The Parliament argues that the application does not appear to criticise the fact of the intervention by the European Union legislature. It is therefore difficult to understand the basis on which infringement of the principle of subsidiarity could be founded. If, however, the Grand Duchy of Luxembourg means by subsidiarity the scope for action retained by the Member States, it is appropriate to point out that that scope for action has largely been preserved, given that Directive 2009/12 does not prescribe the method of calculation of the charges, nor does it lay down what revenues are to be taken into account. Furthermore, the requirements as to organisation of the supervisory authority are relatively limited.

Findings of the Court

76 In that regard, it is appropriate to bear in mind that the second paragraph of Article 5 EC refers to the principle of subsidiarity – given actual definition by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty – and which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. That protocol, in paragraph 5, also lays down guidelines for the purposes of determining whether those conditions are met (*Vodafone and Others*, paragraph 72).

77 As regards legislative acts, the protocol states, in paragraphs 6 and 7, that the Community is to legislate only to the extent necessary and that Community measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty (*Vodafone and Others*, paragraph 73).

78 In addition, it states in its paragraph 3 that the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice.

79 The principle of subsidiarity applies where the European Union legislature uses Article 80 EC as a legal basis, inasmuch as that provision does not give it exclusive competence to regulate air transport.

80 In the present case, the Grand Duchy of Luxembourg has not stated its third plea in law in detail sufficient as to permit review by the Court of the extent to which national rules could be sufficient to achieve the objective pursued by Directive 2009/12 in a Member State in which the main airport does not reach the minimum

size laid down in Article 1(2) of that directive.
81 Moreover, the argument advanced by that Member State in support of its third plea that a common framework is not necessary with regard to airports with fewer than 5 million passenger movements per year cannot succeed, in particular having regard to what has been held in paragraphs 47, 48 and 53 to 55 of the present judgment. It follows therefrom that not only airports with more than 5 million passenger movements per year, but also those which are the main airport of their Member State, irrespective of the actual number of passenger movements per year, are assumed to be in a privileged position.
82 The fact that some airports with annual traffic below 5 million passenger movements per year do not fall within the scope of Directive 2009/12 cannot usefully be relied upon to prove an infringement of the principle of subsidiarity, since such a fact is liable to show only that the European Union legislature considered, rightly in the light of what has been held in paragraphs 38 and 48 of this judgment, that it was not necessary to include such airports in the scope of the directive when they are not the main airport of their Member State.
83 In those circumstances, the third plea in law raised by the Grand Duchy of Luxembourg in support of its action, alleging infringement of the principle of subsidiarity, must be rejected as unfounded.
84 Since none of the pleas in law raised by the Grand Duchy of Luxembourg in support of its action has been upheld, that action must be dismissed.
(omissis)

5.

European Court of Justice 16 October 2003, Case C-363/01
Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa AG.
Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany.
(omissis)
1. By order of 31 July 2001, received at the Court on 24 September 2001, the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 16(3) of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36; 'the Directive').
2. Those questions were raised in the course of proceedings between Flughafen Hannover-Langenhagen GmbH ('the Flughafen'), which operates the Hannover-Langenhagen airport (Germany), and the airline Deutsche Lufthansa AG ('Lufthansa'), concerning Lufthansa's refusal to pay the Flughafen a separate fee from 1 January 1998 onwards for access to the groundhandling market ('the access fee').
Legal background
Community legislation
3. Recital 5 in the preamble to the Directive states that 'the opening-up of access to the groundhandling market should help reduce the operating costs of airline

companies and improve the quality of service provided to airport users'.
4. According to Recital 9 of the Directive, 'free access to the groundhandling market is consistent with the efficient operation of Community airports'.
5. Recital 25 of the Directive states:
'Whereas access to airport installations must be guaranteed to suppliers authorised to provide groundhandling services and to airport users authorised to self-handle, to the extent necessary for them to exercise their rights and to permit fair and genuine competition; whereas it must be possible however, for such access to give rise to the collection of a fee'.
6. Pursuant to Article 2 of the Directive:
'For the purposes of this Directive:
(a) "airport" means any area of land especially adapted for the landing, taking-off and manoeuvres of aircraft, including the ancillary installations which these operations may involve for the requirements of aircraft traffic and services including the installations needed to assist commercial air services;
...
(c) "managing body of the airport" means a body which, in conjunction with other activities or not as the case may be, has as its objective under national law or regulation the administration and management of the airport infrastructures, and the coordination and control of the activities of the different operators present in the airport or airport system concerned;
(d) "airport user" means any natural or legal person responsible for the carriage of passengers, mail and/or freight by air from, or to the airport in question;
(e) "groundhandling" means the services provided to airport users at airports as described in the Annex;
(f) "self-handling" means a situation in which an airport user directly provides for himself one or more categories of groundhandling services and concludes no contract of any description with a third party for the provision of such services; for the purposes of this definition, among themselves airport users shall not be deemed to be third parties where:
- one holds a majority holding in the other;
  or
- a single body has a majority holding in each;

(g) "supplier of groundhandling services" means any natural or legal person supplying third parties with one or more categories of groundhandling services.'
7. Article 6 of the Directive, entitled 'Groundhandling for third parties', provides:
'1. Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling services to third parties.
Member States shall have the right to require that suppliers of groundhandling services be established within the Community.
2. Member States may limit the number of suppliers authorised to provide the following categories of groundhandling services:
- baggage handling,

- ramp handling,
- fuel and oil handling,
- freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.

They may not, however, limit this number to fewer than two for each category of groundhandling service.

3. Moreover, as from 1 January 2001 at least one of the authorised suppliers may not be directly or indirectly controlled by:

- the managing body of the airport,
- any airport user who has carried more than 25% of the passengers or freight recorded at the airport during the year preceding that in which those suppliers were selected,
- a body controlling or controlled directly or indirectly by that managing body or any such user.

However at 1 July 2000, a Member State may request that the obligation in this paragraph be deferred until 31 December 2002.

The Commission, assisted by the Committee referred to in Article 10, shall examine such request and may, having regard to the evolution of the sector and, in particular, the situation at airports comparable in terms of traffic volume and pattern, decide to grant the said request.

4. Where pursuant to paragraph 2 they restrict the number of authorised suppliers, Member States may not prevent an airport user, whatever part of the airport is allocated to him, from having, in respect of each category of groundhandling service subject to restriction, an effective choice between at least two suppliers of groundhandling services, under the conditions laid down in paragraphs 2 and 3.'

8. Article 7 of the Directive, entitled 'Self-handling', is worded as follows:

'1. Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure the freedom to self-handle.

2. However, for the following categories of groundhandling services:

- baggage handling,
- ramp handling,
- fuel and oil handling,
- freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft,

Member States may reserve the right to self-handle to no fewer than two airport users, provided they are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria.'

9. Paragraph 1 of Article 9 of the Directive, entitled 'Exemptions', provides:

'Where at an airport, specific constraints of available space or capacity, arising in particular from congestion and area utilisation rate, make it impossible to open up the market and/or implement self-handling to the degree provided for in this Directive, the Member State in question may decide:

(a) to limit the number of suppliers for one or more categories of groundhandling services other than those referred to in Article 6(2) in all or part of the airport; in this case the provisions of Article 6(2) and (3) shall apply;
(b) to reserve to a single supplier one or more of the categories of groundhandling services referred to in Article 6(2);
(c) to reserve self-handling to a limited number of airport users for categories of groundhandling services other than those referred to in Article 7(2), provided that those users are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria;
(d) to ban self-handling or to restrict it to a single airport user for the categories of groundhandling services referred to in Article 7(2).'

10. Article 16 of the Directive, entitled 'Access to installations', states:
'1. Member States shall take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle have access to airport installations to the extent necessary for them to carry out their activities. If the managing body of the airport or, where appropriate, the public authority or any other body which controls it places conditions upon such access, those conditions must be relevant, objective, transparent and non-discriminatory.
2. The space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria.
3. Where access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria.'

11. At the time the Directive was adopted, the Commission arranged for a statement to be entered in the minutes relating to the application of Article 16(3), worded as follows:
'The Commission states that Article 16(3) recognises an airport is right to collect a fee from suppliers of groundhandling services and self-handling users for access to its installations.
The Commission states that such a fee may be construed as a commercial charge ["Geschäftsgebühr" in the German version of the declaration] and may in particular contribute to the self-financing of the airport in so far as it is determined on the basis of relevant, objective, transparent and non-discriminatory criteria'.

National legislation

12. The Gesetz über Bodenabfertigungsdienste (Law on groundhandling services) of 11 November 1997 (BGBl. 1997 I, p. 2694) inserted into the Luftverkehrsgesetz (Law on air transport) a power under which the Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften (Regulation concerning groundhandling services at airports and amending other provisions of air transport law) of 10 December 1997 (BGBl. 1997 I, p. 2885; 'the BADV') was adopted.

13. Paragraph 9(1) and (3) of the BADV provides:
'(1) The airport operator and the supplier of groundhandling services or self-handler are required to enter into a contract concerning the use of the requisite and available part of the airport and its infrastructure as well as the fees to be paid under this regulation to the airport operator. ...
...
(3) The airport operator is entitled to charge suppliers of groundhandling services and self-handlers a fee for the access, availability and use of its installations. The amount of such remuneration shall be determined after a hearing of the users' committee in accordance with relevant, objective, transparent and non-discriminatory criteria and may in particular contribute, in the sense of a commercial fee, to the self-financing of the airport. ...'

The dispute in the main proceedings and the questions referred to the Court

14. It is clear from the order for reference that Lufthansa planes fly in and out of the Hannover-Langenhagen airport. At that airport, Lufthansa provides, inter alia, check-in services for passengers flying on its planes and for passengers transported by other airlines. In the context of those activities, the Flughafen makes check-in desks available to Lufthansa in return for a rent determined in accordance with a contract for aircraft groundhandling.
15. Until the end of 1997, the Flughafen did not require Lufthansa to pay an access fee, at least in respect of its self-handling activities. However, even at that time it did collect such a fee from suppliers of groundhandling services to third parties and from other suppliers.
16. It is common ground that the access fee constitutes remuneration for the grant of the opportunity to gain access to the groundhandling market in the airport and is not intended as payment for any actual services rendered by the Flughafen, such as the provision of separate installations or installations used in common, which are covered by a user fee paid by Lufthansa to the Flughafen.
17. On 1 January 1998, the Flughafen adopted new rules governing the use of the airport, paragraphs 2.5.1 and 2.5.2 of which provide:
'2.5.1. The airport operator shall offer groundhandling services in accordance with the list of services offered and the table of fees payable which may be applicable from time to time. Self-handlers and suppliers of groundhandling services are also entitled, to the extent permitted by the managing body of the airport, to provide such services.
2.5.2. The airport operator is entitled to charge authorised self-handlers and suppliers of groundhandling services fees for access to, availability and use of its installations. Those fees are intended to contribute, in the sense of a commercial fee, to the self-financing of the airport.'
18. On that basis the Flughafen adopted a table of fees which refers to an access fee of DEM 0.30 per passenger.
19. On 24 July 1998, the Flughafen sought payment from Lufthansa of DEM 151 890.74 in access fees for the period from 1 January 1998. Lufthansa denied the validity of that demand for payment, and, consequently, the Flughafen brought an action before the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main) seeking payment of those fees.

20. After the Landgericht dismissed that action, the Flughafen appealed to the national court which has made this reference. That court is, in particular, uncertain whether Lufthansa is obliged to enter into a contract with the Flughafen regarding the payment of access fees. The Oberlandesgericht notes that the Flughafen could, in certain circumstances, rely on Paragraph 9(3) of the BADV, in conjunction with Article 16(3) of the Directive, as a basis for a right to conclude a licence agreement and receive payment of an access fee in addition to the fee for use of the airport installations.
21. The wording of Paragraph 9(1) and (3) of the BADV does not, of itself, establish whether there is a right to remuneration for the grant of access to the groundhandling market as distinct from the right to remuneration in respect of the availability and use of the airport installations.
22. According to the national court, it cannot be inferred from the wording, meaning or purpose of the Directive, and in particular Article 16(3) thereof read in conjunction with Recital 25, that an airport operator is entitled to require payment of an access fee in addition to a separate fee for making airport installations available.
23. It points out that Article 16(3) of the Directive refers to 'access to airport installations', which covers physical installations. It is difficult to equate access to installations to access to a specific market. That provision allows for the collection of a fee, set by way of common agreement, for the provision of physical installations, which takes account of both the airport operator's interest in achieving a profit and the need to cover its costs, on the one hand, and the objective of opening up the market on the other.
24. In the national court's view, the Directive aims to ensure the opening-up of the market and a reduction in costs. Accepting the Flughafen's view would not only result in the denial of access of a type which Lufthansa and other airlines in a comparable situation had enjoyed for decades, but also render such access more difficult because it would be associated with a significant increase in costs. Article 16(3) of the Directive, in conjunction with Recital 25 in its preamble, merely provides that access to airport installations may be made subject to payment of a fee the amount of which is to be determined in accordance with the criteria indicated, taking into account the profit of the undertaking concerned.
25. The national court submits that the view advocated by the Flughafen appears to be supported by the wording of Paragraph 9(3) of the BADV, by Commission Decision 98/513/EC of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 - Alpha Flight Services/Aéroports de Paris) (OJ 1998 L 230, p. 10), and by Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929). In the light of those texts, Article 16(3) of the Directive and Paragraph 9 of the BADV could also be interpreted as referring to fees payable in return for the grant of a commercial opportunity rather than for making physical installations available for a specific use.
26. According to the national court, the legislative history of the Directive militates against the interpretation advocated by the Flughafen. The proposals drawn up by the European Parliament and the Committee of the Regions of the European Union, the latter of which used the term concession charge, were not taken up in the resolution on the common position of the Council or in the final text of the Directive.

27. The national court also states that some academic writers consider that the access fee differs from the fee for specific services usually provided by the airport operator and points out that Paragraph 9(3) of the BADV provides for a fee relating to three components, namely access, availability and use. Conversely, other authors take the view that no provision of the Directive provides for collection of an access fee and that collection of such a fee impedes airport operators' competitors from gaining access to the groundhandling market.
28. The national court considers that even if the Directive had to be interpreted as authorising collection of an access fee, such a fee would be permissible only in cases where the supplier of services gains access to the market without using the airport installations because, otherwise, the grant of a commercial opportunity would already be remunerated by the user fee for those installations.
29. Moreover, assuming that the Directive must be interpreted as permitting collection of an access fee, the national court raises the question whether such a fee can also be charged in areas in which the market in question has long since been opened up and where, accordingly, the Directive can no longer have any effect.
30. If that question is answered affirmatively, the Oberlandesgericht poses the further question whether that fee may then also be charged to an undertaking which had in the past been granted market access in return for a user fee alone, adjusted at regular intervals, thereby causing groundhandling costs to rise significantly, contrary to the objectives of the Directive.
31. Moreover, the national court takes the view that a difference in the treatment of existing and new operators might result in objectively unjustified unequal treatment and an infringement of the prohibition of discrimination. That court considers that its preferred interpretation does not give rise to discrimination between self-handlers and suppliers of services to third parties or between existing and new operators. The airport operator would in each case be able to charge a user fee determined in such a way as to allow it to achieve a profit while complying with the criteria laid down in Article 16(3) of the Directive.
32. If it were to follow from the interpretation given by the Court of Justice that the Flughafen is entitled to require an undertaking in Lufthansa's situation to pay an access fee, the question would arise whether fee calculation methods such as those at issue in the main proceedings meet the requirements laid down in Article 16(3) of the Directive.
33. In the light of the foregoing considerations, the Oberlandesgericht Frankfurt am Main decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
'(1) Is Council Directive 96/67/EC of 15 October 1996, in particular Article 16(3) thereof, in conjunction with Recital 25 in the preamble thereto, to be interpreted as meaning that the managing body of an airport within the meaning of Article 3 is entitled to demand from a self-handler and/or a supplier of groundhandling services to third parties payment of a separate licence fee for the grant of "access to airport installations" in the sense of an access fee in return for the opening-up of a commercial opportunity in addition to a user fee (rental) payable by the self-handler and/or supplier to third parties of groundhandling services for the rental under contract of

airport installations, in this case, passenger check-in desks; or
alternatively, does the Directive merely provide that, for the purposes of determining a user fee, account is to be taken of the criteria mentioned in Article 16(3) and regard is to be had to the interest of the managing body of the airport in achieving a profit?
(2) If the answer to Question 1 - first alternative - is affirmative, does the airport operator also have the right to claim such a fee from the self-handler and/or supplier of groundhandling services to third parties (supplier in the situation of the defendant in the main proceedings) in sectors where free access to the groundhandling market was already guaranteed prior to the entry into force of the Directive, in particular in regard to land-side handling services?
(3) If Question 2 is answered affirmatively, is the Directive to be interpreted as entitling the managing body of an airport within the meaning of Article 3 also to demand payment of an additional licence fee as described in Question 1 for "access to airport installations" from a self-handler and/or a supplier of services in the situation of the defendant in the main proceedings who, until the entry into force of the Directive or provisions transposing it into national law, paid (only) rent for the use of the relevant airport installations?
(4) May it even be mandatory to demand (additionally) payment of a licence fee by a self-handler and/or supplier of groundhandling services who has hitherto enjoyed free access to that market, or, as the case may be, to the self-handling sector alone, without being required to pay an additional licence fee, in order to prevent unequal treatment in relation to other self-handlers and suppliers of groundhandling services
(a) who have already hitherto been requested to pay a supplementary licence fee in addition to a user fee;
(b) who are for the first time granted access to airport installations on the basis of the legal situation created by the Directive and are henceforth being requested to pay a licence fee for such access in addition to a further user fee for use of the installations?
(5) If Article 16(3) of the Directive entitles an airport's managing body to require payment of a supplementary licence fee as described above, does such a fee, which must be paid in addition to a fee for use of check-in desks, meet the requirements of Article 16(3) in regard to relevance, objectivity, transparency and non-discrimination where it is determined according to numbers of passengers (in this case DEM 0.30 per passenger checked in)?'

The first question

34. By the first part of its first question, the national court is asking essentially whether the Directive, in particular Article 16(3) thereof, authorises the managing body of an airport to make access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an acess fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations.
35. According to the Flughafen and the Greek Government, the fee for 'access to airport installations' which the managing body of an airport may, under Article 16(3) of the Directive, collect from suppliers of services and self-handlers in reality constitutes remuneration for access to the 'market' in groundhandling services or in other words

for the anticipated profit that such access provides to suppliers and self-handlers. Accordingly, such a fee is payable in addition to the fee charged for the provision of the airport installations by the airport's managing body, which does not fall within the scope of the Directive.
36. That interpretation is incorrect.
37. Recital 25 of the Directive states that 'access to airport installations must be guaranteed to suppliers authorised to provide ground-handling services and to airport users authorised to self-handle' and 'it must be possible ... for such access to give rise to the collection of a fee'.
38. Under Article 16(1) and (3) of the Directive, entitled 'Access to installations', 'Member States shall take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle have access to airport installations' and '[w]here access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria'.
39. It follows that the managing body of the airport is authorised to collect a fee in return for granting access to airport 'installations'.
40. The reference to installations clearly relates to the infrastructure and the equipment made available by the airport. That interpretation is consistent with Article 2(a) of the Directive, which defines an airport as any area of land especially adapted for the landing, taking-off and manoeuvres of aircraft, 'including the ancillary installations' which these operations may involve for the requirements of aircraft traffic and services, and the 'installations needed to assist commercial air services'.
41. In addition, as Lufthansa correctly points out, any other interpretation of Article 16 of the Directive would render the first paragraph of that provision meaningless in so far as its aim is to ensure that suppliers and users receive access to the airport installations 'to the extent necessary for them to carry out their activities'. It is common ground that in order to carry out groundhandling activities it is in any event necessary to have access to that market. Therefore, the specification in that paragraph makes sense only if it refers to access to the airport installations themselves, the need for which varies according to the activity concerned. For some groundhandling activities, the supplier or self-handler needs to rent moveable or immoveable property belonging to the airport's managing body, while for others mere access to the installations used in common is sufficient.
42. An interpretation to the effect that the Directive does not allow for the possibility of collecting an access fee is supported by other provisions of the Directive, and in particular by Articles 6 and 7 thereof. In contrast to the provisions of Article 16(3) of the Directive relating to access to airport 'installations', those provisions, which require the Member States to take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle are granted 'free access to the market' and 'the freedom to self-handle' respectively, do not make any provision whatsoever for the collection of a fee as consideration for the exercise of those freedoms.
43. That interpretation is also correct in the light of the Directive's objective of ensuring the opening-up of the groundhandling market which, according to Recital 5 of the Directive, must help, in particular, to reduce the operating costs of airline companies.

44. Not only would the possibility for the managing body of an airport to charge an access fee in addition to the fee for use of the airport installations not facilitate access to the market concerned, it would also run directly counter to the objective of reducing the operating costs of airline companies and, in certain cases, would even lead to an increase in those costs. That would be the case if certain suppliers or self-handlers who, like Lufthansa, did not pay the access fee before the Directive was implemented, were now required, having regard to the criteria laid down in Article 16(3) of the Directive, to pay such a fee.
45. Against that background, the Court must reject the Flughafen's argument that the Directive cannot validly regulate the terms of collection of the user fee for airport 'installations' because the purpose of that Directive is, according to its very title, to ensure access to the groundhandling 'market' and not to those 'installations'.
46. As the Advocate General pointed out in points 36 and 37 of his Opinion, the fact that access to the airport installations is a necessary precondition for access to the groundhandling market explains why the Community legislature not only laid down provisions relating directly to access to that market but, in order to ensure genuine access to the market, was also entitled to specify the conditions for access to the airport installations themselves.
47. The argument put forward by the Flughafen that the Community legislature's intention was to permit the collection of an access fee as consideration for the additional costs to the managing bodies of airports of opening up the groundhandling market, in order to ensure the self-financing of those airports, is inconsistent with the broad logic of the Directive.
48. First, the Community legislature stated in Recital 9 of the Directive that free access to the market concerned was consistent with the efficient operation of Community airports, without mentioning the collection of any fee as consideration for that access. Second, none of the Directive's provisions providing for exceptions to the principle of free access, namely Articles 6, 7 and 9, permit such an exception for reasons relating to the financing requirements of airports. Moreover, airports have access to sources of financing other than those linked to groundhandling activities, such as take-off and landing fees.
49. A consideration of the legislative history of the Directive also confirms the validity of this interpretation of Article 16(3) of the Directive.
50. The final text of the Directive does not include Amendment No 29 to the Commission proposal for a Council Directive No 95/C 142/09 on access to the groundhandling market at Community airports (OJ 1995 C 142, p. 7), set out in the legislative resolution embodying the Parliament's opinion on that proposal (OJ 1995 C 323, p. 94). That amendment states that a fee 'may ... be charged for access by third parties to the commercial opportunities created by the airport undertaking', in addition to the user fee which may be charged for access to airport installations and reflecting the costs that that access and the provision of the necessary infrastructure occasions for the airport. For its part, Article 16(3) of the Directive authorises the collection of a fee only for access to 'airport installations', which lends support to the argument posited by Lufthansa and the Commission that that provision does not permit the collection of a fee for market access as consideration for the commercial

opportunities created by that access.
51. The statement relating to the application of Article 16(3) of the Directive, which the Commission arranged to be entered in the minutes when the Directive was adopted and on which the Flughafen relies in support of its argument, likewise does not permit the inference that the commercial fee referred to therein, which may 'contribute ... to the self-financing of an airport', in fact constitutes a fee for market access. In any event, an interpretation based on such a statement cannot give rise to an interpretation different from that resulting from the actual wording of the provision concerned (se, to that effect, Case 429/85 *Commission* v *Italy* [1988] ECR 843, paragraph 9).
52. Moreover, neither Decision 98/513 nor the judgment in *Aéroports de Paris* v *Commission*, cited above, can reasonably be relied on by the Flughafen if only because the case which gave rise to that decision and later to that judgment did not concern the application of the Directive but related to the Community law applicable prior to its entry into force.
53. Nor do the fundamental principles of Community law relied on by the Flughafen, namely the principle of non-discrimination, the right to property and the freedom to carry on an economic or commercial activity militate against interpreting the Directive as prohibiting the collection of an access fee.
54. As regards the principle of non-discrimination, inasmuch as it is clear from the foregoing considerations that the collection of a fee from any suppliers or self-handlers at all in return for access to the market concerned cannot be justified on the basis of either Article 16(3) of the Directive or any other provision thereof, the Flughafen's argument alleging an infringement of that principle inasmuch as such a fee would be collected from certain operators but not from others, must be rejected because it is based on an incorrect premiss.
55. As to the right to property, the fact that the managing body of an airport is not authorised to collect an access fee does not mean, contrary to the Flughafen's assertions, that that body is deprived of the possibility of profiting from the economic services that it provides on the groundhandling market to which it must grant access.
56. Article 16(3) of the Directive requires that the fee which may be collected in return for access to airport installations must be determined according to relevant, objective, transparent and non-discriminatory criteria. Therefore, that provision does not prevent the fee from being determined in such a way that the mananging body of the airport is able not only to cover the costs associated with the provision and maintenance of airport installations, but also to make a profit.
57. That interpretation is supported by the legislative history of the Directive from which it is clear that, while the proposal for a directive referred to in paragraph 50 of this judgment stated, in the corresponding provision (see Article 14(3)), that the managing body of the airport may collect a fee only 'as a charge for the costs which this access ... occasions for the airport and reflecting the level of the costs', Article 16(3) does not contain any such specification.
58. Therefore, the Flughafen's argument based on the failure to respect the right to property must be rejected inasmuch as it is based on the incorrect premiss that it

would be impossible for that company to exploit its property in such a way as to make a profit.

59. At the hearing the Flughafen submitted that the prohibition on collecting an access fee constitutes arbitrary interference in its freedom to carry on an economic or commercial activity inasmuch as that prohibition is not laid down by the Directive and is thus illegal. But, as is clear from the foregoing considerations, the restriction on the freedom to set prices, which the managing body of the airport sees as the consequence of a prohibition on collecting a fee solely for access to the groundhandling market, clearly follows from the Directive and, accordingly, the Flughafen's argument in that regard is also based on an incorrect premiss and must be rejected.

60. In those circumstances, the answer to the first part of the first question must be that the Directive, in particular Article 16(3) thereof, precludes the managing body of an airport from making access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations.

61. By the second part of its first question, the national court asks whether Article 16(3) of the Directive merely provides that that body is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in that provision, which takes account of the interest of that body in making a profit.

62. As is clear from paragraphs 55 to 57 of this judgment, the answer to the second part of the first question must be that the managing body of an airport is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

63. In the light of all the foregoing considerations, the answer to the first question must be that the Directive, in particular Article 16(3) thereof, precludes the managing body of an airport from making access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations. On the other hand, that body is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

The second to fifth questions

64. In the light of the answer to the first question there is no need to answer the second to fifth questions.

(omissis)

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht Frankfurt am Main by order of 31 July 2001, hereby rules:

Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling

market at Community airports, in particular Article 16(3) thereof, precludes the managing body of an airport from making access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations. On the other hand, that body is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

6.

European Court of Justice 15 March 2007, Case C-95/04 P.
British Airways plc v Commission of the European Communities.
(omissis)

1 In its appeal, British Airways plc ('BA') seeks the annulment of the judgment of the Court of First Instance of the European Communities of 17 December 2003 in Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917 ('the judgment under appeal') in which the Court of First Instance dismissed BA's action for the annulment of Commission Decision 2000/74/EC of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D 2/34.780 – Virgin/British Airways) (OJ 2000 L 30, p. 1; 'the contested decision'), imposing on BA a fine of EUR 6.8 million for abuse of a dominant position on the United Kingdom market for air travel agency services.

Background

2 The facts of this case, as they appear from the file submitted to the Court of First Instance and are set out in paragraphs 4 to 19 of the judgment under appeal, may be summarised as follows.

3 BA, which is the largest United Kingdom airline, concluded agreements with travel agents established in the United Kingdom and accredited by the International Air Transport Association (IATA), which included not only a basic commission system for sales by those agents of tickets on BA flights ('BA tickets') but also three distinct systems of financial incentives: 'marketing agreements', 'global agreements', and, subsequently, a 'performance reward scheme', applicable from 1 January 1998.

4 The marketing agreements enabled certain travel agents, namely those with at least GBP 500 000 in annual sales of BA tickets, to receive payments in addition to their basic commission, in particular a performance reward calculated on a sliding scale, based on the extent to which a travel agent increased the value of its sales of BA tickets, and subject to the agent's increasing its sales of such tickets from one year to the next.

5 On 9 July 1993, Virgin Atlantic Airways Ltd ('Virgin') lodged a complaint with the Commission, directed in particular against those marketing agreements.

6 The Commission decided to initiate a proceeding in relation to those agreements and adopted a statement of objections against BA on 20 December 1996. BA presented its oral observations at a hearing on 12 November 1997.

7 The second type of incentive agreements, known as global agreements, was concluded with three travel agents, entitling them to receive additional commissions calculated by reference to the growth of BA's share in their worldwide sales.

8 On 17 November 1997, BA sent all travel agents established in the United Kingdom a letter in which it explained the detailed operation of a third type of incentive agreements, namely the new performance reward scheme.

9 Under that system, the basic commission rate was reduced to 7% for all BA tickets (as opposed to the previous rates of 9% for international tickets and 7.5% for domestic tickets), but each agent could earn an additional commission of up to 3% for international tickets and up to 1% for domestic tickets. The size of the additional variable element depended on the travel agents' performance in selling BA tickets. The agents' performance was measured by comparing the total revenue arising from the sales of BA tickets issued by an agent in a particular calendar month with that achieved during the corresponding month in the previous year. The benchmark above which the additional variable element became payable was 95% and its maximum level was achieved if an agent's performance level was 125%.

10 On 9 January 1998, Virgin lodged a supplementary complaint against that new performance reward scheme. On 12 March 1998 the Commission adopted a supplementary statement of objections in relation to that new system.

11 On 14 July 1999 the Commission adopted the contested decision, holding, in paragraph 96 of its grounds, that, by applying the marketing agreements and the new performance reward scheme (jointly, 'the bonus schemes at issue') to travel agents established in the United Kingdom, BA abused its dominant position on the United Kingdom market for air travel agency services (recital 96). That abusive conduct, by rewarding loyalty from the travel agents and by discriminating between travel agents, had the object and effect of excluding BA's competitors from the United Kingdom markets for air transport.

The action before the Court of First Instance and the judgment under appeal

12 By application lodged at the Registry of the Court of First Instance on 1 October 1999, BA brought an action for the annulment of the contested decision.

13 In the judgment under appeal, the Court of First Instance dismissed BA's application against the contested decision.

14 In support of its action, BA had made eight pleas in law, arguing that the Commission lacked competence, that it infringed the principle of non-discrimination, that it incorrectly defined the relevant product and geographic markets, that there was no sufficiently close nexus between the product markets allegedly affected, that the Commission adopted an incorrect legal basis for the contested decision, that there was no dominant position, that there was no abuse of a dominant position and, finally, that the fine was excessive.

15 Only the seventh plea is at issue in this appeal. In that plea, claiming that there was no abuse of a dominant position, BA challenged the Commission's assertion that the bonus schemes at issue engendered discrimination between travel agents established in the United Kingdom or produced an exclusionary effect in relation to competing airlines.

16 First of all, with regard to the discriminatory nature of those schemes, the Court

of First Instance pointed out, in paragraph 233 of the judgment under appeal, that, according to subparagraph (c) of the second paragraph of Article 82 EC, abuse of a dominant position may consist in applying in relation to its business partners dissimilar conditions to equivalent transactions, thereby placing those partners at a competitive disadvantage within the meaning of subparagraph (c) of the second paragraph of Article 82 EC.

17 In the following paragraph of that judgment, the Court of First Instance noted that the increase in the rate of commission paid by BA applied not only on BA tickets sold once the sales target had been met but on all BA tickets handled by an agent during the relevant reference period. The Court of First Instance thus concluded, in paragraph 236 of its judgment, that by remunerating at different levels services that were identical and supplied during the same reference period, the schemes at issue distorted the level of remuneration received in the form of commissions paid by BA.

18 In paragraph 238 of the judgment under appeal, the Court of First Instance considered that those discriminatory conditions of remuneration affected the ability of travel agents established in the United Kingdom to compete in supplying air travel agency services to travellers and to stimulate the demand of competing airlines for such services.

19 In paragraph 240 of that judgment, the Court of First Instance concluded that the Commission was right to hold that the bonus schemes at issue constituted an abuse of BA's dominant position on the United Kingdom market for air travel agency services, in that they produced discriminatory effects within the network of travel agents established in the United Kingdom, thereby inflicting on some of them a competitive disadvantage within the meaning of subparagraph (c) of the second paragraph of Article 82 EC.

20 Concerning, second, the exclusionary effect on airlines competing with BA arising from the 'fidelity-building' nature of the schemes at issue, the Court of First Instance pointed out, in paragraphs 245 and 246 of the judgment under appeal, that, according to the case-law of the Court of Justice, whilst quantitative rebate schemes linked exclusively to the volume of purchases made from a dominant producer are generally regarded as not having the effect of preventing customers from obtaining supplies from competitors, in breach of Article 82 EC, a rebate scheme linked to the attainment of a purchasing objective applied by such a producer does infringe that article (see, to that effect, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 71).

21 In paragraph 270 of the judgment under appeal, the Court of First Instance held that, in order to determine whether BA abused its dominant position by applying the bonus schemes at issue to travel agents established in the United Kingdom, it was necessary to consider the criteria and rules governing the granting of those rewards, and to investigate whether, in providing an advantage not based on any economic service justifying it, those bonuses tended to remove or restrict the agents' freedom to sell their services to the airlines of their choice and thereby hinder the access of BA's competitor airlines to the United Kingdom market for air travel agency services.

22 The Court of First Instance held, in paragraph 271 of the judgment under appeal, that it needed to be determined in this case whether the schemes at issue had a

fidelity-building effect in relation to travel agents established in the United Kingdom and, if they did, whether those schemes were based on an economically justified consideration.

23 With regard to, first, the fidelity-building character of the bonus schemes at issue, the Court of First Instance found, in paragraphs 272 and 273 of the judgment, that they did have such an effect for two reasons. Firstly, given their progressive nature and very noticeable effect at the margin, the increased commission rates were capable of rising exponentially from one period to the next. Secondly, the Court found that the higher revenues from BA ticket sales had been during the reference period, the stronger was the penalty suffered by the persons concerned in the form of a disproportionate reduction in the rates of performance rewards, in the case of even a slight decrease in such sales during the period under consideration, compared with that reference period.

24 Moreover, concerning BA's objection that the bonus schemes at issue did not prevent its competitors from concluding similar agreements with travel agents established in the United Kingdom, the Court of First Instance held at paragraph 277 of the judgment under appeal that the number of BA tickets sold by travel agents established in the United Kingdom in respect of air routes to and from United Kingdom airports invariably represented a multiple both of the ticket sales achieved by each of those five main competitors and of the cumulative total of those sales. The Court concluded, in paragraph 278 of its judgment, that it had been demonstrated to the requisite legal standard that the rival undertakings were not in a position to attain in the United Kingdom a level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a bonus scheme comparable with the bonus schemes at issue, which would be capable of counteracting the exclusionary effect generated by the latter.

25 Concerning, secondly, the question whether the bonus schemes at issue were based on an economically justified consideration, the Court acknowledged, in paragraph 279 of the judgment under appeal, that the fact that an undertaking is in a dominant position cannot deprive it of its entitlement, within reason, to perform the actions which it considers appropriate in order to protect its own commercial interests when they are threatened. It held, however, at paragraph 280 of its judgment, that, in order to be lawful, the protection of the competitive position of such an undertaking had to be based on criteria of economic efficiency.

26 In paragraph 281 of the judgment under appeal, the Court of First Instance held that BA had not demonstrated that the fidelity-building character of the bonus schemes at issue was based on an economically justified consideration. In paragraphs 282 and 283 of that judgment, it considered in that respect that, since the achievement of sales growth targets for BA tickets by travel agents established in the United Kingdom resulted in the application of a higher rate of commission not just on the BA tickets sold once those sales targets had been met but on all BA tickets handled during the period under consideration, the additional remuneration of those agents bore no objective relation to the consideration arising, for BA, from the sale of the additional air tickets.

27 The Court of First Instance further indicated, in paragraph 285 of its judgment,

that, even if any airline has an interest in selling extra seats on its flights rather than leaving them unoccupied, the advantage represented by a better rate of occupancy of the aircraft had to be considerably reduced in the present case by reason of the extra cost incurred by BA through the increase in the remuneration of the travel agent arising from retrospective application of the increased commission.

28 The Court therefore concluded, in paragraphs 286 to 288 of the judgment under appeal, that, being devoid of any economically justified consideration, the bonus schemes at issue had to be regarded as tending essentially to remunerate sales growth of BA tickets from one reference period to another and thus reinforce the fidelity to BA of travel agents established in the United Kingdom. Those schemes thus hindered entry into or progress in the United Kingdom market for travel agency services of airlines in competition with BA, and thereby hindered maintenance of the existing level of competition or the development of such competition on that market.

29 The Court further noted, in paragraph 290 of its judgment, that BA had itself acknowledged at the hearing that there was no precise relationship between, on the one hand, any economies of scale achieved by virtue of extra BA tickets being sold after the attainment of the sales objectives and, on the other, the increases in the rates of remuneration paid by way of consideration to travel agents established in the United Kingdom.

30 In paragraph 293 of the judgment, the Court rejected BA's argument that the Commission had failed to demonstrate that its practices produced an exclusionary effect. It held in that respect, first, that, for the purposes of establishing an infringement of Article 82 EC, it was not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned, it being sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition.

31 In the following paragraph of its judgment, the Court further held not only that the bonus schemes at issue were likely to have a restrictive effect on the United Kingdom markets for air travel agency services and air transport, but also that such an effect on those markets had been demonstrated in a concrete way by the Commission.

32 In that respect, the Court noted, first, that since, at the time of the conduct complained of, 85% of tickets sold in the United Kingdom were sold through travel agents, BA's conduct on the United Kingdom market for air travel agency services '[could] not fail to have had the effect of excluding competing airlines (to their detriment) from the United Kingdom air transport markets' (paragraph 295 of the judgment under appeal). The Court also took the view, secondly, that 'where an undertaking in a dominant position actually puts into operation a practice generating the effect of ousting its competitors, the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse of a dominant position within the meaning of Article 82 EC' (paragraph 297 of the judgment).

33 Finally, in paragraph 298 of the judgment under appeal, the Court of First Instance held that the growth in the market shares of some of BA's airline competitors, which was modest in absolute value having regard to the small size of their original market shares, did not mean that BA's practices had no effect, since, in the absence of those practices, 'it may legitimately be considered that the market shares of those

competitors would have been able to grow more significantly'.

34 The Court of First Instance therefore concluded, in paragraph 300 of the judgment under appeal, that the seventh plea had to be dismissed.

Forms of order sought

35 BA claims that the Court should:

– annul the judgment under appeal in whole or in part;

– annul or reduce the amount of the fine imposed pursuant to the contested decision as the Court may consider appropriate in the exercise of its discretion;

– take any other measures that the Court deems appropriate;

– order the Commission to pay the costs.

36 The Commission contends that the Court should:

– dismiss the appeal in its entirety;

– order BA to pay the Commission's costs in these proceedings.

37 Virgin contends that the Court should:

– declare the appeal inadmissible or, in any event, clearly unfounded and dismiss it by reasoned order pursuant to Article 119 of the Rules of Procedure of the Court of Justice;

– (in the alternative) dismiss the appeal and uphold the judgment under appeal in its entirety; and

– (in any event) order BA to pay the costs of the appeal, including Virgin's costs.

The appeal

38 In support of its appeal, BA raises five pleas in law, alleging respectively:

– that the Court of First Instance erred in law by applying the wrong test in assessing the exclusionary effect of the bonus schemes at issue and concluding that they had no objective economic justification;

– that the Court of First Instance erred in law by disregarding evidence that BA's commissions had no material effect on its competitors;

– that the Court of First Instance erred in law by failing to consider whether there was 'prejudice to consumers' under subparagraph (b) of the second paragraph of Article 82 EC;

– that the Court of First Instance erred in law by wrongly concluding that the new performance reward scheme had the same effect as the marketing agreements, despite the difference relating to the duration of the respective reference periods, and did not analyse or quantify the effects of that scheme on BA's competitors;

– that the Court of First Instance misapplied subparagraph (c) of the second paragraph of Article 82 EC in relation to the assessment of the discriminatory effect of the bonus schemes at issue in relation to United Kingdom travel agents.

The first plea, alleging error of law in the Court's assessment of the exclusionary effect of the bonus schemes at issue

39 In this plea, BA criticises the findings in paragraphs 270 to 298 of the judgment under appeal, according to which the bonuses granted by BA both had a 'fidelity-building' and thus an exclusionary effect, and lacked justification from an economic point of view.

The first part of the first plea, concerning the criterion for assessing the possible exclusionary effect of the bonus schemes at issue

– Arguments of the parties

40 BA argues, first, that the Court of First Instance erred in law by applying an incorrect test for assessing the bonus schemes at issue, namely the test concerning the fidelity-building effect of those schemes.

41 According to BA, Article 82 EC merely prohibits an undertaking in a dominant position from using methods different from those governing normal competition between products or services on the basis of supplies by economic operators, or from using methods other than competition on merit, to which legitimate competition on price is allied. BA argues that the freedom which an undertaking must have to grant its business partners greater discounts than those granted by its competitors falls within the scope of that legitimate competition.

42 In its examination of the fidelity-building effect of the bonus schemes at issue, the Court of First Instance drew no distinction between the fidelity of customers resulting from the most generous commission or the lowest prices, and the fidelity of customers induced by anti-competitive or exclusionary practices, which oust competitors by creating difficulties or artificial obstacles for them.

43 BA argues that the ambiguity of the 'fidelity-building' concept used by the Court of First Instance means that it was practically inevitable that the bonus schemes at issue would be condemned once they contained a fidelity-building effect in the sense that the commissions were generous and attractive for travel agents.

44 The approach thus adopted by the Court of First Instance is, BA submits, incompatible with the case-law of the Court of Justice. In its submission, the judgments in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, and in *Michelin*, cited above, demonstrate that the granting by an undertaking occupying a dominant position of higher commissions may be abusive only if it is subject to the condition that the co-contractor is obliged, de jure or de facto, to deal solely or mainly with that undertaking or if it limits the capacity of the co-contractor to choose freely the undertaking with which it wishes to deal. By contrast, those judgments did not condemn the granting of higher commissions on all sales above a threshold, since, even if a higher commission does give the co-contractor a strong incentive to sell more products of the dominant undertaking, it does not imply that that co-contractor accepts anything anti-competitive and does not prevent rival undertakings from granting all types of commission that they consider appropriate.

45 BA regards that distinction as fundamental. Unless it is made subject to the condition that the other party deal exclusively (or mainly) with the dominant undertaking or limits the markets of competitors in some other way, a generous commission is merely a form of competition on price.

46 According to BA, in order to distinguish between legitimate competition on price and unlawful anti-competitive or exclusionary conduct, the Court of First Instance should have applied subparagraph (b) of the second paragraph of Article 82 EC, according to which practices constituting an abuse of a dominant position may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers. It should therefore have verified whether BA had actually limited the markets of rival airlines and whether a prejudice to consumers had resulted.

47 BA submits that such limitation of competitors' markets by the dominant un-

dertaking requires more than the mere granting of generous bonuses. It can be envisaged only in two situations, neither of which is present in this case, namely:

– where the granting of bonuses is made subject to the condition that the recipient deals exclusively or mainly with the undertaking in a dominant position; or

– where the recipient of the bonuses cannot choose freely between the undertaking occupying a dominant position and its competitors. That would be the case if the recipient could expect to make profits only by dealing exclusively or mainly with the dominant undertaking or where that undertaking practises unfair competition through pricing ('predatory prices') and its competitors cannot resist that pressure.

48 Outside those situations, BA submits, subparagraph (b) of the second paragraph of Article 82 EC does not prevent an undertaking from adopting a given commercial policy on prices, services or commissions, merely because its competitors find it difficult or impossible to align themselves with it.

49 BA argues finally that, because of certain differences, the case-law in *Michelin*, cited above, does not apply to this case. It maintains in that regard that, unlike Michelin distributors, travel agents were informed by BA in writing in advance both of the thresholds and of the increase in the percentage of commissions, that they were not deprived of profit if they did not receive increased commissions from BA, inasmuch as all agents received a basic commission in any event, and that BA did not apply any pressure on them to attain the objectives on which grant of the increased commissions depended. According to BA, the only consequence, for travel agents, of not attaining those objectives was loss of the opportunity to obtain a higher commission. That, however, did not constitute an abuse.

50 The Commission and Virgin are agreed on the contrary that, in assessing the exclusionary effect of the bonus schemes at issue, the Court of First Instance applied criteria that were both correct and in accordance with the case-law, particularly with the *Hoffmann-La Roche* and *Michelin* judgments.

51 According to the Commission, *Michelin* in particular is relevant to the present case. That judgment concerned discounts which, first, were conditional on attaining certain volume objectives calculated by reference to a previous sales period, and, secondly, applied to all sales achieved during the period in question and not just marginal sales.

52 That was also the case with the bonus schemes at issue here, since the bonuses granted to travel agents which attained the volume objectives were calculated on their sales as a whole and not on the tickets sold once those objectives had been attained. The Court of First Instance rightly described that feature as having 'a very noticeable effect at the margin', since, once a travel agent was on the point of attaining those objectives, he was no longer inclined to offer tickets of airlines other than BA, for fear of missing out on the increased commission not only in respect of the marginal sales but in respect of all sales of BA tickets achieved during the period in question. Thus, for such an agent, the sale of a few tickets, or even of a single extra ticket, had a reducing effect on the remuneration generated by all sales of BA tickets achieved during the period in question.

53 The Commission rejects BA's argument that, because of a few inessential differences, the principles in *Michelin* cannot be applied to the present case.

54 First of all, the core element is common to both cases. The systems of incentives established by BA had the same characteristic as the discounts at issue in *Michelin*, namely that they rewarded fidelity more than volume. Such systems inevitably lead to the travel agent not being able to choose freely with which airline he wishes to deal, precisely the practice which the Court of First Instance condemned in its judgment.

55 The Commission also challenges BA's argument that *Michelin* is to be distinguished from the present case in that dealers were dependent on Michelin to make a profit, which is allegedly not the case with travel agents dealing with BA in the United Kingdom. The Commission argues that BA's incentive schemes enabled considerable pressure to be exerted on travel agents, even if they did not necessarily stand to make a loss if they failed to reach the sales target. In reality, BA is seeking to restrict *Michelin* to a very narrow set of circumstances, whereas that interpretation finds no basis in the judgment.

56 According to the Commission and Virgin, the examination by the Court of First Instance is not vitiated by any error of law. It was thus correctly held that the bonus schemes in question had a fidelity-building effect in relation to United Kingdom travel agents by reason of the characteristics examined in paragraphs 272 to 292 of the judgment under appeal, were not based on an economically justified consideration, restrained the freedom of those agents to deal with other airlines, thereby produced an exclusionary effect, and were likely to restrain competition.

– Findings of the Court

57 Concerning, first, the plea that the Court of First Instance wrongly failed to base its argument on the criteria in subparagraph (b) of the second paragraph of Article 82 EC in assessing whether the bonus schemes at issue were abusive, the list of abusive practices contained in Article 86 EC is not exhaustive, so that the practices there mentioned are merely examples of abuses of a dominant position (see, to that effect, Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 37). According to consistent case-law, the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by the EC Treaty (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26; Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports a.o.* v *Commission* [2000] ECR I-1365, paragraph 112).

58 It follows that discounts and bonuses granted by undertakings in a dominant position may be contrary to Article 82 EC even where they do not correspond to any of the examples mentioned in the second paragraph of that article. Thus, in determining that fidelity discounts had an exclusionary effect, the Court based its argument in *Hoffmann-La Roche* and *Michelin* on Article 82 of the EEC Treaty (subsequently Article 86 of the EC Treaty, and then Article 82 EC) in its entirety, and not just on subparagraph (b) of its second paragraph. Moreover, in its judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 523, concerning fidelity rebates, the Court expressly referred to subparagraph (c) of the second paragraph of Article 86 of the EEC Treaty, according to which practices constituting abuse of a dominant position may consist, for example, in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

59 The plea that the Court of First Instance erred in law by not basing its argument on the criteria in subparagraph (b) of the second paragraph of Article 82 EC is therefore unfounded.

60 Nor does it appear that the Court's assessment of the exclusionary effect of the bonus schemes in question was based on a misapplication of the case-law of the Court of Justice.

61 In the *Hoffmann-La Roche* and *Michelin* judgments, the Court of Justice found that certain discounts granted by two undertakings in a dominant position were abusive in character.

62 The first of those two judgments concerned discounts granted to undertakings whose business was the production or sale of vitamins, and the grant of which was, for most of the time, expressly linked to the condition that the co-contractor obtained its supplies over a given period entirely or mainly from Hoffmann-La Roche. The Court found such a discount system an abuse of a dominant position and stated that the granting of fidelity discounts in order to give the buyer an incentive to obtain its supplies exclusively from the undertaking in a dominant position was incompatible with the objective of undistorted competition within the common market (*Hoffmann-La Roche*, paragraph 90).

63 In *Michelin*, unlike in *Hoffmann-La Roche*, Michelin's co-contractors were not obliged to obtain their supplies wholly or partially from Michelin. However, the variable annual discounts granted by that undertaking were linked to objectives in the sense that, in order to benefit from them, its co-contractors had to attain individualised sales results. In that case, the Court found a series of factors which led it to regard the discount system in question as an abuse of a dominant position. In particular, the system was based on a relatively long reference period, namely a year, its functioning was non-transparent for co-contractors, and the differences in market share between Michelin and its main competitors were significant (see, to that effect, *Michelin*, paragraphs 81 to 83).

64 Contrary to BA's argument, it cannot be inferred from those two judgments that bonuses and discounts granted by undertakings in a dominant position are abusive only in the circumstances there described. As the Advocate General has stated in point 41 of her Opinion, the decisive factor is rather the underlying factors which have guided the previous case-law of the Court of Justice and which can also be transposed to a case such as the present.

65 In that respect, *Michelin* is particularly relevant to the present case, since it concerns a discount system depending on the attainment of individual sales objectives which constituted neither discounts for quantity, linked exclusively to the volume of purchases, nor fidelity discounts within the meaning of the judgment in *Hoffmann-La Roche*, since the system established by Michelin did not contain any obligation on the part of resellers to obtain all or a given proportion of its supplies from the dominant undertaking.

66 Concerning the application of Article 82 EC to a system of discounts dependent on sales objectives, paragraph 70 of the *Michelin* judgment shows that, in prohibiting the abuse of a dominant market position in so far as trade between Member States is capable of being affected, that article refers to conduct 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.

67 In order to determine whether the undertaking in a dominant position has abused such a position by applying a system of discounts such as that described in paragraph 65 of this judgment, the Court has held that it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (*Michelin*, paragraph 73).

68 It follows that in determining whether, on the part of an undertaking in a dominant position, a system of discounts or bonuses which constitute neither quantity discounts or bonuses nor fidelity discounts or bonuses within the meaning of the judgment in *Hoffmann-La Roche* constitutes an abuse, it first has to be determined whether those discounts or bonuses can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners.

69 It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted. In accordance with the analysis carried out by the Court of First Instance in paragraphs 279 to 291 of the judgment under appeal, an undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified.

70 With regard to the first aspect, the case-law gives indications as to the cases in which discount or bonus schemes of an undertaking in a dominant position are not merely the expression of a particularly favourable offer on the market, but give rise to an exclusionary effect.

71 First, an exclusionary effect may arise from goal-related discounts or bonuses, that is to say those the granting of which is linked to the attainment of sales objectives defined individually (*Michelin*, paragraphs 70 to 86).

72 It is clear from the findings of the Court of First Instance in paragraphs 10 and 15 to 17 of the judgment under appeal that the bonus schemes at issue were drawn up by reference to individual sales objectives, since the rate of the bonuses depended on the evolution of the turnover arising from BA ticket sales by each travel agent during a given period.

73 It is also apparent from the case-law that the commitment of co-contractors towards the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount or bonus does not relate solely to the growth in turnover in relation to purchases or sales of products of that undertaking

made by those co-contractors during the period under consideration, but extends also to the whole of the turnover relating to those purchases or sales. In that way, relatively modest variations – whether upwards or downwards – in the turnover figures relating to the products of the dominant undertaking have disproportionate effects on co-contractors (see, to that effect, *Michelin*, paragraph 81).

74 The Court of First Instance found that the bonus schemes at issue gave rise to a similar situation. Attainment of the sales progression objectives gave rise to an increase in the commission paid on all BA tickets sold by the travel agent concerned, and not just on those sold after those objectives had been attained (paragraph 23 of the judgment under appeal). It could therefore be of decisive importance for the commission income of a travel agent as a whole whether or not he sold a few extra BA tickets after achieving a certain turnover (paragraphs 29 and 30 of the grounds for the Commission's decision, reproduced in paragraph 23 of the judgment under appeal). The Court of First Instance, which describes that characteristic and its consequences in paragraphs 272 and 273 of the judgment under appeal, states that the progressive nature of the increased commission rates had a 'very noticeable effect at the margin' and emphasises the radical effects which a small reduction in sales of BA tickets could have on the rates of performance-related bonus.

75 Finally, the Court took the view that the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors (see, to that effect, *Michelin*, paragraph 82). It held that, in those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts or bonuses based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, those competitors would have to offer them significantly higher rates of discount or bonus.

76 In the present case, the Court of First Instance held in paragraph 277 of the judgment under appeal that BA's market share was significantly higher than that of its five main competitors in the United Kingdom. It concluded, in paragraph 278 of that judgment, that the rival airlines were not in a position to grant travel agents the same advantages as BA, since they were not capable of attaining in the United Kingdom a level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a reward scheme similar to BA's (paragraph 278 of the judgment under appeal).

77 Therefore, the Court of First Instance was right to examine, in paragraphs 270 to 278 of the judgment under appeal, whether the bonus schemes at issue had a fidelity-building effect capable of producing an exclusionary effect.

78 It should be recalled, concerning the assessment of market data and the competitive situation, that it is not for the Court of Justice, on an appeal, to substitute its own assessment for that of the Court of First Instance. In accordance with Article 225

EC and the first paragraph of Article 58 of the Statute of the Court of Justice, the appeal must be limited to questions of law. Assessment of the facts does not, save where there may have been distortion of the facts or evidence, which has not been pleaded here, constitute a question of law submitted as such for review by the Court of Justice (to that effect, see for example Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975, paragraphs 43 and 53; Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-0000, paragraph 83, and the order of 28 September 2006 in Case C-552/03 P *Unilever Bestfoods* v *Commission*, not published in the ECR, paragraph 57). BA's claim that its competitors were financially capable of making competitive counter-offers to travel agents is therefore inadmissible.

79 The same applies to BA's allegation that the Court of First Instance overestimated the 'very noticeable effect at the margin' of the bonus schemes at issue. BA thereby calls into question the assessment of facts and evidence made by the Court of First Instance, which constitutes an inadmissible plea on appeal.

80 It follows from the whole of the above considerations that the first part of the first plea is in part inadmissible and in part unfounded.

The second part of the first plea, concerning the assessment by the Court of First Instance of the relevance of the objective economic justification for the bonus schemes at issue

– Arguments of the parties

81 BA challenges as erroneous the finding by the Court of First Instance in paragraph 279 et seq. of the judgment under appeal that BA's commissions were not based on an economically justified consideration. BA argues that it is economically justified for an airline to reward travel agents which allow it to increase its sales and help it to cover its high fixed costs by bringing additional passengers.

82 The Commission and Virgin challenge that position. The Commission points to the abruptness of BA's argument in that regard. It argues that merely stating that the airline business is characterised by high fixed costs is not enough to justify the initiatives taken by an airline in order to cover a part of those costs. In any event, competing airlines also had to bear high fixed costs. Exclusionary practices by a dominant undertaking, like BA, reduced the revenue of those companies and made it even more difficult for them to cover those costs.

83 Virgin acknowledges that a system of discounts for quantity linked solely to the volume of sales made by a dominant undertaking is in principle economically justified, since discounts for quantity are deemed to reflect efficiency gains and economies of scale achieved by that undertaking. However, before the Court of First Instance, BA had itself admitted that there was no relation between, on the one hand, the possible economies of scale achieved by virtue of BA tickets sold after the attainment of the sales objectives and, on the other hand, the increases in the commission rates granted to United Kingdom travel agents in consideration for exceeding those objectives.

– Findings of the Court

84 Discounts or bonuses granted to its co-contractors by an undertaking in a dominant position are not necessarily an abuse and therefore prohibited by Article 82 EC. According to consistent case-law, only discounts or bonuses which are not based on any economic counterpart to justify them must be regarded as an abuse (see, to that

effect, *Hoffmann-La Roche*, paragraph 90, and *Michelin*, paragraph 73).

85 As has been held in paragraph 69 of this judgment, the Court of First Instance was right, after holding that the bonus schemes at issue produced an exclusionary effect, to examine whether those schemes had an objective economic justification.

86 Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case (see, to that effect, *Michelin*, paragraph 73). It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse.

87 In this case, correctly basing its examination upon the criteria thus inferred from the case-law, the Court of First Instance examined whether there was an economic justification for the bonus schemes at issue. In paragraphs 284 and 285 of the judgment under appeal, it adopted a position in relation to the arguments submitted by BA, which concerned, in particular, the high level of fixed costs in air transport and the importance of aircraft occupancy rates. On the basis of its assessment of the circumstances of the case, the Court of First Instance came to the conclusion that those systems were not based on any objective economic justification.

88 In this context, it should be noted that BA's arguments concerning the high level of fixed costs in air transport and the importance of aircraft occupancy rates are inadmissible for the reasons set out in paragraph 78 of this judgment, since, by those arguments, BA is in reality challenging the assessment of facts and evidence made by the Court of First Instance. It is not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of the Court of First Instance.

89 Therefore, the second part of the first plea must be dismissed as inadmissible.

90 The Court of First Instance did not therefore make any error of law in holding that the bonus schemes at issue had a fidelity-building effect, that they therefore produced an exclusionary effect, and that they were not justified from an economic standpoint.

91 The first plea must therefore be dismissed in its entirety.

The second plea, alleging error of law in that the Court of First Instance did not examine the probable effects of the commissions granted by BA, or take account of the evidence that they had no material effect on competing airlines

Arguments of the parties

92 By its second plea, BA effectively accuses the Court of First Instance of not examining the probable effects of the bonus schemes at issue, namely the existence or otherwise of an exclusionary effect, whereas Article 82 EC requires that, in each case, the actual or probable effects of the practices complained of should be examined, rather than conclusions being reached on the basis of their form, or of presumptions of such an effect.

93 In that regard, while stating that it is not in any way maintaining that it is nec-

essary to demonstrate the existence of actual anti-competitive effects in each case, BA argues that, in this case, there was evidence clearly indicating that the bonus schemes at issue had no material effect. That evidence showed that, in the United Kingdom, the market share of competing airlines grew during the period of the alleged infringement and that the proportion of BA tickets in travel agents' sales diminished. According to BA, the Court of First Instance should have taken account of that clear evidence that there was no exclusionary effect. Having taken into consideration, in other cases, evidence of the growth in market share of the undertaking in a dominant position and the fall in market share of its competitors in order to corroborate the existence of an abuse, it should, conversely in this case, have acknowledged the relevance of evidence the other way in order to set aside allegations of abuse.

94 In the judgment under appeal, the Court of First Instance rejected that evidence, stating in paragraph 295 that since, at the time of the conduct complained of, travel agents established in the United Kingdom carried out 85% of all air ticket sales in the territory of the United Kingdom, BA's conduct 'cannot fail to have had' an exclusionary effect to the detriment of competing airlines, and, in paragraph 298, that BA's competitors would have achieved a better result in the absence of that conduct. The Court added, wrongly, in paragraph 297 of the judgment under appeal, that, where an undertaking in a dominant position puts into operation a practice generating the effect of ousting its competitors, the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse.

95 Virgin regards that plea as inadmissible, and the Commission regards it as unfounded. The latter argues, in particular, that the Court of First Instance examined the probable effects of the bonus schemes at length from paragraph 271 onwards of the judgment under appeal, before making an assessment of those effects in paragraphs 294 and 295. It adds that, according to consistent case-law, for a practice to constitute an abuse, it is sufficient to demonstrate that there is a risk of it restraining competition, without there being any need to prove that it actually produced that effect. The Commission points out that, in paragraph 73 of *Michelin*, for example, the Court held that it needed to be examined whether the discount in question 'tended' to have certain restrictive effects.

Findings of the Court

96 Concerning BA's argument that the Court of First Instance did not examine the probable effects of the bonus schemes at issue, it is sufficient to note that, in paragraphs 272 and 273 of the judgment under appeal, the Court of First Instance explained the mechanism of those schemes.

97 Having emphasised the very noticeable effect at the margin, linked to the progressive nature of the increased commission rates, it described the exponential effect on those rates of an increase in the number of BA tickets sold during successive periods, and, conversely, the disproportionate reduction in those rates in the event of even a slight decrease in sales of BA tickets in comparison with the previous period.

98 On that basis, the Court of First Instance was able to conclude, without committing any error of law, that the bonus schemes at issue had a fidelity-building effect. It follows that BA's plea accusing the Court of not examining the probable effects of those schemes is unfounded.

99 Moreover, in paragraph 99 of its appeal, BA acknowledges that, in its judgment, the Court of First Instance rightly held that travel agents were given an incentive to increase their sales of BA tickets. In addition, in paragraph 113 of its appeal, it states that, if the Court of First Instance had examined the actual or probable impact of the bonus schemes at issue on competition between travel agents, it would have concluded that that impact was negligible.

100 It follows that BA is not seriously denying that those schemes had a fidelity-building effect on travel agents and thus tended to affect the situation of competitor airlines.

101 Concerning BA's allegations of evidence showing that no exclusionary effect arose from the bonus schemes at issue, of which evidence the Court of First Instance is alleged to have taken insufficient account, it is sufficient to note that this part of the second plea is inadmissible on an appeal for the reasons already set out in paragraph 78 of this judgment.

102 The second plea must therefore be dismissed as in part inadmissible and in part unfounded.

The third plea, alleging an error of law in that the Court of First Instance did not examine whether BA's conduct involved a 'prejudice [to] consumers' within the meaning of subparagraph (b) of the second paragraph of Article 82 EC

Arguments of the parties

103 In its third plea, BA considers that the Court of First Instance erred in law by failing to examine whether the bonus schemes at issue caused prejudice to consumers, as required by subparagraph (b) of the second paragraph of Article 82 EC, as interpreted by the Court of Justice in *Suiker Unie*. Without making any analysis of that condition, the Court of First Instance confined itself, in paragraph 295 of the judgment under appeal, to examining the impact of BA's conduct on its competitors in United Kingdom air transport markets.

104 Referring to the judgment in *Europemballage and Continental Can*, the Commission and Virgin argue that that plea is unfounded, since Article 82 EC covers not only practices likely to cause immediate damage to consumers but also those which cause them damage by undermining an effective structure of competition.

Findings of the Court

105 It should be noted first that, as explained in paragraphs 57 and 58 of this judgment, discounts or bonuses granted by an undertaking in a dominant position may be contrary to Article 82 EC even where they do not correspond to any of the examples mentioned in the second paragraph of that article.

106 Moreover, as the Court has already held in paragraph 26 of its judgment in *Europemballage and Continental Can*, Article 82 EC is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC.

107 The Court of First Instance was therefore entitled, without committing any error of law, not to examine whether BA's conduct had caused prejudice to consumers within the meaning of subparagraph (b) of the second paragraph of Article 82 EC, but to examine, in paragraphs 294 and 295 of the judgment under appeal, whether

the bonus schemes at issue had a restrictive effect on competition and to conclude that the existence of such an effect had been demonstrated by the Commission in the contested decision.

108 Having regard to those considerations, the third plea must be dismissed as unfounded.

The fourth plea, alleging that the Court of First Instance erred in law by holding that the new performance reward scheme had the same effect as the marketing agreements, despite the difference in relation to the duration of the period taken into consideration and despite the lack of analysis and quantification of the effects of the bonus schemes at issue on BA's competitors

(omissis)

The fifth plea, alleging that the Court of First Instance misapplied subparagraph (c) of the second paragraph of Article 82 EC as regards the discriminatory effect of the bonus schemes in question on United Kingdom travel agents

126 As a preliminary observation, it should be noted that, whatever the findings of the Court in relation to BA's first four pleas, concerning the abusive nature of the bonus schemes at issue resulting from the exclusionary effect on BA's competitors in the absence of objective economic justification, the fifth plea must be examined since BA retains an interest in denying that those schemes are prohibited pursuant to subparagraph (c) of the second paragraph of Article 82 EC, since the amount of the fine imposed may be reduced where it is found that the schemes were not abusive under that provision.

Arguments of the parties

127 In its fifth plea, which concerns paragraphs 233 to 240 of the judgment under appeal, in which the Court of First Instance confirms the Commission's findings concerning the discriminatory effect of the schemes at issue, BA essentially accuses the Court of First Instance of holding that those schemes produced discriminatory effects amongst United Kingdom travel agents on the basis of a misapplication of subparagraph (c) of the second paragraph of Article 82 EC.

128 According to BA, the Court of First Instance based its reasoning solely on the assumption, stated in paragraph 238 of the judgment under appeal, that the mere fact that two travel agents received different commission rates whereas they achieved an identical amount of revenue from the sale of BA tickets 'naturally' had a noticeable impact on their ability to compete with each other.

129 BA argues that, for subparagraph (c) of the second paragraph of Article 82 EC to apply, a simple difference in treatment, such as the fact that two travel agents receive different rates of commission, is not enough. It submits that that provision prohibits differences in treatment only if the services compared are equivalent, the conditions applied to them are different, and the agent obtaining a lower commission suffers a competitive disadvantage in relation to agents receiving a higher commission.

130 BA argues, first, that the Court of First Instance erred in law, having regard to subparagraph (c) of the second paragraph of Article 82 EC, by holding that transactions involving a travel agent who increases his sales and transactions involving an agent who does not increase them are 'equivalent transactions' within the meaning of that article. The situation of travel agents whose sales of BA tickets have increased during a

given period is not comparable with that of other agents who have not achieved such growth. The agent who increases his turnover in sales of tickets issued by a given airline is particularly useful to that airline, as he allows the airline to cover its fixed costs by bringing additional passengers, thereby meriting a reward.

131 Moreover, and also wrongly, the Court of First Instance did not examine whether travel agents suffered a competitive disadvantage, as required by subparagraph (c) of the second paragraph of Article 82 EC.

132 The Commission and Virgin, by contrast, are agreed that the bonus schemes at issue treated comparable facts differently without any objective reason. The Commission argues in particular that the services of travel agents providing outlets for BA tickets are equivalent in so far as increases in rates of commission are not linked to productivity gains by BA, with the result that no additional service is provided to the latter by agents who have increased their sales in comparison with the reference period. The Commission adds that an in-depth analysis of the competitive disadvantage of the travel agents concerned is not prescribed by law. Virgin considers that that disadvantage is obvious in any event.

Findings of the Court

133 Subparagraph (c) of the second paragraph of Article 82 EC prohibits any discrimination on the part of an undertaking in a dominant position which consists in the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 46).

134 In the present case, it is undisputed that BA applied different commission rates to travel agents operating in the United Kingdom according to whether or not they had achieved their sales objectives by comparison with the reference period.

135 It remains to be examined, first, whether the Court of First Instance was right to rely on the equivalence of the travel agents' services in order to conclude that the bonus schemes at issue, being capable of entailing the application of different rates of commission to agents who had sold the same number of BA tickets, were discriminatory, and, secondly, whether, without committing an error of law, that Court could dispense with detailed findings concerning the existence of a competitive disadvantage.

– The first part of the fifth plea, concerning the equivalence of the travel agents' services

136 In the first part of its fifth plea, BA criticises the analysis by the Court of First Instance of the comparability of the services carried out by travel agents who attained their objectives in BA ticket sales and those carried out by agents who did not attain those objectives. In particular, BA accuses the Court of First Instance of failing to take account of the greater economic usefulness from the airline's point of view of the services of travel agents who attained their sales objectives or increased their turnover.

137 On that latter point, which concerns the assessment by the Court of First Instance of the circumstances of this case from which it might be possible to deduce the comparability or otherwise of travel agents' services for an airline such as BA, it is sufficient to point out that the assessment of facts and evidence is a matter for the Court of First Instance alone. It is thus not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of

the Court of First Instance. This claim is therefore inadmissible.

138 As for the second claim, that the Court of First Instance erred in law in relation to subparagraph (c) of the second paragraph of Article 82 EC, by holding that transactions involving a travel agent who had increased his sales of BA tickets and transactions involving an agent who had not increased them constituted 'equivalent transactions' within the meaning of that provision, it should be noted that, in paragraph 234 of the judgment under appeal, the Court of First Instance pointed out that attainment by United Kingdom travel agents of their BA ticket sales growth targets led to an increase in the rate of commission paid to them by BA not only on BA tickets sold after the target was reached but also on all BA tickets handled by the agents during the period in question.

139 The Court of First Instance logically inferred therefrom that the bonus schemes at issue led to the sale of an identical number of BA tickets by United Kingdom travel agents being remunerated at different levels according to whether or not those agents had attained their sales growth targets by comparison with the reference period.

140 The Court of First Instance does not therefore appear to have erred in law by regarding as equivalent the services of travel agents whose sales of BA tickets had, in absolute terms, been at the same level during a given period. This second claim is therefore unfounded.

141 Therefore, the first part of the fifth plea must be dismissed as in part inadmissible and in part unfounded.

– The second part of the fifth plea, concerning the requirements in relation to findings of a competitive disadvantage

142 In the second part of its fifth plea, BA argues that, for the purposes of correctly applying subparagraph (c) of the second paragraph of Article 82 EC, the mere finding of the Court of First Instance, in paragraph 238 of the judgment under appeal, that travel agents, in their capacity to compete with each other, are 'naturally affected by the discriminatory conditions of remuneration inherent in BA's performance reward schemes' is not sufficient, since concrete evidence of a competitive disadvantage was required.

143 The specific prohibition of discrimination in subparagraph (c) of the second paragraph of Article 82 EC forms part of the system for ensuring, in accordance with Article 3(1)(g) EC, that competition is not distorted in the internal market. The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking. Co-contractors of that undertaking must not be favoured or disfavoured in the area of the competition which they practise amongst themselves.

144 Therefore, in order for the conditions for applying subparagraph (c) of the second paragraph of Article 82 EC to be met, there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others (see, to that effect, *Suiker Unie*, paragraphs 523 and 524).

145 In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as

soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually.

146 In paragraphs 237 and 238 of the judgment under appeal, the Court of First Instance found that travel agents in the United Kingdom compete intensely with each other, and that that ability to compete depended on two factors, namely 'their ability to provide seats on flights suited to travellers' wishes, at a reasonable cost' and, secondly, their individual financial resources.

147 Moreover, in the part of the judgment under appeal relating to the examination of the fidelity-building effect of the bonus schemes at issue, the Court of First Instance found that the latter could lead to exponential changes in the revenue of travel agents.

148 Given that factual situation, the Court of First Instance could, in the context of its examination of the bonus schemes at issue having regard to subparagraph (c) of the second paragraph of Article 82 EC, move directly, without any detailed intermediate stage, to the conclusion that the possibilities for those agents to compete with each other had been affected by the discriminatory conditions for remuneration implemented by BA.

149 The Court of First Instance cannot therefore be accused of an error of law in not verifying, or in verifying only briefly, whether and to what extent those conditions had affected the competitive position of BA's commercial partners. The Court of First Instance was therefore entitled to take the view that the bonus schemes at issue gave rise to a discriminatory effect for the purposes of subparagraph (c) of the second paragraph of Article 82 EC. The second part of the fifth plea is therefore unfounded.

150 The fifth plea must therefore be dismissed in its entirety.

151 Since none of the pleas raised by BA in support of its appeal can be accepted, the appeal must be dismissed.

7.

Case AT.39964 - Air France/KLM/Alitalia/Delta
(omissis)
(footnotes omitted)

1. SUBJECT MATTER

(1) This Decision concerns a transatlantic joint venture agreement ('the TAJV Agreement') concluded between Société Air France ('Air France'), Alitalia Società Aerea Italiana S.p.A. ('Alitalia'), Delta Air Lines Inc. ('Delta') and Koninklijke Luchtvaart Maatschappij N.V. ('KLM') (together 'the Parties').

(2) The TAJV Agreement relates to the establishment of a profit/loss-sharing joint venture ('the TAJV'), which covers, among other things, all passenger air transport services operated by the Parties on routes between Europe and North America ('the Transatlantic Routes'). The TAJV Agreement provides for extensive cooperation be-

tween the Parties, including on pricing, capacity, scheduling and revenue management coordination.
(3) The Commission concentrated on those routes where there was a high probability that the conditions of Article 101(3) of the Treaty would not be met.
(4) In its preliminary assessment of 26 September 2014 ('the Preliminary Assessment'), the Commission came to the provisional conclusion that the Parties' cooperation in the TAJV raised concerns as to its compatibility with Article 101 of the Treaty, in particular in relation to the Paris-New York premium market and the Amsterdam-New York and Rome-New York premium and non-premium markets (collectively referred to as 'the Routes of Concern').

2. THE PARTIES

(5) Air France, registered in France, is a 100% subsidiary of Air France KLM S.A. Its main business is passenger air transport and cargo air transport (domestic and international) and its principal hub for international operations is at Paris-Charles de Gaulle airport, France. It also has a significant presence at Paris-Orly, with short-haul, mainly intra-European, flights.
(6) KLM, registered in the Netherlands, is also a subsidiary of Air France KLM S.A., which holds a 97.5% share of the capital and a 49% share of the voting rights in KLM. Its main activities are passenger transport, cargo transport and aircraft maintenance services. KLM's principal hub is at Amsterdam Schiphol airport, the Netherlands.
(7) Air France and KLM operate together a fleet of 573 aircraft and serve 243 destinations in 103 countries. In 2013, the worldwide turnover of Air France KLM S.A. was EUR 25 520 million.
(8) Alitalia is the result of a concentration notified to the Commission on 29 September 2014 by Etihad Airways PJSC ('Etihad') and Alitalia Compagnia Aerea Italiana S.p.A. ('Alitalia CAI') pursuant to Article 3(1)(b) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the Merger Regulation'). Under this transaction, the aviation business of Alitalia CAI was transferred to Alitalia Società Aerea Italiana S.p.A. and ownership of 49% of this new entity passed to Etihad and 51% to Alitalia CAI (which became a holding company). The concentration was approved by the Commission with conditions on 14 November 2014. Pursuant to the terms of the transaction, Alitalia succeeded to Alitalia CAI's rights and obligations with effect from 1 January 2015 (including those attached to the TAJV). Alitalia's winter 2014/2015 schedule provided services to 83 destinations, including 26 in Italy and 57 in the rest of the world, and covered 123 routes, with a fleet of 118 aircraft. Its main hub airports are Leonardo da Vinci airport in Rome Fiumicino ('Rome FCO') and Milan Malpensa. In 2013, Alitalia CAI's worldwide turnover was EUR 3 521 million.
(9) Delta is a U.S.-based airline, with its headquarters in Atlanta. It serves 333 destinations in 64 countries, with a fleet of 722 mainline aircraft. Delta operates hubs at the airports of Atlanta, Cincinnati, Detroit, Memphis, Minneapolis-St. Paul, New York LaGuardia, New York John F. Kennedy International Airport ('New York JFK')

and Salt Lake City. In 2008, Delta merged with Northwest Airlines, a member of the SkyTeam Alliance. In 2013, Delta had a turnover of USD 37,773 million (approximately EUR 33 068 million).
(10) The Skyteam Alliance ('SkyTeam') was established in 2000 and is the world's second largest airline alliance by number of member airlines and passengers carried. As of March 2014, SkyTeam had 20 member airlines. In 2013, SkyTeam's member airlines carried over 602 million passengers to over 1000 destinations, in 177 countries. Air France and Delta were founding members of SkyTeam, together with Aeromexico and Korean Air. KLM joined SkyTeam in 2004, after the creation of Air France KLM S.A. Alitalia CAI joined SkyTeam and the TAJV Agreement only later, on 5 July 2010.

3. PROCEDURAL STEPS UNDERREGULATION (EC) NO1/2003

(11) On 23 January 2012, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 ('Regulation 1/2003') in relation to the TAJV Agreement.
(12) During the investigatory phase, the Commission sent several requests for information to the Parties, to their main corporate customers, to travel agents, to the Parties' main competitors on the Routes of Concern and to airports and slot coordinators concerned by the TAJV Agreement. The Commission also held several meetings with the Parties and considered the Parties' written submissions.
(13) On 26 September 2014, the Commission adopted the Preliminary Assessment pursuant to Article 9(1) of Regulation 1/2003, which set out the Commission's competition concerns. These concerns related to the compatibility of the TAJV Agreement with Article 101 of the Treaty, in particular as regards the Routes of Concern.
(14) On 3 October 2014, the Parties submitted commitments ("the Initial Commitments") to the Commission in response to the Preliminary Assessment.
(15) On 23 October 2014, a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation 1/2003, summarising the case and the Initial Commitments and inviting interested third observations on the Initial Commitments within one month.
(16) On 8 December 2014, the Commission provided the Parties with non-confidential versions of the observations made by interested third Commitments. On 4 May 2015, the Parties submitted a signed version of their amended commitments ("the Final Commitments").
(17) On 28 April 2015, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 30 April 2015, the Hearing Officer issued his final report.

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

4.1.1. Origin and destination (city pair) markets

(18) The Commission has traditionally defined the relevant market for scheduled passenger air transport services on the basis of the 'point of destination/point of origin' ('O&D') city pair approach. Such a market definition corresponds to a demand-side perspective, whereby passengers consider all possible alternatives of travelling from a city of origin to a city of destination, while they do not generally consider one city pair to be substitutable for a different approach, every combination of a point of origin and a point of destination is considered to be a separate market.
(19) The Parties did not contest the O&D market definition. However, they considered that it fails to fully capture the extent of competition that airlines experience from competing networks, notably from the presence of competition between the three major transatlantic alliances.
(20) With respect to corporate customers, the data gathered during the investigation shows that there is a group of corporate customers (for example large multinational) who attach particular importance to the geographic coverage of airline networks when negotiating corporate contracts with airlines. Nonetheless, as identified in the Commission's past practice, most of these corporate customers engage in route-specific negotiations for discounts, since the needs of corporate customers' employees still revolve around transport from one point to another.
(21) On the basis of the data gathered during its market investigation, the Commission considers that in the present case, O&D city pairs remain the appropriate approach to market definition, including for corporate customers. So-called 'network effects' are taken into account in the assessment of the impact of the TAJV Agreement on competition on each individual O&D, in particular when considering the barriers to entry arising from such networks.

4.1.2. Premium and non-premium passengers

(22) In line with its previous decisions, the Commission has distinguished between two main categories of passengers on long-haul flights: 'premium' passengers and 'non-premium' passengers. In order to better reflect the various comfort and service levels offered on long-haul flights and single out passengers willing to pay a higher price for tickets in high-end comfort class, the Commission took the preliminary view that it was appropriate to distinguish between premium and non-premium passengers. Premium passengers tend to travel for business purposes, require significant flexibility, higher service quality, and tend to pay higher prices for this flexibility and level of comfort. Non-premium passengers travel predominantly for leisure purposes or to visit friends and relatives, do not require flexibility and are therefore usually not willing to pay higher prices in exchange for flexibility and higher service quality.
(23) The Parties and a big majority of corporate customers and travel agents agree

that a distinction between two categories of passengers can be made, based on the travel needs and preferences of each group. The Commission's passenger survey in the present case indicated that first class and business class passengers share common travel preferences, which differ from those of passengers travelling in restricted economy class. Thus, the Commission's survey concluded that first and business classes form part of a premium market, while restricted economy class passengers form part of a non-premium market.

(24) Overall, on the basis of the data gathered during the market investigation, the Commission considers that the distinction between premium and non-premium markets remains relevant in the present case. For the purposes of this Decision, the Commission has carried out its competitive assessment and calculated market shares based on the widest possible premium market, which includes services in all cabin and fare classes except restricted economy class (for example, in first, business and flexible economy). For the non-premium market in the present case, the Commission has taken into account bookings in the restricted economy class only.

4.1.3. Non-stop and one-stop flights

(25) The Commission considers that the degree to which one-stop flights constrain nonstop flights should be considered on a route-by-route basis. In previous cases, the Commission has accepted that, although one-stop flights are generally less attractive than non-stop flights, because of the extended travel time and inconvenience associated with the stop-over, these drawbacks may be mitigated by countervailing elements such as price. Thus, in some previous cases the Commission has included certain long-haul one-stop flights in the same relevant market as non-stop flights.

(26) The Parties consider that one-stop services exercise a strong competitive constraint on non-stop services for all types of passengers and that they therefore form part of the same market. According to the Parties, they match their competitors' price changes for both one-stop and non-stop services on the non-stop routes investigated by the Commission in the present case.

(27) As regards corporate customers, approximately one third (37%) of respondents replied that they consider one-stop flights to be substitutable to non-stop flights, although the attractiveness of one-stop flights decreases as their additional travelling time increases compared to the corresponding non-stop flights. As regards travel agents, 21% of respondents for premium passengers and 75% of respondents for non-premium passengers agreed that non-stop and one-stop services are substitutable. Competitors generally stated that one-stop services exert some competitive pressure on non-stop services on long-haul routes. The passenger survey suggested that one-stop flights could be considered to be in the same relevant market as non-stop flights for both premium and non-premium passengers.

(28) The Commission took the preliminary view that it was not necessary to conclude whether one-stop flights were in the same market as non-stop flights, as the competitive assessment would not materially differ if the market encompassed both non-stop and one-stop flights. The Commission's assessment of the anti-competitive effects on the Routes of Concern included an evaluation of the constraint that

one-stop services would exercise on the Parties' non-stop services (in addition to the constraint from competitors' non-stop services) in the premium and non-premium markets respectively. The extent to which one-stop flights exercise a competition constraint on the non-stop flights on the Routes of Concern has therefore been examined on a route-by-route basis.

4.1.4. Airport substitution

(29) The Commission assessed airport substitutability both in terms of demand-side substitutability and supply-side substitutability, which are the key considerations in determining the relevant market. In the present case, decisive airport substitution issues arose in relation to airports serving the Paris and New York areas.

4.1.4.1. New York airports

(30) As regards New York, the Parties argued that Newark Liberty International Airport ('Newark Liberty') and John F. Kennedy International Airport ('New York JFK') are substitutable, on the basis that (a) both airports are served by major international airlines flying non-stop to European cities; (b) the two airports have significantly overlapping catchment areas, and (c) the Commission, the U.S. Department of Transport ('the DOT') and the U.S. Department of Justice have consistently held that these two New York airports are substitutable.

(31) In its investigation, the Commission found no serious indication that there were separate markets for transatlantic services to Newark Liberty and New York JFK for either premium or non-premium passengers. In general, corporate customers and travel agents who responded to the Commission's requests for information agreed on the substitutability of Newark Liberty and New York JFK.

(32) In conclusion, the Commission considers that, for the purposes of this Decision, the airports of Newark Liberty and New York JFK should be considered as substitutable. This is consistent with past cases, where the Commission found both airports to be substitutable for transatlantic services.

4.1.4.2. Paris airports

(33) Concerning Paris, the Parties considered that Paris-Charles de Gaulle airport ("Paris CDG") and Paris-Orly airport ("Paris ORY") are substitutable from a demand-side and supply-side perspective, for several reasons: (a) both airports are located in the same catchment area, (b) the two airports have comparable access facilities and (c) there are no specific constraints on operating out of either of these airports, since many airlines operate at both airports.

(34) The majority of travel agents and corporate customers who replied to the Commission's market investigation questionnaire considered Paris CDG and Paris ORY airports to be substitutable for transatlantic flights and equally convenient for business trips.

(35) Consequently, the Commission took the view, for the purposes of this Decision, that the airports of Paris CDG and Paris ORY should be considered as substitut-

able. This is consistent with past cases, where the Commission found both airports to be substitutable for transatlantic services.

4.2. Competitive assessment
4.2.1. Application of Article 101(1) of the Treaty
Introduction

(36) While the TAJV Agreement creates a contractual joint venture, the joint venture does not conduct its business autonomously and at arm's length from its parent undertakings. On the contrary, it is directly managed by the parent undertakings and it uses their assets as well as their marketing channels. Therefore, since the TAJV does not qualify as a 'full-function' joint venture, the TAJV Agreement is subject to Article 101 of the Treaty, rather than the Merger Regulation.
(37) The TAJV Agreement is the latest in a series of long-standing bilateral and multilateral transatlantic cooperation agreements between Delta (and earlier Northwest Airlines) on the US side, and Air France, KLM and Alitalia (and its predecessors) on the European side of the Atlantic. The Parties implemented the TAJV Agreement in June 2009.
(38) The TAJV Agreement covers scheduled services for passengers and combined passenger/cargo flights, therefore excluding cargo-only flights. The core geography covered by the TAJV Agreement is Europe to/from North America (namely U.S.A., Canada and Mexico). The Parties operate a profit/loss sharing joint venture on the Transatlantic Routes and their behind/beyond routes. Pursuant to the TAJV Agreement, the Parties fully coordinate their activities on capacity, schedule, pricing and revenue management on the Transatlantic Routes. The Parties agree that the guiding principle on sales is that each Party will implement sales and distribution programs and policies without preference for its own operated flights on the Transatlantic Routes, which is defined as metal neutrality.

Restriction of competition by object

(39) The TAJV Agreement provides for extensive cooperation between the Parties in relation to all key parameters of airline competition, including price, capacity, scheduling and quality of service. In particular, it creates a metal-neutral profit/loss-sharing cooperation which includes: joint setting of capacity and schedules, frequency and aircraft type used; fully coordinated pricing at all levels; centralised and coordinated revenue management functions; harmonised marketing and sales activities in all segments; full coordination of the Parties' combined passenger/cargo activities; and further cooperation in the fields of frequent flyer programmes, operating policies, IT systems, product planning and joint purchases.
(40) Given that the TAJV Agreement eliminates competition between the Parties on these key parameters, the Commission took the preliminary view that it is by its very nature harmful to the proper functioning of normal competition, and therefore has the object of restricting competition. In particular, the TAJV Agreement incentivises each Party to focus on the common interest of all the Parties, at the expense of

its individual incentives on the market. The concept of metal neutrality conflicts with the concept inherent in the Treaty provisions relating to competition, as the Parties substitute cooperation for competition between them.
(41) Therefore, the Commission considered in its Preliminary Assessment that the TAJV Agreement, which applies to a large number of transatlantic routes, constitutes a restriction of competition by object within the scope of Article 101(1) of the Treaty.
(42) A restriction of competition by object alone is sufficient for an agreement to be caught by the prohibition of Article 101(1) of the Treaty. Among the routes covered by the TAJV Agreement, the Commission concentrated on those routes where there was a high probability that the conditions of Article 101(3) of the Treaty would not be met. The Commission raised preliminary competition concerns as regards the Paris-New York route for premium passengers, and the Amsterdam-New York and Rome-New York routes for premium and non-premium passengers, where no efficiency arguments were submitted.

Restriction of competition by effect

(43) The Commission also examined whether the TAJV Agreement had the actual or potential effect of appreciably restricting competition on the Paris-New York route for premium passengers and the Amsterdam-New York and Rome-New York routes for both premium and non-premium passengers. As part of this assessment, the Commission first examined whether the Parties were actual or potential competitors in the relevant markets. Secondly, the Commission identified the likely anticompetitive effects, based in particular on the key market characteristics. Finally, it considered whether competitors of the Parties would be likely to counter the likely anti-competitive effects of the Parties' cooperation in the TAJV, by expanding their services.

4.2.2. Route-by-route analysis
4.2.2.1. Paris-New York (premium passengers) Factual overview

(44) Approximately [700 000-800 000] O&D passengers travelled on the Paris-New York route in 2013. The Commission only raised preliminary concerns in relation to the premium market on this route, which covers about [100 000-120 000] O&D passengers annually (1 % of the total market size), of whom only 6% travel one-stop. Paris-New York is the second largest transatlantic route after London-New York. O&D passengers represent around 52% of the total flow on this route.
(45) Air France operates a hub at Paris CDG for long-haul services. It is also the largest operator at Paris ORY. Delta has a hub at New York JFK. Besides Delta, both the oneworld Transatlantic Joint Business ("oneworld TJB"), notably American Airlines at New York JFK, and Star Alliance A++ transatlantic joint venture ("Star Alliance A++"), notably United Airlines, Inc at Newark Liberty ("United"), operate hub airports at the New York end of the route.
(46) Air France and Delta operate seven daily frequencies on most weekdays on the Paris-New York route (Air France five frequencies and Delta two daily frequencies), evenly spread throughout the day. They jointly offer the highest number of frequen-

cies. Except for one Delta flight between Paris CDG and Newark Liberty, all the Parties' flights operate from Paris CDG to New York JFK. The largest competitor on the route is oneworld alliance partners with five daily frequencies (OpenSkies with almost three daily frequencies in the summer 2013 season (19 weekly frequencies) and approximately two daily frequencies in the winter 2013 season, while American Airlines consistently operated two daily frequencies). OpenSkies flies from Paris ORY approximately twice daily to Newark Liberty, and on average once daily to New York JFK, while American Airlines flies from Paris CDG to its hub at New York JFK. United flew twice daily between Paris CDG and Newark Liberty in the summer 2013 season and slightly reduced its weekly frequency in the winter 2013 season (11 weekly flights on average). During the summer season, XL Airways operates 2-6 frequencies a week, exclusively for non-premium passengers (with the exception of April 2013, first month of the summer season, when there were no flights). Lastly, in July 2014, La Compagnie began operating five weekly frequencies between Paris CDG and Newark Liberty.
(47) Air India only operated the route in the 2012 summer season and for a brief period between 2003 and 2008. As a result of the TAJV Agreement, the number of non-stop competitors on the Paris-New York route for premium passengers decreased from four (Air France, Delta, American Airlines/OpenSkies, United) to three (Air France/Delta, American Airlines/OpenSkies, United).

Competitive conditions in the absence of the TAJV Agreement

(48) The Commission came to the preliminary conclusion that in the absence of the TAJV Agreement, Air France and Delta would each be operating non-stop flights on the Paris-New York route independently and would therefore be actual non-stop competitors. In 2009, when the TAJV was implemented, Delta was not operating on the route and it re-entered only in 2011. However, Delta did operate on the route continuously between 1992 and 2008, with a year-round daily service. The Parties acknowledged that in the absence of the TAJV Agreement, Delta would operate one or two non-stop daily frequencies on the Paris-New York route. Furthermore, the Commission came to the preliminary conclusion that, as Paris-New York is the second largest of all transatlantic routes, airlines with a hub at either end of the route are likely to have access to enough connecting traffic to operate at least one non-stop daily frequency.

Loss of competition between the Parties and market-specific assessment

(49) In the Preliminary Assessment, the Commission took the view that, prior to their cooperation in the TAJV, Air France and Delta each had to consider the other's reaction when taking their individual decisions on pricing, capacity and service levels. By cooperating on these parameters, these Parties no longer face competition from each other.
(50) In the Paris-New York premium market, in 2013, the Parties held a combined market share of [65-75] %. Air France had a market share of [50-60]% and Delta [1020]%. American Airlines and its oneworld partner OpenSkies had a combined 19

% market share, while United and other Star Alliance A++ airlines held 11 %. The Commission has previously stated that high market shares are one of the factors relevant for the assessment of horizontal cooperation agreements.
(51) The Commission also examined the closeness of competition between the various competitors' services and found evidence to suggest that Delta is a closer competitor to Air France on the Paris-New York route for premium passengers than are the rival airlines (for example American Airlines; OpenSkies; United). Both corporate customers and travel agents named Air France and Delta most often as the 'best choice' airlines on this route. These findings were confirmed by the Commission's passenger survey, which showed that, among premium passengers who had travelled between Paris and New York on a non-stop flight in the preceding twelve months, 52 % of respondents stated that they had travelled with one of the Parties (Air France or Delta).
(52) After analysing the key characteristics of the market, the Commission concluded in its Preliminary Assessment that the TAJV Agreement constituted a restriction by object and was likely to have anti-competitive effects for premium passengers on the Paris-New York route. The combined market share of the Parties is very large; the Parties' cooperation in the TAJV eliminates competition on all key parameters and Air France and Delta are closer competitors with respect to each other than with respect to other competitors. In view of these market characteristics, these effects are likely to be appreciable.

Will competitors counter the likely anti-competitive effects?

(53) Finally, the Commission assessed whether competitors of the Parties would be able to counter the likely anti-competitive effects on the Paris-New York premium market. It considered barriers to entry and the ability of competitors to replace the loss of competition between Air France and Delta by expanding their services.
(54) The Commission considers that its investigation showed that the Paris-New York route is a hub-to-hub route with significant barriers to entry and expansion, in particular airport congestion and hub advantages for the Parties at both ends of the route.
(55) On the basis of its investigation the Commission found that both Paris CDG and Paris ORY are 'slot-coordinated' airports. Furthermore, both airports are capacity constrained, in particular during the morning and evening peak times. As regards Paris CDG, it may be difficult for an airline to open new transatlantic routes arriving and departing from Paris CDG during the morning peak and at certain times of the afternoon and evening. In the case of Paris ORY, the quota limitation has been reached and new operations can start only if and when quota is made available, for example due to the loss of historic rights to quota, slot returns, or airline insolvencies. However, with the exception of a few weeks a year, all slot requests had been able to be accommodated within a +/- 60 minute time window. As regards terminal capacity, currently and for the next three to five years, there is no identified terminal constraint at Paris CDG or Paris ORY.
(56) Despite the slot shortages at both airports, OpenSkies successfully expanded its services on the route by adding a third daily frequency in March 2013.64 Finally,

La Compagnie, a new business-class-only airline, started operating flights five times per week between New York Newark airport and Paris CDG in July 2014.

(57) As regards the New York airports (New York JFK and Newark Liberty), the Commission, further to its investigation, found that both airports are capacity constrained and that it is particularly difficult to obtain suitable peak time slots for transatlantic services. To address 'persistent congestion' issues, the U.S. Federal Aviation Administration ('FAA') issued orders in 2008 limiting scheduled operations at New York JFK and Newark Liberty. However, the current numbers of hourly movements already exceed the limits fixed.

(58) The Commission also found that, compared to competitors or potential new entrants, the Parties have a unique ability to reshuffle their slots to provide optimal timings for their Paris-New York flights, as they have a much larger slot portfolio at Paris CDG and Paris ORY than any other airline. In the 2013 summer season, SkyTeam alliance partners held approximately [55-65]% of the slots at Paris CDG and [3545]% at Paris ORY ([50-60]% and [35-45]% for the Parties at the two airports respectively). At the New York airports, the competitors have a larger combined presence than the Parties. Thus, entry and expansion at U.S. airports would not be as difficult for these competitors on the Paris-New York route as for other competitors or potential new entrants.

(59) The Commission also provisionally concluded that the Parties' advantage from operating hub airports at both ends of the Paris-New York route acts as a substantial barrier to entry and expansion for any new entrant or smaller competitor wishing to expand premium passenger operations on the route. A hub operator is able to reap benefits from (a) economies of scale, as it is able to spread its fixed costs at that airport over a large number of routes; (b) better brand recognition and more efficient marketing and advertising expenditure; (c) attractiveness of its frequent flyer programme among the local population; (d) feed traffic from its network flowing through the airport in question, and (e) a better ability to attract corporate customers. Several Commission decisions have recognised that this hub advantage constitutes a barrier to entry. As stated in recital (45), the Parties benefit from these advantages at the airports of Paris (Air France) and to some extent at New York JFK (Delta).

(60) The hub advantage of the Parties ensures benefits in particular with regard to feed traffic flowing from their large networks through the hubs in question. However, connecting traffic may not always be available to non-hub airlines. Given that the European alliance partners of the Parties' competitors do not have hubs at Paris airports, these competitors have very limited access to traffic at these airports and mainly rely on their own limited self-feed at their U.S. hubs (New York).

(61) As regards frequency on the Paris-New York route, the Commission observed that in the 2013 summer season, the total number of frequencies operated by the Parties' competitors (almost 8 daily frequencies at the peak in August) was slightly higher than that operated by the Parties (7 daily frequencies). The oneworld TJB operated 5 daily frequencies, Star Alliance A++ operated 2 daily frequencies and XL Airways operated 3-5 weekly frequencies (less than one daily).

(62) However, despite their number of frequencies, some of the Parties' competitors operate with smaller aircraft than the Parties. The use of less competitive nar-

row-body aircraft by these competitors limits their possibility to operate profitable services. Thus the scale of the competitors' operations is unlikely to counter the likely anti-competitive effects of the TAJV Agreement.
(63) As regards one-stop services, the Commission considered that they provide a limited competitive constraint on the Paris-New York route. While one-stop capacity is easier to ramp up than non-stop capacity, it is unlikely that one-stop competitors will expand their Paris-New York capacity in response to the TAJV Agreement – and find passengers – to such an extent that they will counter the likely anti-competitive effects of the TAJV, in particular in light of the many existing non-stop frequencies on the route. Finally, in the Paris-New York premium market, only 6 % of passengers travel on one-stop services, given that New York is on the U.S. East coast, so one-stop services via U.S. hubs would require backtracking.
(64) As regards potential non-stop entrants, it is not very likely that any major European or U.S. airline would enter the Paris-New York route, since all three revenue-sharing alliances already operate non-stop services on the route. Furthermore, fifth-freedom carriers, such as Air India, would not be covered by the EU-U.S. Open Skies Agreement, and, as such, would be subject to the regulatory restrictions embodied in the existing bilateral air service agreements.

Conclusion on Article 101(1) of the Treaty

(65) The Commission took the preliminary view that the TAJV Agreement has an anticompetitive object and in any event has the effect of appreciably restricting competition in the Paris-New York premium market. In particular, the Commission considered that the competition that would have existed between Air France and Delta has been eliminated and is unlikely to be replaced by competition from third-party airlines, because the latter face substantial barriers to entry and expansion. This preliminary conclusion is, for reasons explained in recitals (53) to (64), not altered by evidence of a degree of residual competition from American Airlines, OpenSkies, United, the recent entry of La Compagnie, nor by one-stop competitors.

4.2.2.2. Amsterdam-New York (premium and non-premium passengers)
Factual overview

(66) Approximately [200 000-300 000] O&D passengers travelled on the Amsterdam New York route in 2013. The proportion of premium passengers was 15%, of whom 12 % travel one-stop. The share of total passengers flying one-stop was 16%. O&D passengers represented around 37 % of the total flow.
(67) KLM operates its hub at Amsterdam, while Delta has a hub at New York JFK. As regards competitors, both the oneworld TJB (American Airlines at New York JFK) and Star Alliance A++ (United at Newark Liberty) operate hub airports at the New York end of the route.
(68) The route is served by three non-stop airlines: Delta, KLM and United. In the winter 2013 season, KLM and Delta together operated 26 weekly frequencies (14 KLM and 12 Delta), whereas United operated 7 weekly frequencies. In summer 2013, the

Parties operated 31 weekly frequencies on average (14 KLM and 17 Delta on average), against 7 weekly frequencies for United. KLM operates to New York JFK airport; United flies from its hub at Newark Liberty and Delta serves both of these New York airports.

Competitive conditions in the absence of the TAJV Agreement

(69) The Commission came to the preliminary conclusion that in the absence of the TAJV Agreement, KLM and Delta would each be operating non-stop services on the Amsterdam-New York route independently, as they did before the implementation of the TAJV Agreement. They would therefore be actual non-stop competitors.
(omissis)
(72) Therefore, the Commission concluded on a preliminary basis that the counterfactual to the TAJV Agreement is that KLM and Delta would be operating competing nonstop services on the Amsterdam-New York route.

Loss of competition between the Parties and market-specific assessment.

(omissis)
(77) After analysing key market characteristics, the Commission concluded in its Preliminary Assessment that the TAJV Agreement constituted a restriction by object and was likely to have anti-competitive effects, for premium and non-premium passengers, on the Amsterdam-New York route. The combined market share of the Parties is very large; the Parties' cooperation in the TAJV eliminates competition on all key parameters, and KLM and Delta are closer competitors with respect to each other than with respect to other competitors. In view of these market characteristics, these effects are likely to be appreciable.
Will competitors counter the likely anti-competitive effects?

(78) Finally, the Commission assessed whether competitors of the Parties would be able to counter the likely anti-competitive effects on the Amsterdam-New York route for premium and non-premium passengers. It considered barriers to entry and the ability of competitors to replace the loss of competition between KLM and Delta by expanding their services.
(79) On the basis of its investigation the Commission found that Amsterdam-New York is a hub-to-hub route for the Parties, with significant barriers to entry and expansion, in particular airport congestion, as well as hub and frequency advantages for the Parties, at both Amsterdam Schiphol and New York JFK airports.
(80) Amsterdam Schiphol is a 'slot-coordinated' airport and is currently capacity constrained. The current limitations vary according to the arrival and departure peaks. In recent years, as a result of the economic downturn, the slots requested and the corresponding aircraft movements did not reach the airport's capacity limits and additional slots were available even at peak times. As shown in recital (57) of this Decision, both New York airports (namely JFK and Newark Liberty) are capacity constrained and it is particularly difficult to obtain suitable peak time slots for transatlantic services.
(81) Furthermore, the Parties and their alliance partners have a much larger slot

portfolio at Amsterdam Schiphol than any other airline. This large portfolio gives the Parties a unique ability to reshuffle their slots, to provide optimal timings for their Amsterdam-New York flights, compared to competitors or new entrants. In the 2013 summer season, SkyTeam alliance members held approximately [55-65]% of the slots ([50-60]% for the Parties).

(82) Furthermore, the Parties enjoy significant benefits from their established hub presence at both ends of the Amsterdam-New York route, and in particular at the European end, which acts as a substantial barrier to entry and expansion by competitors80. The hub advantage provides the Parties with a significant strength in the O&D market in terms of brand recognition, frequent flyer programme attractiveness and access to connecting traffic, which cannot be reproduced by competitors. The need for access to connecting traffic at the European end of the route presents a significant barrier to entry and expansion and restricts the number of non-stop competitors and new entrants.

(83) As to the frequency gap between the Parties' and their competitors' services post-cooperation, the Commission provisionally considered it to be a significant advantage that the Parties' existing or potential competitors would be unable to bridge. As a result of the TAJV Agreement, the number of daily frequencies offered by KLM and Delta doubled from two to four flights per day in the summer season. The only competing service is provided by United, with its single daily flight. The frequency share of the Parties is four times that of the only competitor. Therefore, United's daily service – even if competitively priced – is unlikely to draw significant numbers of passengers away from the Parties' four-times-daily service. The quality gap is such that premium passengers are likely to prefer to pay higher prices for the higher-frequency service. Moreover, due to the above-mentioned hub advantage of the Parties at Amsterdam Schiphol, United is unlikely to be able to replicate the Parties' four-times-daily service, as there would not be enough additional demand. Furthermore, since the Parties enjoy a significant advantage and United is unable to bridge the frequency gap, United is likely to suffer a permanent disadvantage in its ability to attract sufficient passengers to fill potential additional aircraft. This disadvantage constitutes a significant barrier to entry and expansion for United and any potential new entrant on the Amsterdam-New York route.

(84) The Commission also looked at the existing one-stop services on the Amsterdam-New York route and provisionally concluded that the competitive constraints provided by these services are limited. While one-stop capacity is easier to ramp up than non-stop capacity, it is unlikely that one-stop competitors would expand their Amsterdam-New York capacity – and find passengers – to such an extent that they could counter the likely anti-competitive effects of the TAJV Agreement, in particular in the light of the many existing non-stop frequencies on the route. On the Amsterdam-New York route, 16% of total passengers travel on one-stop services (12% of premium passengers and 17% of non-premium passengers). Furthermore, the relative popularity of one-stop services on the route also benefits the Parties, which offer attractive one-stop options.

(85) As regards further potential entrants, fifth-freedom carriers would not be covered by the EU-U.S. Open Skies Agreement, and, as such, would be subject to the reg-

ulatory restrictions embodied in the bilateral air service agreements of other countries. The most recent example of fifth-freedom operations on the Amsterdam-New York route was Singapore Airlines in 2003. In any event, there is no clear indication that potential entrants are planning any likely, timely and sufficient entry.

Conclusion on Article 101(1) of the Treaty

(86) The Commission took the preliminary view that the TAJV Agreement has an anticompetitive object and in any event has the effect of appreciably restricting competition in the Amsterdam-New York premium and non-premium markets. In particular, the Commission considered that the competition which would have existed between KLM and Delta has been eliminated and is unlikely to be replaced by competition from third parties, for the reasons explained in recitals (78) to (85), because the latter face substantial barriers to entry and expansion. This preliminary conclusion is not altered by evidence of residual competition from United and one-stop competitors.

4.2.2.3. Rome-New York (premium and non-premium passengers)
Factual overview

(87) Approximately [250 000-350 000] O&D passengers travelled on the Rome-New York route in 2013. The proportion of premium passengers on this route is 9% (approximately [20 000-30 000] passengers), of whom only 17% travel one-stop. The proportion of total O&D passengers flying one-stop is relatively high: 33%. O&D passengers represent around 42% of the total flow on this route. The route is highly seasonal: around three quarters of annual passengers travel during the summer season.
(88) Alitalia operates a hub at Rome FCO, while Delta has a hub at New York JFK. Besides the Parties, both oneworld TJB (American Airlines at New York JFK) and Star Alliance A++ (United at Newark Liberty) operate hub airports at the New York end of the route.
(89) In the 2013 summer season, Alitalia and Delta operated an average of four daily flights on Rome-New York (Alitalia on average almost three (average weekly frequency of 18 flights) and Delta one daily flight). The non-stop competitors American Airlines and United offered one daily frequency each. The seasonality of the route, combined with Italy's recent economic difficulties has resulted in a decrease in winter capacity. In the 2013/2014 winter season, the only airline operating a non-stop service on the route was Alitalia, which reduced its services to only two daily flights. American Airlines has not operated services in the winter season since 2010, while United stopped its four times weekly service in winter 2013, though it re-introduced the service at the end of the winter season (April 2014). Alitalia, Delta and American Airlines operate between Rome FCO and New York JFK, while United flies from Rome FCO to its Newark Liberty hub.

Competitive conditions in the absence of the TAJV Agreement

(omissis)
(95) After analysing key market characteristics, the Commission concluded in its Preliminary Assessment that the TAJV Agreement constitutes a restriction of competition by object and is likely to have anti-competitive effects for premium and non-premium passengers on the Rome-New York route. The combined market share of the Parties is very large; the Parties' cooperation in the TAJV eliminates competition on all key parameters, and Alitalia and Delta are closer competitors with respect to each other than with respect to other competitors. In view of these market characteristics, these effects are likely to be appreciable.

Will competitors counter the likely anti-competitive effects?

(96) Finally, the Commission assessed whether competitors of the Parties would be able to counter the likely anti-competitive effects on the Rome-New York route for premium and non-premium passengers. It considered barriers to entry and the ability of competitors to replace the loss of competition between Alitalia and Delta by expanding their services.
(97) On the basis of its investigation the Commission found that Rome-New York is a hub-to-hub route, with significant barriers to entry and expansion, in particular airport congestion, as well as hub and frequency advantages for the Parties at both Rome FCO and New York JFK airports.
(98) Rome FCO airport is 'slot-coordinated' and is currently capacity constrained. Capacity limits are reached especially in the morning peak hours of the summer season and sometimes during the evening peak. Furthermore, the Italian slot coordinator indicated that there are also terminal and stand capacity constraints at Rome FCO airport. Nevertheless, according to the Italian slot coordinator, in the last four IATA seasons, all slot requests were able to be accommodated within a +/- 60 minute time window.
(99) As shown in recital (57) of this Decision, both New York airports (namely JFK and Newark) are capacity constrained and it is particularly difficult to obtain suitable peak time slots for transatlantic services.
(100) The Parties have the largest slot portfolio at Rome FCO. In the 2013 summer season, SkyTeam alliance members held approximately [45-55]% of the slots ([45-55]% for the Parties). This large portfolio gives the Parties a unique ability to reshuffle their slots, to provide optimal timings for their Rome FCO-New York flights. A new entrant or competitor wishing to expand does not have such flexibility.
(101) Furthermore, the Parties enjoy significant benefits from their hubs at both ends of the Rome-New York route, and in particular at the European end, which acts as a barrier to entry and expansion to competitors on this route. This provides a significant strength in the O&D market in terms of brand recognition, frequent flyer programme attractiveness and access to connecting traffic, which cannot be reproduced by competitors. Finally, the fact that Alitalia is the only airline operating a year-round service on the route distinguishes it from other competitors as being the obvious choice for corporate customers and frequent flyers.
(102) The need for access to connecting traffic at the European end of the route also

presents a significant barrier to entry and expansion and restricts the number of non-stop competitors and new entrants. Connecting passengers represent 58% of the total flow on the Rome-New York route, the large majority of them connecting at least at the European end. As regards connecting traffic, the majority of the Parties' competitors' (namely American Airlines and United) connecting passengers on the route are provided by their U.S. networks. In the case of United, it has historically operated the New York (Newark Liberty)-Rome (FCO) route on an annual basis until 2012, when it suspended its winter service as a result of market conditions on the route. It has not reintroduced the winter service since then.

(103) As to the frequency gap between the Parties' and their competitors' services post-cooperation, in the 2013 summer season, the Parties operated twice as many flights as their competitors combined and four times as many frequencies as each of the two competitors individually. As of the 2012/2013 winter season, partly due to low demand, no competitor operated a non-stop service on the route during the winter season. Both American Airlines' and United's once daily services are inherently less competitive than the Parties' average of four daily services, which provide greater flexibility and lower schedule delay. In the absence of a year-round daily flight and given the significant difference in summer frequencies, the Parties have a frequency advantage which constitutes a significant barrier to entry and expansion for United, American Airlines and any potential new entrant on the Rome-New York route.

(104) The Commission also looked at the existing one-stop services on the Rome-New York route and came to the preliminary view that the competitive constraints provided by one-stop services are also limited on this route. While one-stop capacity is easier to ramp up than non-stop capacity, it is unlikely that one-stop competitors would expand their Rome-New York capacity in response to the TAJV Agreement – and attract passengers – to such an extent that they could counter the likely anticompetitive effects of the TAJV Agreement, in particular in the light of the many existing non-stop frequencies on the route. On Rome-New York, 33% of O&D passengers travel one-stop, which can be explained by Rome's geographic position (one-stop flights via other European hubs do not usually require backtracking). In addition, the Parties' one-stop services on the Rome-New York route are among the best, based on total travel time.

(105) As regards further potential entrants, fifth-freedom carriers would not be covered by the EU-U.S. Open Skies Agreement, as already concluded in recital (64) of this Decision, and, as such, they would be subject to the regulatory restrictions embodied in the bilateral air service agreements of other countries. The most recent example of fifth-freedom operations on the Rome-New York route was Ethiopian Airlines, which stopped operating the route in 2005. In any event, the Commission did not find indications that potential entrants are planning any "likely, timely and sufficient" entry.

Conclusion on Article 101(1) of the Treaty

(106) The Commission took the preliminary view that the TAJV Agreement has an anticompetitive object and in any event has the effect of appreciably restricting competition in the Rome-New York premium and non-premium markets. In particular, the

Commission considers that the competition that would have existed between Alitalia and Delta has been eliminated and is unlikely to be replaced by competition from third parties, for the reasons explained in recitals (96) to (105), because the latter face substantial barriers to entry and expansion. This preliminary conclusion is not altered by evidence of residual competition from American Airlines and United and from one-stop competitors.

4.2.2.4. Effect on trade between Member States

(107) The Courts of the European Union have consistently held that, in order to find that an agreement or a practice may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. The effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. Moreover, the Courts of the Union have consistently held that the effect on trade should be appreciable, although they have specified that a potential effect suffices.
(108) In the present case, the Parties have significant operations and sales across Europe. The TAJV Agreement covers all the passenger services of the Parties on the transatlantic routes, as well as intra-EU services connecting to the Transatlantic Routes. The TAJV Agreement alters the manner in which the Parties would provide such transatlantic and intra-EU services absent that Agreement.
(109) In the light of the above factors, the Commission provisionally concluded that the TAJV Agreement may appreciably affect trade between Member States within the meaning of Article 101(1) of the Treaty.

4.2.3. Article 101(3) of the Treaty

(110) In order to benefit from the exception provided by Article 101(3) of the Treaty, as explained in the Commission's guidelines on the application of Article 101(3) ("the Article 101(3) Guidelines") (1) an agreement must create efficiencies, (2) the restrictions imposed by the agreement must be indispensable to the creation of those efficiencies, (3) consumers must receive a fair share of such efficiencies, and (4) the agreement must not create the possibility to eliminate competition in respect of a substantial part of the market.
(111) The Parties have not provided any arguments concerning the creation of efficiencies in relation to the Paris-New York, Amsterdam-New York or Rome-New York routes. Therefore, the Commission provisionally concluded in its Preliminary Assessment that there are no efficiencies that would offset the appreciable restriction of competition by object and by effect resulting from the TAJV Agreement on the Routes of Concern.

(omissis)

8. ASSESSMENT OF THE FINAL COMMITMENTS IN THE LIGHT OF THE COMMENTS RECEIVED IN RESPONSE TO THE MARKET TEST NOTICE

8.1. Slot release commitments

(145) The Parties propose to make slots available at Amsterdam airport and Rome airport and, if applicable, at the choice of a competitor at either New York JFK or Newark Liberty airport, to allow up to seven new or additional frequencies weekly on each of the Amsterdam-New York and Rome New-York routes. The slot release commitments enable a potential competitor to enter the route or existing competitors to expand their services with additional competitively timed frequencies.
(146) Following the comments from third parties in response to the Market Test Notice, the Parties did not propose any change concerning the slot release commitments offered in the Initial Commitments, notably as regards the third party comment set out in recital (135) of this Decision.
(147) As has been recognised by the courts of the Union and the Commission, the lack of slots at congested airports constitutes the main barrier to entry in the air transport industry. The Commission found that its investigation in this case confirmed that the lack of slots is one of the main barriers to entry on the Amsterdam-New York and Rome-New York routes, in particular at the two New York airports (New York JFK and Newark Liberty). The Commission also provisionally established that new entrants or competitors which might wish to expand their services with additional frequencies may encounter difficulties in obtaining slots and access to the necessary infrastructure at peak times at both Amsterdam and Rome airports. The Final Commitments address this barrier by making slots available to competitors on the Amsterdam-New York and Rome-New York routes. The flexibility offered to new entrants with regard to the choice of New York airports makes the slot commitments more attractive and available to airlines with different business strategies and airport preferences.
(148) The procedure for selecting slot applicants under the Final Commitments builds on the experience gained by the Commission in previous commitments cases in the aviation sector. Furthermore, the Final Commitments provide that the slots to be released must be within a narrow window of +/- 60 minutes of the time requested by the slot applicant. The Final Commitments also make clear that the definition of a slot includes both access to runway capacity for take-off and landing and to the full range of airport infrastructure (for example check-in desks, luggage belts) necessary for the provision of an air service on the route in question (namely Amsterdam-New York or Rome-New York). Furthermore, the Final Commitments contain procedural safeguards to prevent misuse by either the Parties or prospective entrants.
(149) The number of slots to be released by the Parties may be decreased depending on the number of competitive frequencies operated by the Parties' competitors from time to time. This provision ensures the proportionality of the slot commitments in view of the concerns identified by the Preliminary Assessment.
(150) As regards the absence of a slot release commitment for the Paris-New York route, the Commission preliminarily found that this route is demonstrably more com-

petitive than any other route where slot commitments have previously been offered to the Commission, in particular in relation to concerns limited to premium passengers. Competitors operate more frequencies per day than the Parties and some competitors have recently been able to add frequencies on the route. The Parties therefore considered that there is no justification for a slot commitment on this route, in view of the other commitments they have given, notably SPA and fare combinability commitments for both existing and new competitors.

(151) On that basis, the Commission considers that the slot release commitments offered under the Final Commitments remedy the competition concerns identified in the Preliminary Assessment. In addition, the attractiveness of the slot commitments offered on the Amsterdam-New York and Rome-New York routes is further increased by the fare combinability, SPA and FFP commitments, which should enable competitors to increase the sustainability of their new services through access to the Parties' connecting traffic, schedules, frequencies and FFP. Therefore, the Commission considers that the number of slots to be released, in combination with the fare combinability, SPA and FFP commitments, are adequate to meet the competition concerns identified.

(152) Overall, the Commission considers that the scope of the Final Commitments as regards slots is sufficient and adequate to make the Final Commitments effective and attractive enough to encourage competitors to actually take them up.

8.2. Fare combinability commitment

(153) Under the Final Commitments, the Parties offer to conclude fare combinability agreements with competitors which begin operating a new non-stop service on the Routes of Concern or which increase the frequency of their existing services. For the Paris-New York route, the Parties also offer to conclude fare combinability agreements with competitors which already operate a non-stop service on the route. The ability for competitors to offer the combined frequencies and schedules of the Parties in one direction and their own frequencies and schedules in the other direction should mitigate the frequency disadvantage of these competitors relative to the Parties. Through the fare combinability commitments, such competitors would be able to offer a higher frequency service with better schedules, which should make the competing services more attractive for premium passengers on all the Routes of Concern and also for non-premium passengers on the Amsterdam-New York and Rome-New York routes. The improved ability to attract premium and non-premium passengers should, in turn, improve the overall long-term sustainability of competitors' services on the Routes of Concern and enable competitors to provide a long-lasting competitive discipline on the Parties' services in relation to premium and non-premium passengers.

(154) On that basis, the Commission considers that the fare combinability commitment, as proposed in the Final Commitments, is adequate and sufficient. The Commission considers that the conditions of the commitment are attractive enough to encourage competitors to actually take it up. The Commission therefore concludes that the fare combinability commitment lowers the barriers to entry on the Paris-New York route for premium passengers and on the Amsterdam-New York and Rome-New York

routes for premium and non-premium passengers and addresses the Commission's concerns in this regard. The Commission also concludes that the fare combinability commitment in respect of existing competitor services on the Paris-New York route should assist the competitors concerned to sustain their services for premium passengers, thereby addressing the Commission's concerns on this route.

8.3. Special prorate agreement commitments

(155) Under the Final Commitments, the Parties offer to conclude SPAs with competitors on up to twenty feeder routes operated by the relevant Party, including routes operated by Air France's subsidiary HOP! wet-leased by Air France, routes operated by KLM's subsidiary KLM Cityhopper, routes operated by Altialia's subsidiary CityLiner and routes marketed under the Delta Connection brand. These feeder routes must have a point of origin or destination in geographical Europe, Lebanon or Israel on the one hand, and an origin or destination in North America (Canada, United States of America and Mexico), the Caribbean or Central America on the other hand. Such SPAs would be available for all classes of passengers, except on Paris-New York, where only premium passengers would be covered.
(156) The ability to attract feed traffic is particularly important for sustainable operations on a long-haul route. The SPA commitments are therefore intended to give competitors access to sufficient connecting traffic provided by the Parties on advantageous terms at both ends of the Routes of Concern, where the lack of such access constitutes a barrier to entry or expansion. The SPA commitments would also reduce the hub advantage of the Parties against new entrants and would therefore incentivise entry by competitors with no presence or no alliance partners at Paris, Amsterdam, Rome and/or New York airports. Furthermore, the availability of SPAs for existing competitor services on Paris-New York for premium passengers is intended to address the Commission's concerns in relation to the access of existing competitors to the Parties' connecting traffic on this route and to assist these competitors in sustaining their premium passenger services on the route.
(*omissis*)
(161) Therefore the Commission considers that the SPA commitments contained in the Final Commitments are adequate and sufficient. In particular, the Commission concludes that the availability of SPAs on favorable terms and with wider geographical coverage (namely including Lebanon and Israel) and a large number of feeder routes, should, in conjunction with the other commitments, where applicable, further reduce barriers to entry and expansion on the Routes of Concern. The amendments should also encourage timely and likely entry and expansion on the Routes of Concern. The Commission also concludes that the availability of SPAs for premium passengers for existing competitors on the Paris-New York route should assist such competitors to sustain their services on this route and should address the Commission's concerns on the route.

8.4. Frequent flyer programme commitment

(162) Under the Final Commitments, the Parties offered to allow competitors which begin operating new non-stop services on any of the Routes of Concern or which increase the frequency of their existing services to be hosted in the Parties' FFP. The FFP commitment only applies to those competitors that do not have a comparable programme and do not already participate in the Parties' programmes.
(163) In its Preliminary Assessment, the Commission provisionally found that the Parties' FFP constituted an advantage at both ends of the Routes of Concern. The FFP commitment proposed by the Parties removes or reduces this advantage. The Commission considers that the proposed access to the Parties' FFP is appropriate and necessary, as it enables competitors to strengthen the attractiveness of their services to premium and non-premium passengers on the Routes of Concern and therefore enhances the likelihood of entry and expansion.

8.5. Reporting obligation

(164) As noted in recital (130) of this Decision, the Parties undertake to provide the Commission with data which relate to the Parties' operations from the date of the DOT's final order granting antitrust immunity to the Parties' cooperation in the TAJV Agreement.
(165) The Commission takes the view that this reporting obligation is appropriate and necessary, since it provides the Commission with access to detailed data, allowing it to monitor the Parties' cooperation in the TAJV Agreement and assess its impact in the future.

8.6. Review clause

(166) The Commission takes the view that the review clause, as proposed by the Parties, is appropriate and necessary. It provides an additional safeguard, enabling the Commission to assess how the market has evolved in light of the Final Commitments after five years from the date of adoption of this Decision. In order not to disincentives entry during the first five years, the Final Commitments make clear that any such review will not affect any agreement that may have been concluded in the meantime on the basis of the Final Commitments.

8.7. Comments in relation to travel agents

(167) The Commission considers that the Final Commitments are designed to ensure a sufficient level of competition between airlines on the Routes of Concern. By addressing this horizontal concern the Commission considers that vertical issues related to passenger sales and marketing of airline tickets by the Parties should also be addressed. The Final Commitments are therefore suitable to address the competitive concerns identified by the Commission, without the need for specific provisions on

passenger sales and marketing of airline tickets by the Parties. Finally, in the present Decision the Commission assesses the TAJV Agreement under Article 101 of the Treaty. Therefore comments from travel agents in response to the Market Test Notice that go beyond the TAJV Agreement itself are not covered in this Decision.

9. PROPORTIONALITY OF THE COMMITMENTS

9.1. Principles

(168) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.
(169) In the context of Article 9 of Regulation 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must take into consideration the interests of third parties.

9.2. Application in the present case

(170) The Final Commitments are sufficient to address the concerns identified by the Commission in its Preliminary Assessment. In this respect, the Commission considers that it must evaluate the whole package of the Final Commitments and not only their individual elements.
(171) The Commission has already examined the appropriateness and necessity of the Final Commitments in section 8 above. Therefore, recitals (172) to (173) below set out only the Commission's main points in this regard.
(172) The slot commitment offered by the Parties remedies the loss of competition between the Parties on the Amsterdam-New York (namely between KLM and Delta) and Rome-New York (namely between Alitalia and Delta) routes. With the released slots at Amsterdam and Rome respectively, and if applicable at New York, new entrants or existing competitors can operate or add up to one daily new or additional frequency (seven weekly frequencies) on each of the Amsterdam-New York and Rome New-York routes. As regards the Paris-New York route, the Commission considers that the SPA commitment as proposed by the Parties (namely applicable both to competitors which begin to operate a new or increased non-stop services and to competitors which already operate non-stop services on the route) provides an appropriate remedy in view of the concerns identified on the Paris-New York route. Thus, the Commission considers that the number of slots proposed to be released by the Parties is appropriate to address the concerns identified in the Preliminary Assessment, given the characteristics and competitive situation on each of the Routes of Concern.
(173) The provisions of the Final Commitments concerning fare combinability, SPA and FFP commitments ensure the proportionality of the Final Commitments. Following the comments made by third parties in response to the Market Test Notice,

the Parties agreed to extend the geographical scope of the SPA commitment in order to cover two further significant behind/beyond destinations (namely Lebanon and Israel). The Commission considers that this geographical extension of the SPA commitments in the Final Commitments is sufficient to address the arguments raised by third parties.

(174) The Parties have not offered less onerous commitments in response to the Preliminary Assessment that would address the Commission's concerns adequately.

(175) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Market Test Notice.

(176) This Decision accordingly complies with the principle of proportionality.

10. CONCLUSION

(177) By adopting a decision pursuant to Article 9(1) of Regulation 1/2003, the Commission makes the commitments offered by the undertakings concerned binding upon them. Recital 13 of the Preamble to Regulation 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its Preliminary Assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a Market Test Notice.

(178) In the light of the Final Commitments offered by the Parties, the Commission considers that there are no longer grounds for action on its part and the proceedings in this case should therefore be brought to an end. The Commission notes that, in the case of any material change in the factual situation on which this Decision is based, the Commission may reopen the proceedings upon request or on its own initiative, pursuant to Article 9(2) of Regulation 1/2003.

HAS ADOPTED THIS DECISION:

Article 1

The Final Commitments as listed in the Annex shall be binding on Société Air France, Alitalia Società Aerea Italiana S.p.A., Delta Air Lines Inc. and Koninklijke Luchtvaart Maatschappij N.V. for a period of ten (10) years from the date of adoption of this Decision.

(omissis)

8.

European Court of First Instance 4 July 2006, Case T-177/04.
easyJet Airline Co. Ltd v Commission of the European Communities.
(omissis)

Legal context

1 Article 1 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, as rectified (OJ 1990 L 257, p. 13), and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1), as rectified (OJ 1998 L 40, p.17)) provides that that regulation is to apply to all concentrations with a Community dimension, as defined in paragraphs 2 and 3 of that article.

2 Article 4(1) of Regulation No 4064/89 provides that concentrations with a Community dimension are to be notified in advance to the Commission.

3 Article 6(1)(b) of Regulation No 4064/89 provides that where the Commission finds that the concentration notified, although falling within the scope of that regulation, does not raise serious doubts as to its compatibility with the common market, it is to decide not to oppose it and is to declare that it is compatible with the common market ('phase I').

4 Article 6(1)(c) of Regulation No 4064/89 provides that if, on the other hand, the Commission finds that the concentration notified falls within the scope of that regulation and raises serious doubts as to its compatibility with the common market, it is to decide to initiate proceedings ('phase II').

5 Article 6(2) of Regulation No 4064/89 provides:

'Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.'

6 Article 6(3)(b) of Regulation No 4064/89 provides that the Commission may revoke the decision it has taken where the undertakings concerned commit a breach of an obligation attached to that decision.

7 In the Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ 2001 C 68, p. 3, 'the notice on remedies') the Commission sets out the guidelines which it intends to follow in relation to commitments, and states in particular that:

– the parties are required to show clearly that the remedy restores conditions of effective competition in the common market on a permanent basis (paragraph 6) and from the outset to remove any uncertainties as to the type, scale and scope of the proposed remedy and as to the likelihood of its successful, full and timely implementation by the parties (paragraph 7);

– the basic aim of commitments is to ensure competitive market structures.

Commitments which are structural in nature, such as the commitment to sell a subsidiary, are, as a rule, preferable from the point of view of the objective of Regulation No 4064/89, inasmuch as such a commitment prevents the creation or strengthening of a dominant position previously identified by the Commission and does not, moreover, require medium- or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may themselves also be capable of preventing the emergence or strengthening of a dominant position. However, whether such commitments can be accepted has to be determined on a case-by-case basis (paragraph 9);

– commitments submitted to the Commission in phase I must be sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) of Regulation No 4064/89 (paragraph 11);

– where a proposed merger threatens to create or strengthen a dominant position which would impede effective competition, the most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors by means of divestiture (paragraph 13);

– the divested activities must consist of a viable business which, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. Normally a viable business is an existing one which can operate on a stand-alone basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitional period (paragraph 14);

– there are cases where the viability of the divestiture package depends, in view of the assets which are part of the business, to a large extent on the identity of the purchaser. In such circumstances, the Commission will not clear the merger unless the parties undertake not to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business, approved by the Commission (paragraph 20);

– whilst being the preferred remedy, divestiture is not the only remedy acceptable to the Commission. There may be situations where a divestiture of a business is impossible. In such circumstances, the Commission has to determine whether or not other types of remedy may have a sufficient effect on the market to restore effective competition (paragraph 26).

8 The Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, 'the notice on market definition') states that firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions (paragraph 13).

Background to the dispute

The companies in question

9 On 11 February 2004, upon the conclusion of phase I, the Commission adopted a decision declaring the concentration compatible with the common market, subject

to fulfilment of the proposed commitments, pursuant to Article 6(2) of Regulation No 4064/89 (Case COMP/M.3280 – Air France/KLM) (OJ 2004 C 60, p. 5, 'the contested decision'). The applicant is a low-cost airline registered in the United Kingdom which offers its services at attractive prices to various destinations in Europe.

10 Air France is an airline established in France which has three main activities: passenger air transport, cargo transport and maintenance services. It operates a hub-and-spoke network, with its principal hub for international operations at Roissy-Charles-de-Gaulle airport ('CDG') and its main domestic hub at Paris-Orly airport ('Orly'). It is also one of the founding members of the SkyTeam alliance, whose other members are Aeromexico, Alitalia, Continental Airlines, CSA Czech Airlines, Delta, Northwest Airlines and Korean Air.

11 KLM is an airline established in the Netherlands with four main activities: passenger air transport, cargo transport, maintenance services and the operation of charter and low-cost scheduled services by its subsidiary Transavia. KLM operates a hub-and-spoke network with its principal hub at Amsterdam-Schiphol airport. It has an alliance with Northwest Airlines covering principally operations on North Atlantic routes.

The administrative procedure before the Commission

12 On 18 December 2003 Air France and KLM notified to the Commission, pursuant to Regulation No 4064/89, a framework agreement signed on 16 October 2003. This agreement provided for the acquisition by Air France of all KLM's economic interests, together with the gradual acquisition of control of KLM. Air France was to acquire initially 49% of KLM's voting rights, which would confer a right of veto over KLM's strategic operations (the adoption of a strategic plan and of the budget and the appointment of senior management), and at a later date the remaining voting rights ('the merger').

13 On 23 December 2003, on the basis of Article 11 of Regulation No 4064/89, the Commission sent a request for information about the merger to more than 90 competitors, including the applicant. On 14 January 2004 the applicant submitted its observations.

14 On 21 January 2004, Air France and KLM proposed commitments to the Commission pursuant to Article 6(2) of Regulation No 4064/89. On 23 January 2004 the Commission sent the commitments to the interested parties for their observations. On 30 January and 4 February 2004 the applicant submitted its comments on the commitments proposed by the parties to the merger.

15 On 11 February 2004, at the conclusion of phase I, the Commission adopted the contested decision, finding that the merger was compatible with the common market, subject to compliance with the proposed commitments.

The commitments accepted by the Commission

16 In order to dispel the serious doubts which had arisen as to the merger's compatibility with the common market, Air France and KLM offered commitments with a view to resolving competition problems in relation to 14 services, 9 of which are in Europe (Paris-Amsterdam, Lyons-Amsterdam, Marseilles-Amsterdam, Toulouse-Amsterdam, Bordeaux-Amsterdam, Milan-Amsterdam, Rome-Amsterdam, Venice-Amsterdam and Bologna-Amsterdam). The commitments, which are subject to the supervision of a trustee, may be summarised as follows:

– commitments concerning short-haul/European routes: the merged entity undertakes to make a number of slots available, without financial compensation and in accordance with the procedure specified in the commitments, at Amsterdam and/or Paris and/or Lyons and/or Milan and/or Rome, and to allow one or more new entrants to operate, on identified European routes, (new or additional) non-stop scheduled daily passenger air services. For the Paris-Amsterdam route, up to six frequencies per day must be made available, for the Milan-Amsterdam route, up to four frequencies per day, for the Lyons-Amsterdam and Rome-Amsterdam routes, up to three frequencies per day and for the Marseilles-Amsterdam, Toulouse-Amsterdam, Bordeaux-Amsterdam, Venice-Amsterdam and Bologna-Amsterdam routes, up to two frequencies per day;
– commitments concerning long-haul/intercontinental routes: slots will be made available at the Amsterdam and Paris airports for the long-haul routes specified in the contested decision where competition problems arise;
– commitments concerning conditions for the release of slots: the slots released by the merged entity will be situated in a range not differing by more than 90 minutes from the time requested by the new entrant for long-haul routes and in a range not differing by more than 30 minutes from the time requested by the new entrant for intra-European routes. On the basis that CDG and Orly are substitutable for the purposes of intra-European passenger air services, potential new entrants may request slots at either of those airports;
– duration of commitments relating to slots: unlimited. However, the merged entity may invoke the review clause if that is justified by exceptional circumstances or radical changes in market conditions, such as the operation of a competing air transport service on an identified European or long-haul route. The Commission may then decide to waive, modify or replace one or more of the commitments. If, following such a review, the Commission concludes that the merged entity's obligation to release slots on a given route is extinguished, the new entrant may continue to use the slots it has previously received. If it ceases to use the slots on a given route, they must be surrendered to the slot coordinator;
– frequency freeze: the merged entity undertakes not to add frequencies on the Paris-Amsterdam or Lyons-Amsterdam routes, as the case may be, for a period beginning on the start of operations by the new provider of air transport services on the route in question. The frequency freeze will last for six consecutive IATA (International Air Transport Association) seasons. The merged entity undertakes not to add frequencies beyond a total of 14 per week on the Amsterdam-New York (J.F. Kennedy Airport) route and not to add frequencies on the Amsterdam-New York (Newark Airport) route for six consecutive IATA seasons beginning on the start of the operation of a non-stop service by the new provider of air transport services on that route;
– interline agreements: the merged entity undertakes, at the request of a new entrant, to enter into an interline agreement concerning all the routes specified in the contested decision;
– special pro-rate agreements: if so requested by a potential new entrant, the merged entity undertakes to enter into a special pro-rate agreement for traffic with a true origin and destination in France and/or the Netherlands, provided that part of the

journey is on the Paris-Amsterdam route;

– frequent flyer programme: if so requested by a new entrant, the merged entity will allow it to participate in its frequent flyer programme for the routes specified in the contested decision, on the same conditions as the other partners who are members of the merged entity's alliance;

– intermodal services: if so requested by a railway company or other surface transport company operating routes between France and the Netherlands and/or between Italy and the Netherlands, the merged entity undertakes to conclude an intermodal agreement with it. Under such agreement, the merged entity will provide air passenger transport as a segment of an itinerary also comprising surface transport provided by the intermodal partner;

– blocked-space agreements: if so requested by a potential new entrant, the merged entity undertakes to conclude with it a blocked-space agreement for traffic with a true origin and destination, on the one hand, in the Netherlands and, on the other, at Marseilles, Toulouse or Bordeaux, provided that part of the journey is on the Paris-Amsterdam route. The blocked-space agreement is based on a fixed number of seats and remains in force for at least one entire IATA season. The number of seats covered by the agreement is a maximum of 15% of the seats offered on a given frequency and must not be more than 30 in one aircraft;

– obligations pertaining to fares: whenever the merged entity reduces a published fare on the Paris-Amsterdam route, it undertakes to apply an equivalent reduction to the corresponding fare on the Lyons-Amsterdam route, provided that there is no competitive air transport service on that route.

Procedure and forms of order sought

17 The applicant brought the present action by application lodged at the Court Registry on 14 May 2004.

18 By document lodged at the Court Registry on 24 September 2004, the French Republic sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. On 9 November 2004 the applicant requested confidential treatment of certain information relating, it claimed, to its business secrets. By order of 17 December 2004 the President of the Second Chamber of the Court of First Instance granted the French Republic leave to intervene. The intervener lodged its statement and the other parties lodged their observations on the statement within the time-limits allowed.

19 As the intervener raised no objections to the applicant's request for confidentiality, a non-confidential version of the pleadings was sent to the intervener, as originally provided for by the abovementioned order of 17 December 2004.

20 By letter of 26 October 2005, the intervener informed the Court Registry that it did not intend to take part in the hearing.

21 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. The oral arguments of the parties and their replies to the questions of the Court were heard at the hearing of 23 November 2005.

22 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

23 The Commission and the intervener contend that the Court should:
– dismiss the application;
– order the applicant to pay the costs.

The request that measures of inquiry be adopted

24 By letter lodged at the Court Registry on 3 October 2005, the applicant requested the adoption of measures of inquiry requiring the Commission to disclose, first, all the replies received to its request for information of 23 December 2003 as well as all the documents sent to it by the airlines Meridiana, Virgin Express and Volare and, second, all its working documents on the proposed commitments together with all the correspondence relating thereto with the parties to the merger.

25 The Court considers that that request constitutes in reality an offer of further evidence. Under Article 48(1) of the Rules of Procedure of the Court of First Instance, the parties may in a reply or rejoinder offer further evidence in support of their case and must give reasons for the delay in offering it.

26 In the present case, the applicant requested the adoption of measures of inquiry almost 11 months after having lodged its reply, and without offering any explanation for that delay. Consequently, the applicant was asked at the hearing to explain why, in its view, the delay in making its request was justified. It stated in that connection that the delay was explained by the fact that it had initially intended to bring an action to challenge the Commission's decision refusing it access to the documents it had sought to obtain. Although that hesitation as regards the type of action to bring may explain why the applicant did not lodge its request immediately after that refusal, it cannot however justify the fact that the applicant waited for several further months before acting.

27 Moreover, and independently of the lateness of that request, the Court considers that the information in the pleadings and the submissions of the parties is sufficient to enable it to give judgment in the present case. Therefore the request for the adoption of measures of inquiry is rejected.

Admissibility

Arguments of the parties

28 The applicant submits that the contested decision is of direct and individual concern to it. As it operates on the markets in which the merged entity will operate, it considers that it is directly concerned by the contested decision. The applicant claims also to be individually concerned since it is one of the main competitors of Air France and KLM on several routes and is also to be regarded as a potential competitor of Air France on other routes in France, particularly those to and from CDG and Orly. It further submits that it participated actively in the administrative procedure leading to the contested decision, which, according to the case-law, distinguishes it individually just as in the case of the persons to whom that decision is addressed (Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 44).

29 The Commission questions whether the action is admissible, given the applicant's lack of interest in the routes affected by the merger.

Findings of the Court

Standing to bring proceedings

30 Under the fourth paragraph of Article 230 EC, any natural or legal person may

institute proceedings against a decision addressed to it or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to it.

31 The applicant is not a party to the merger in this case and is not therefore a person to whom the contested decision is addressed. It is thus necessary to consider whether it is directly and individually concerned by the decision.

32 The contested decision, in permitting the merger to be put into effect immediately, was capable of bringing about an immediate change in the state of the relevant markets. As the intention of the parties to the merger to bring about such a change was not in doubt, the undertakings engaged in the relevant market or markets could, on the date of the contested decision, be certain of an immediate or imminent change in the state of the market (see, to that effect, Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 80). It follows that the applicant is directly concerned by the contested decision.

33 It is therefore necessary to determine whether the applicant is also individually concerned by the contested decision.

34 According to well-established case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and thus distinguishes them individually just as in the case of the person to whom the decision is addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 39; and Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 62).

35 Whether a third party is individually concerned by a decision finding a concentration to be compatible with the common market depends, on the one hand, on that third party's participation in the administrative procedure and, on the other, on the effect on its market position. Whilst mere participation in the procedure is not sufficient to establish that the decision is of individual concern to the applicant, particularly in the field of merger control, the careful examination of which requires regular contact with numerous undertakings, active participation in the administrative procedure is a factor regularly taken into account in the case-law on competition, including in the more specific area of merger control, to establish, in conjunction with other specific circumstances, the admissibility of the action (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 24 and 25; Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission ('Kali & Salz')* [1998] ECR I-1375, paragraphs 54 to 56; *Air France* v *Commission*, paragraph 28 above, paragraphs 44 to 46; and Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, paragraph 95).

36 As regards, first, the issue of participation in the administrative procedure, it must be noted that the applicant took an active part therein, in particular by replying on 14 January 2004 to the Commission's request for information of 23 December 2003 and by giving its views on 30 January 2004 on the terms of the commitments offered by Air France. It also participated on 30 January 2004 in a conference call with the Commission concerning the proposed commitments, and on 4 February 2004

submitted its replies to the questions sent to it by the Commission concerning the commitments offered by the parties to the merger.

37 As regards, secondly, the effect on the applicant's market position, it appears from its written pleadings, and is not challenged by the Commission, that it is one of Air France's main competitors in France on various direct routes, such as Paris-Marseilles, Paris-Nice and Paris-London, and is one of KLM's main competitors on other direct routes, such as Amsterdam-Edinburgh, Amsterdam-London and Amsterdam-Nice. Moreover, the applicant competes on one of the markets on which both parties to the merger operate, the Amsterdam-Nice route.

38 Therefore, the applicant is individually concerned by the contested decision.

39 In the light of the foregoing, the applicant is directly and individually concerned by the contested decision and thus has the requisite standing to bring proceedings to challenge that decision.

Interest in bringing the proceedings

40 As regards the applicant's interest in bringing the proceedings, it is settled case-law that an action for annulment brought by a natural or legal person is admissible only if the applicant has an interest in having the contested measure annulled (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 59; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 40; and Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, paragraph 33). That interest must be vested and present (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33) and is evaluated as at the date on which the action is brought (Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357, 371, and Case T-159/98 *Torre and Others* v *Commission* [2001] ECR-SC I-A-83 and II-395, paragraph 28). Such an interest exists only if the action, if successful, is likely to procure an advantage for the party who has brought it (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited).

41 On the date on which the applicant brought this action, it had a vested and present interest in having the contested decision annulled, since the decision authorises, subject to certain conditions, a concentration between two of its competitors which may affect its commercial situation. Consequently, the applicant's interest in bringing proceedings against the contested decision cannot be denied. That finding is not put in doubt by the lack of interest in bringing proceedings alleged by the Commission in respect of the third and fifth pleas. Even assuming that the concept of inadmissibility for lack of interest in bringing proceedings can apply independently to an individual plea, the third and fifth pleas in the present case constitute criticisms of various aspects of the Commission's reasoning which led it to adopt the operative part of the contested decision, which does in fact adversely affect the applicant.

42 Consequently, the action is admissible.

Merits

43 The applicant puts forward five pleas in support of its action for annulment. By the first, it submits that the Commission committed a manifest error of assessment by failing to consider the strengthening of the dominant position of the merged entity on the routes on which the activities of the parties to the merger did not overlap, either

directly or indirectly. By the second plea, the applicant submits that the Commission committed a manifest error of assessment by failing to consider the possible strengthening of the dominant position of the merged entity on the market for the purchase of airport services. By the third plea, it submits that the Commission committed a manifest error of assessment by finding that CDG and Orly were substitutable. By the fourth plea, the applicant submits that the Commission committed a manifest error of assessment by failing to take account of the effect on competition in the future if the merger did not take place. Lastly, by the fifth plea, it submits that the contested decision is vitiated by a manifest error of assessment inasmuch as the commitments are not sufficient to dispel the Commission's serious doubts regarding the compatibility of the merger with the common market.

44 According to settled case-law, review by the Community judicature of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by Regulation No 4064/89 is limited to ensuring compliance with the rules governing procedure and the statement of reasons, as well as the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers (see Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1161, paragraph 101, and Case T-87/05 *EDP* v *Commission* [2005] ECR II-0000, paragraph 151).

45 Under Article 2(3) of Regulation No 4064/89, a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. Conversely, the Commission is bound to declare a concentration falling within the scope of the regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled. If, therefore, a dominant position is not created or strengthened, the merger must be authorised and there is no need to examine the effects of the merger on effective competition (*Air France* v *Commission*, paragraph 28 above, paragraph 79).

46 It is in the light of those considerations that the applicant's five pleas must be considered.

The first plea, alleging a manifest error of assessment by reason of the failure to consider the strengthening of the dominant position of the merged entity on the routes on which there was no overlap between the operations of Air France and those of KLM

Arguments of the parties

47 As regards the scheduled air transport of passengers, the applicant notes that the Commission defined the product market on the basis of point of origin/point of destination ('O&D') pairs, any combination constituting a separate market from the point of view of demand. The applicant contends that the Commission should have assessed the supply of 'leisure travel by air' on a broader basis than that of segmentation by city-pair route, in the context of the 'general leisure/holiday market'.

48 In addition, the Commission ought to have considered whether the merger was likely to create or strengthen a dominant position on any market in the European Union. Accordingly, the Commission committed a manifest error of assessment by failing to consider the effects of the merger on routes on which the operations of Air France and those of KLM did not overlap. In particular, the applicant alleges that

the Commission failed to consider whether the additional benefits resulting from the merger and the increase in Air France's network or its presence at international level would have the effect of strengthening its position on those routes. The applicant thus considers that the Commission departed from its practice in assessing the strengthening of a dominant position, as shown by several decisions adopted on the basis of Article 8(2) of Regulation No 4064/89 in which the broader impact of the notified concentration in related markets beyond the area of direct overlap was considered (see, to that effect, inter alia Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2220 – *General Electric* v *Honeywell*) (OJ 2004 L 48, p. 1).

49 The manifest error of assessment arising from that failure to assess the strengthening of the dominant position of the merged entity was compounded by the fact that, pursuant to Article 81(3) EC, the Commission has acknowledged the benefits to consumers arising from joint ventures and other cooperative activities between airlines. In this case the applicant considers that the ability of an airline or alliance to offer competitive benefits, such as better connections, lower prices and new routes, is likely to influence consumers as regards the choice of airline or alliance. However, the Commission found, wrongly, that those benefits favoured competition and not that they strengthened a dominant position.

50 As an example, as regards the increase in flight connections, the applicant submits that passengers wishing to travel from Biarritz to Amsterdam cannot do so directly, but must change at Clermont-Ferrand, Lyons, Paris or Nice. Consequently, the merger will strengthen Air France's position on the Biarritz-Amsterdam market. Thus, passengers wishing to travel from Biarritz to Amsterdam will be more likely to travel with Air France because the merger has increased the flight connections between those four airports and Amsterdam. The same argument applies to the Brest-Amsterdam route, on which the increase in flight connections resulting from the merger reinforces Air France's position.

51 The Commission considers that the market for passenger air transport services had to be defined in this case according to the O&D approach. It points out that the applicant did not specify what it means by 'leisure travel by air' or 'the general leisure holiday market', thus failing to show clearly what a more broadly-based approach to defining the market would be.

52 The Commission argues that the applicant cannot merely assert that it should have considered the effects on non-overlapping routes without explaining which routes that applied to in this case. Moreover, neither the parties to the merger nor the third parties consulted during the administrative procedure claimed that there was a risk that the merger would have anti-competitive effects on non-overlapping routes, apart from those in which Air France or KLM were potential competitors. As for the applicant's allegation in respect of the Biarritz-Amsterdam route, the Commission considers that to be a separate market and that its analysis must be based, first, on potential competition in the form of direct flights between Biarritz and Amsterdam and, second, on actual or potential competition on the indirect routes between those destinations. It follows from that analysis that the merger does not restrict competition and a similar conclusion applies to the Brest-Amsterdam route. The plea is thus wholly unfounded.

53 The intervener considers that the Commission defined the relevant market correctly and that the applicant's argument that the Commission did not consider the effects of the merger on non-overlapping markets is unfounded.

Findings of the Court

54 The plea is in two parts. First, the applicant submits that the Commission failed to consider the effect of the merger on competition in the market for 'leisure travel by air'. Second, it alleges that the Commission failed to assess the effects of the merger on non-overlapping markets.

55 In order to assess whether a proposed merger creates or strengthens a dominant position, the Commission must first of all define the relevant market (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 32, and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 46 and 64).

56 For the purposes of defining the relevant product market in this case the Commission carried out an analysis of demand-side substitution. The contested decision records that, in the case of passenger air transport, the Commission's view was that the product market should be defined according to the O&D method, whereby each route between a point of origin and a point of destination is treated as a separate market. In order to establish whether the combination of a place of origin and a place of destination is a relevant product market, the Commission rightly examined, in recital 9 of the contested decision, the various transport options available to passengers between those two points (see, to that effect, Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraphs 39 to 41, and *Air France* v *Commission*, paragraph 28 above, paragraph 84).

57 At the hearing the Court asked the applicant to clarify its position with regard to market definition so as to state whether or not it was seeking to challenge the Commission's definition of the market. The applicant replied in the negative, explaining that it did not intend to challenge the merits of the O&D method, but wished to highlight the fact that, in its view, the Commission ought to have assessed the effect on competition on other markets, which should have been defined differently.

– The failure to analyse the effect of the merger on the market in 'leisure travel by air'

58 Article 44(1)(c) of the Rules of Procedure of the Court of First Instance provides that an application must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case, if appropriate without other information. In order to ensure legal certainty and the sound administration of justice, for an action to be admissible the essential points of fact and law on which it is based must be apparent from the text of the application itself, even if stated only briefly, provided the statement is coherent and comprehensible (see the order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29).

59 Apart from the reference to failure to analyse the merger's effect on the market in 'leisure travel by air', a market which is not clearly defined by the applicant in its pleadings, the applicant has put forward no argument in these proceedings in support of its

contention. It has merely asserted that, for some passengers wishing to travel for leisure purposes, various destinations were interchangeable. However, it did not describe the characteristics of that alleged market. In the absence of any more precise definition of the market for which the applicant contends, it is impossible for the Court to determine whether it was necessary for the Commission to consider it.

60 Accordingly, it must be held that the requirements of Article 44(1)(c) of the Rules of Procedure are not satisfied in the present case.

61 In any event, the Court considers that the applicant has failed to demonstrate why a market definition based on the O&D approach, which in substance includes the routes for 'leisure travel by air', does not allow analysis of all the competition problems which the merger is liable to entail.

62 Consequently, the first part of the plea is inadmissible.

– The failure to analyse the effect of the merger on non-overlapping markets

63 Pursuant to Article 2 of Regulation No 4064/89, in particular, the Commission is required to examine the effects on competition in the markets in which there is a risk of the creation or strengthening of a dominant position as a result of which competition would be significantly impeded. It is possible that a concentration may have such an effect in markets in which there is no overlap between the activities of the parties to a merger.

64 Although its analysis of the effect on competition may be oriented, in part, towards the concerns raised by the third parties consulted during the administrative procedure, the Commission is bound, even in the absence of any express request by such third parties, but where there are serious indications to that effect, to assess the competition problems created by the merger on all the markets which may be affected by it.

65 Nevertheless, where it is alleged that the Commission failed to have regard to a possible competition problem on the markets on which the activities of the parties to a merger do not overlap, it is for the applicant to adduce serious evidence of the genuine existence of a competition problem which, by reason of that effect, should have been examined by the Commission.

66 In order to discharge that burden, the applicant should identify the relevant markets, describe the state of competition in the absence of the merger and indicate what would be the likely effects of a merger given the state of competition on those markets.

67 In the present case the applicant merely asserts that the Commission wrongly confined its analysis to the effects on competition in markets on which the activities of the parties to the merger overlapped either directly or indirectly, without adducing evidence in support of its argument. The applicant simply points out that Air France has a monopoly on 27 of the 42 domestic routes from Paris, that it has 61.8% of the total capacity on routes from France and that it has 53% of the total number of slots available at Orly and 74% of those at CDG.

68 Those figures are not sufficient, however, to substantiate the applicant's argument in respect of the non-overlapping markets, since it fails to identify them clearly.

69 As regards the examples put forward by the applicant in respect of passengers wishing to travel from Brest or Biarritz to Amsterdam and who would be inclined to choose Air France because of the increase in flight connections arising from the merg-

er, the applicant's case rests on that bare assertion, for which there is no supporting evidence. Moreover, as the Commission shows, the analysis of the market must take account, first, of potential competition on direct flights between Biarritz or Brest and Amsterdam and, second, of actual or potential competition on indirect flights between those cities. According to the Commission, there is no tangible evidence to show that Air France and KLM were potential competitors on the Biarritz-Amsterdam route for direct flights or that KLM could be viewed as a potential competitor of Air France on indirect flights between those cities.

70 Furthermore, with regard to the Brest-Amsterdam route, the Commission, unchallenged on this point by the applicant, pointed out that there was no direct flight as passengers had to change at Lyons, Marseilles, Nice or Paris. It should be noted in this regard that the contested decision recognised that the Lyon-Amsterdam, Marseilles-Amsterdam and Paris-Amsterdam markets raised competition problems, and commitments were offered in order to remedy them. As regards the Nice-Amsterdam market, which concerns only a small number of passengers, the contested decision states that KLM and its subsidiary Basiq Air are competing with the applicant, which holds a substantial share of the market on that route. Conversely, Air France operates only an indirect service and its market share on that route is less than 1% (recital 79 of the contested decision). Consequently, the Commission considered that that route did not give rise to competition problems.

71 The Court concludes that the applicant has brought forward no matter that could show that these findings were vitiated by a manifest error of assessment.

72 Lastly, the fact that the Commission recognised, pursuant to Article 81(1) and (3) EC, the advantages to the consumer of joint ventures or cooperation agreements between airlines does not reveal a manifest error of assessment. A merger, like an agreement between competitors which is exempt under Article 81(3) EC, may give rise to consequent competitive advantages that may benefit consumers. It should be noted in this regard that merger control is not premissed on the prohibition of such advantages, but on the aim of avoiding the creation or strengthening of a dominant position as a result of which effective competition could be significantly impeded in the common market. The ability as a result of the merger to offer passengers services at a better price could only constitute evidence of the creation or strengthening of a dominant position in limited cases, for example where the merged entity intends or has the capacity to operate a predatory pricing policy.

73 Since the applicant has not provided tangible evidence that the merged entity is able to offer passengers attractive competitive advantages on other markets, which it has not in any case defined, the creation or strengthening of a dominant position and the corresponding harm to competition which might arise on those markets have not been established.

74 Accordingly, the Court finds that the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment by not extending its assessment to the non-overlapping markets.

75 Consequently, the second part of the plea and thus the first plea in its entirety must be rejected.

The second plea, alleging a manifest error of assessment by reason of the failure to assess the

strengthening of the dominant position of the merged entity on the market for the purchase of airport services

Arguments of the parties

76 The applicant submits that the Commission failed to take account of the fact that Air France and KLM are purchasers of airport services, whereas in past decisions it has assessed the effects of a merger on the purchasing market (Commission Decision 97/227/EC of 20 November 1996 declaring a concentration to be incompatible with the common market (Case No IV/M.784 – Kesko/Tuko) (OJ 1997 L 110, p. 53); Commission Decision 97/816/EC of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.877 – Boeing/McDonnell Douglas) (OJ 1997 L 336, p. 16); and Commission Decision 1999/674/EC of 3 February 1999 relating to proceedings under Council Regulation (EEC) No 4064/89 (Case No IV/M.1221 – Rewe/Meinl) (OJ 1999 L 274, p. 1)). In this case the upstream market is the market in services linked to airport infrastructures for which a fee is payable, being the use and maintenance of runways, the use of taxiways and aprons, and approach guidance for civil aircraft (Commission Decision 2000/521/EC of 26 July 2000 relating to a proceeding pursuant to Article 86(3) of the EC Treaty (OJ 2000 L 208, p. 36)).

77 The applicant argues that the Commission acknowledged in the contested decision that it took account of the concerns raised by competitors, in particular with regard to hub dominance (recital 161 of the contested decision). Thus, the Commission required certain commitments to be given in order to deal with Air France's dominant position in its Paris hub. In so doing the Commission implicitly found that the merger would strengthen Air France's position at CDG and Orly in the market for the purchase of airport services.

78 The applicant argues that CDG and Orly are dominated by Air France, and points out that Aéroports de Paris ('AdP'), which runs those airports and allocates slots, and Air France were State-owned companies. The bodies responsible for allocating slots may be regarded as performing an economic activity (Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 121). The Commission did not take account of the fact that the merger might result in the creation or strengthening of a dominant position on a market for the purchase of airport services, such as that of Paris dominated by AdP.

79 The Commission observes that the applicant alleges for the first time, in these proceedings, the existence of a market for the purchase of airport services. That is a matter which was not raised during the administrative procedure. Moreover, the applicant does not explain what it means by 'airport services' and merely puts forward arguments relating to the allocation of slots. It makes no reference to airport services as these are generally understood, for example catering and ground-handling services. Consequently, the Commission considers that there was no need to examine them and underlines the fact that there was no evidence that the market for the purchase of those services required investigation.

80 In the first place, the Commission points out that it is generally recognised that slots are indispensable to the provision of air transport services. Consequently, there was no reason to treat the latter as a separate activity. Moreover, the allocation of slots

is an administrative activity and not an economic one, since AdP acts in that respect as a public authority and not as a company. In the case of coordinated airports the body responsible for the allocation of slots in France is anyway the Association pour la coordination des horaires (COHOR), and not AdP as the applicant claims. Moreover, there is no question of either the merged entity or any other company being able to wield power over the bodies responsible for allocating slots, which might be regarded as a dominant position within the meaning of Regulation No 4064/89 or Article 82 EC.

81 In the second place, the Commission considers that in the case of services defined as relating to access to airport infrastructures for which a fee is payable it does not suffice for the applicant to show that such a market exists: it must go on to demonstrate that the Commission committed a manifest error of assessment by failing to investigate that market.

Findings of the Court

82 There are two parts to the present plea. First, the applicant submits that the Commission failed to assess the strengthening of the position of the merged entity on the market for the purchase of airport services, which it defines as that for services relating to infrastructures, such as the use and maintenance of runways, the use of taxiways and aprons, and approach guidance for civil aircraft, for which a fee is payable. Secondly, it submits that the Commission failed to consider the commercial influence which the merged entity could wield over AdP.

83 The parties were invited at the hearing to state whether those services constitute one or several relevant markets, which should be separated from those defined according to the O&D method. The Commission, unchallenged on this point by the applicant, considered that those services constituted several relevant markets separate from those defined according to that approach.

– The failure to take into account the strengthening of the dominant position on the market for the purchase of airport services

84 In these proceedings the applicant merely asserts that there is a separate market for services linked to access to airport services for which a fee is payable and on which the merged entity would wield increased purchasing power, without adducing any evidence of the creation or strengthening of a dominant position likely to impede competition on that market.

85 At the hearing, the applicant was asked to explain how, in its view, the merger strengthened the dominant position on the relevant market, since its written pleadings were silent in that regard. However, the Court considers that the applicant has not been able to adduce relevant matters that could demonstrate such strengthening and, consequently, show that there was a manifest error of assessment on the part of the Commission in that regard.

86 For the sake of completeness, the Court notes that recital 73 of the contested decision recognises that the parties to the merger 'in comparison to their competitors ... benefit from economies of scale at both airports ... and the increased leverage to negotiate pricing with third-party service providers such as engineering, ground-handling services and airport facilities etc.'. It follows, according to the contested decision, that 'the merged entity would have a very strong position on [the Paris-Amsterdam]

hub-to-hub route'.

87 Accordingly, the Commission has recognised the possibility of the effects on competition at hubs likely to result from the merger. The Commission's acknowledgment of the existence of adverse effects on competition in respect of the commercial activities of the parties to the merger at the hubs, without carrying out a precise analysis of those markets, is not a manifest error of assessment such as to undermine the legality of the contested decision. In fact, this finding led the Commission to accept the commitments the stated aim of which was to counteract the increased weight of the merged entity at the hubs, taken as a whole, and in particular in the light of the recognition of a dominant position.

88 Consequently, the first part of the plea must be rejected.

– The strengthened influence of the merged entity with regard to AdP

89 The applicant alleges that AdP, in its view responsible inter alia for the allocation of slots, might be affected by the dominant position of the merged entity in Paris.

90 As regards first the allocation of slots, it should be noted that at the relevant time this was governed by Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1). Article 4 of that regulation provided:

'… A Member State shall ensure that the coordinator carries out his duties under this Regulation in an independent manner ... The coordinator shall act in ... a neutral, non-discriminatory and transparent way ... The coordinator shall be responsible for the allocation of slots [and] shall monitor the use of slots.'

91 It follows from the foregoing that the allocation of slots is governed by a regulatory framework which in principle prevents the body responsible for allocating slots from favouring the merged entity by awarding it more slots than its competitors. In that regard the applicant and the Commission stated at the hearing that they did not wish to say whether AdP or COHOR was in fact the competent authority.

92 Furthermore, the applicant has adduced no relevant evidence to show that the parties to the merger could influence that body one way or the other.

93 Second, a distinction is generally drawn between AdP's purely administrative activities, in particular supervisory activities, and the management and operation of the Paris airports, which are remunerated by commercial fees which vary according to turnover (*Aéroports de Paris* v *Commission*, paragraph 78 above, paragraph 112). Thus, it cannot be denied that AdP is in charge of two types of activity which are intrinsically different: those referred to as 'public service' activities, and commercial activities which are necessarily subject to the competition rules. Consequently, the fact that Air France and AdP were two State-owned companies could not give rise to any presumption of concertation, as the applicant seems to imply.

94 In the light of the foregoing, the second part of the plea and therefore the second plea as a whole must be rejected.

The third plea, alleging a manifest error of assessment as regards the substitutability of CDG and Orly

Arguments of the parties

95 The applicant challenges the Commission's reasoning concerning the substitutability of CDG and Orly. With regard to the location of the airports, the applicant

observes that according to its calculations CDG is almost twice as far from the centre of Paris as Orly (30 km as against 18 km), Orly being south of central Paris and CDG to the north-east. In addition the applicant considers that, as Orly is a smaller airport, the time taken to get from the aircraft to connections with other means of transport is less than in the case of CDG. Consequently, it is quicker to reach the centre of Paris from Orly.

96 The applicant submits that in practice most long-haul network carriers have concentrated their activities at CDG, while Orly is used more for short-haul intra-European and domestic traffic. According to the applicant, CDG handles large volumes of transfers between flights, whereas Orly is an older airport and is consequently less well-equipped to cope with such volumes. Air France thus concentrates its long-haul intercontinental flights at CDG and uses Orly for its domestic routes. To gain access to intercontinental flights, it is accordingly necessary to fly from CDG, since all network carriers are based there. As airport charges are significantly higher than at Orly, low-cost carriers prefer to operate from Orly. The applicant adds that the Commission itself recognised that many customers do not consider the two airports to be substitutable (recital 28 of the contested decision). Whilst the Commission states that the substitutability of the airports must be looked at from both the demand and the supply side, it does not analyse the situation by considering the airports as suppliers of services directly to the airlines. Thus, the Commission did not arrive at the logical conclusion that the airlines as consumers of airport services have different needs according to whether they are network carriers such as Air France or low-cost carriers.

97 The Commission observes that recognition of CDG and Orly as substitutable for each other means that prospective new entrants may request slots at either airport (paragraph 1.3.9 of the commitments package). In those circumstances, the contested finding does not place the applicant at a disadvantage, so that it has no legitimate interest in raising this plea, which is therefore inadmissible (*NBV and NVB* v *Commission*, paragraph 40 above, paragraph 31 et seq.).

98 As to the substance of this plea, the Commission observes that what determines the geographical substitutability is not the distance of the two airports from central Paris, but rather the time taken to reach it. Contrary to what the applicant implies, CDG is well served by public transport from the centre of the city. Moreover, the Commission does not dispute the applicant's arguments that CDG is used mainly for long-haul flights whereas Orly concentrates on short-haul flights, but these arguments refer to the supply side, which is less important than the demand side in determining substitutability.

Findings of the Court

99 As the Commission stated in the notice on market definition, companies are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view and for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions (paragraph 13). Substitutability must therefore be looked at not only from the supply side but also from the demand side, which remains, in principle, the most effective assessment criterion.

– The location of the two airports

100 As the Commission points out, the decisive factor in assessing the geographic substitutability of CDG and Orly on the demand side is not the distance between a main starting point and the two airports, but the time required to travel from that point to the airports. The applicant has adduced no evidence to show that that test is not an important indicator of geographic substitutability.

101 The applicant cannot deny that the travelling time to those two airports is the same since it stated itself that from Boulevard Saint-Michel it took 33 minutes (by RER line B) to get to CDG and 30 minutes to get to Orly (by RER line B or the Orlyval line). The applicant's argument in that regard – that the travelling time to the centre of Paris from the two airports differs because of the time required, from leaving the aircraft, to reach other means of transport – is not supported by any evidence.

102 Consequently, the applicant has not shown that the Commission committed a manifest error of assessment by finding that the two airports were substitutable given the lack of consumer preference for flights as between CDG or Orly as regards travel to and from the centre of Paris.

– The type of flights provided from the two airports

103 First, as regards demand-side substitutability, the Commission found that for point-to-point traffic comprising both time-sensitive and non-time-sensitive passengers, CDG and Orly were substitutable as they are located in the same catchment area and have comparable access facilities (recital 29 of the contested decision).

104 It should be noted that, for the purposes of examining the substitutability of the two airports, the Commission must take account of all demand, since customers for whom time is not a priority have different requirements because they are more flexible. Therefore, the Commission was entitled to find that for numerous business customers CDG and Orly were not substitutable, since Orly offers fewer connections (recital 28 of the contested decision). The particular expectations of business customers therefore led the Commission to find that there were 'sub-markets', depending on whether or not customers were time sensitive. However, those considerations, peculiar to certain business customers, which are only one part of the demand, do not undermine the finding on substitutability. First, the Commission expressly recognised the specific requirements of that category of passengers. Second, the applicant adduces no evidence to show that the particular requirements of time-sensitive passengers, which are in effect those of most business customers, should have taken priority over those of other customers who are not time sensitive and who consider the two airports to be substitutable.

105 As for the applicant's argument that the Commission wrongly failed to consider that the airlines, as customers and therefore consumers of airport services, would have different needs depending on whether they are network or low-cost carriers, so that the two airports could not be regarded as substitutable, the Court finds that the applicant has not provided any data capable of substantiating that view.

106 It follows from the foregoing that the applicant has adduced no relevant evidence to show that the Commission erred in finding that there was demand-side substitutability between the two Paris airports.

107 Second, as regards the services offered to consumers by the airlines from one or

other of the airports, it must be held that the applicant's arguments concerning, first, the types of flights which the airports offer on the basis of their specific infrastructures and, second, the particular characteristics of the two airports have, as has already been noted, a more limited impact.

108 The Court notes that the Commission acknowledged the functional particularities of the two airports pointed out by the applicant since it found that, on the supply side, most network carriers regarded the two airports as substitutable even if they concentrated their operations at CDG, whereas the airlines based at Orly concentrated their operations primarily on domestic traffic. For certain airlines, the two might not be substitutable, depending on the markets they serve (transit or point to point, domestic or international traffic) and the costs incurred (see, to that effect, recital 28 of the contested decision). Thus, the contested decision states that substitutability may be assessed differently, in particular for low-cost airlines for whom it is important to be able to choose between airports in order to minimise their costs, since airport taxes may differ from one airport to another (recital 28 of the contested decision). It follows that the Commission carried out a comprehensive analysis on the basis of which it found that the two airports were substitutable, while taking account of criteria which included the commercial factors peculiar to low-cost carriers.

109 In the light of the foregoing, the applicant has not adduced evidence capable of showing that there was a manifest error of assessment of the substitutability of CDG and Orly.

110 Therefore, the third plea must be rejected.

The fourth plea, alleging a manifest error of assessment by reason of the failure to examine the effects of the merger on potential competition

Arguments of the parties

111 The applicant maintains, first, that the Commission ought to have considered the commercial strategy of KLM if the merger were not put into effect, in the light of the impact of the liberalisation of the air transport sector and the grant to the Commission of a mandate to negotiate air services agreements between the Community and third countries. It submits that Community airlines such as KLM should gain the freedom to offer unlimited services with, inter alia, wide traffic rights and no limitations on pricing or scheduling.

112 The applicant submits, second, that in the absence of a merger with Air France, KLM would be the most likely new entrant at Paris since KLM's domestic market is somewhat limited, which would encourage it to expand internationally and within Europe. Moreover, KLM carries out its operations in proximity to Paris and is familiar with the Franco-Belgian market, and the competition in international air transport services operating from Paris is anyway limited. Thus, the applicant considers that the merger enables Air France to eliminate its most likely potential competitor at Paris and preserve its dominant position in its domestic markets.

113 The Commission submits that because of the scale of liberalisation in the air transport sector and the large number of agreements involved, any prediction as to the duration of such a process can only be a matter of speculation. Moreover, it stresses that since KLM is not likely to have any genuine or specific chance of entering the relevant market, it cannot be regarded as a potential competitor of Air France at Paris.

Findings of the Court

114 This plea is in two parts, the first concerning the effects on competition of the liberalisation of the air transport sector and the second whether KLM is a potential competitor at Paris.

115 As regards liberalisation in the air transport sector, the applicant has not shown, in the absence of specific evidence adduced in support of its argument, that that liberalisation, the impact of which remains difficult to measure, would enable KLM to develop its competitive base and thus increase its commercial strength and compete with Air France at Paris, in particular by offering services from Paris and to non-European countries. Therefore, the first part of the plea must be rejected.

116 As to whether KLM is a potential competitor at Paris, it should be noted that according to settled case-law, the examination of conditions of competition must be based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter the relevant market and compete with established undertakings (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 137).

117 It is necessary to examine first in this connection the argument relating to the limited nature of KLM's domestic market as alleged by the applicant, and secondly the applicant's argument based on the proximity of Amsterdam, KLM's centre of operations, to Paris.

– The limited nature of KLM's domestic market

118 The contested decision states that a network carrier can be regarded as a potential competitor on a route only if it can be directly linked to its hub. Recital 17 of the contested decision states that 'the hub-and-spoke system determines the network carriers' decision to operate (or not) a passenger air transport service on a particular O&D pair'. It adds that 'network airlines concentrate traffic into a specific hub and disperse passengers via connection to numerous spokes' and that 'they normally refrain from entering city pairs which are not connected to their respective hubs'. In that regard, it should be noted that the applicant does not deny that the network airlines in fact concentrate their activities in their respective hubs.

119 For the short-haul routes, as the Commission explains, the costs to the network airlines are such that they generally offer services on those routes only if they are connected to their hubs or if they are the only operator on those routes. Consequently, any new entrant to those routes would logically be the national carrier of the point of origin or destination of those routes or a low-cost company, which explains why KLM would not be likely to operate in those markets if routes are not connected to Amsterdam.

120 As for the long-haul routes, the Commission states in its pleadings that a certain proportion of passengers must be passengers in transit, so that an airline can sell a significant number of seats and maintain the long-term viability of its service. This is only possible if it can feed traffic from the other routes into its long-haul service

through its hub.

121 It is not disputed by the parties in this case that at Amsterdam most passengers are in transit, thereby enabling KLM to retain the viability of its operations at that hub. The applicant has not shown that KLM has a network which enables it to carry passengers to other destinations in France from Paris. Accordingly, even if KLM intended to develop its operations, which the applicant describes as limited, KLM's organisation does not appear to enable it to exert competitive pressure on Air France at Paris.

122 It must be found that in the present case the applicant has not shown to the requisite legal standard that the approach adopted by the Commission regarding the centralisation of KLM's operations in Amsterdam is vitiated by a manifest error of assessment.

– The proximity of Amsterdam, KLM's centre of operations, to Paris, and the limited competition in international air transport services from Paris

123 The Commission states in its pleadings that the establishment of a connection between two airports as close as Paris and Amsterdam does not appear to be strategically viable. Thus, other airlines have commercial reasons more obvious than those of KLM to enter that market, as a passenger is unlikely to regard it as an advantage to be able to change at both Paris and Amsterdam. Since KLM's primary destinations from Amsterdam are the United States and the Far East, the applicant has not shown that KLM has a commercial interest in developing its operations from Paris since it benefits at Amsterdam from passengers in transit from the United States and local passengers heading to the Far East. Moreover, such a commercial strategy risks competing directly with the operations developed and centralised at Amsterdam and which appear to be an integral part of KLM's particular organisational structure. Lastly, considerable investment would be necessary without any clearly identifiable return, which significantly limits the pertinence of the applicant's allegation that KLM should be regarded as one of Air France's potential competitors at Paris.

124 Lastly, as regards the applicant's allegation that existing competition in international air transport services from Paris is limited, it should be noted that apart from that bare assertion there is no argument from the applicant to support that position. The Court cannot therefore rule on the impact of that allegation.

125 Consequently, the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment by finding that KLM was not a potential competitor of Air France at Paris.

126 It follows that the second part of the plea and therefore the fourth plea as a whole must be rejected.

The fifth plea, alleging a manifest error of assessment of the commitments given by the parties to the merger

127 There are seven parts to this plea. In the first, the applicant submits that the commitments should have been extended to the non-overlapping markets. In the second and third parts, it argues that the commitments are not attractive to low-cost airlines and that there is no divestiture of a viable business. In the fourth and fifth parts, it submits that the divestiture of slots and the other remedial measures adopted are inadequate. In the sixth part, the applicant stresses the failure to identify a new

entrant and that there was no rapid entry of a new competitor likely to last. In the seventh part, the applicant points to the failure to take into account the Thalys high-speed train as a competitor.

128 According to settled case-law, the Commission enjoys a broad discretion in assessing the need for commitments to be given in order to dispel the serious doubts raised by a concentration. It follows that it is not for the Court of First Instance to substitute its own assessment for that of the Commission: the Court's review must be limited to ascertaining that the Commission has not committed a manifest error of assessment. In particular, the alleged failure to take into consideration the commitments suggested by the applicant does not by itself prove that the contested decision is vitiated by a manifest error of assessment. Moreover, the fact that other commitments might also have been accepted, or might even have been more favourable to competition, cannot justify annulment of that decision in so far as the Commission was reasonably entitled to conclude that the commitments set out in the decision served to dispel the serious doubts (Case T-158/00 *ARD* v *Commission* [2003] ECR II-3825, paragraphs 328 and 329).

129 In exercising its power of review, the Court of First Instance must take into account the specific purpose of the commitments entered into during the phase I procedure, which, contrary to those entered into during the phase II procedure, are intended not to prevent the creation or strengthening of a dominant position but rather to dispel any serious doubts in that regard. Consequently, where the Court of First Instance is called on to consider whether, having regard to their scope and content, the commitments entered into during the phase I procedure are such as to permit the Commission to adopt a decision of approval without initiating the phase II procedure, it must examine whether the Commission was entitled, without committing a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts (Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraphs 79 and 80).

The first part, alleging failure to extend the commitments to non-overlapping markets

– Arguments of the parties

130 The applicant submits that the commitments should have been extended to include routes on which the Commission had not identified competition problems because the markets concerned were not attractive. The applicant observes that during the administrative procedure it proposed to the Commission a significant number of slots to be surrendered in order for the commitments to be wholly effective. Accordingly, the applicant questions whether the Commission in fact considered its proposal. Furthermore, it submits that the Commission restricted the commitments on routes without regard to the relevant markets on each of the routes considered.

131 The Commission submits that unless there is a genuine need there is no justification for requiring the parties to the merger to surrender slots on routes on which there are no competition problems.

– Findings of the Court

132 The Commission acknowledges in paragraph 17 of the notice on remedies that 'in order to assure a viable business, it might be necessary to include in a divestiture those activities which are related to markets where the Commission did not raise com-

petition concerns because this would be the only possible way to create an effective competitor in the affected markets'. It explains in its pleadings that those measures must be decided in the light of the principle of proportionality.

133 According to consistent case-law, the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60; Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 39; and Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-0000, paragraph 99).

134 It is clear from the foregoing that commitments must be decided on in the light of the competition problems raised on the affected markets, because if competition can be maintained on those markets it is not necessary for the Commission to extend the scope of the commitments to markets not affected, in accordance with the principle of proportionality.

135 The applicant submits that in this instance the Commission should have extended the commitments to non-overlapping markets so as to eliminate all barriers to entry. However, it merely asserts that to be the case and does not identify the markets to which the Commission should have extended those commitments.

136 Furthermore, the Court observes that during the administrative procedure the applicant appeared minded to use certain slots which were divested by the parties to the merger for markets unaffected by the merger. Accordingly, the applicant demonstrated its intention of taking advantage of the commitments given by the merged entity to increase its commercial presence in the markets in which there were no competition problems, but without showing that that use would ensure effective competition on the markets affected.

137 It should be noted that the commitments cannot be regarded as a means of favouring, without justification on competition grounds, a potential competitor which wishes to enter a particular market. Therefore the fact that the Commission did not extend the commitments to non-overlapping markets, even though that measure might have benefited the applicant's own commercial interests on the markets not affected by the merger, in no way proves that that extension is the only way to create an effective competitor on the markets affected.

138 Lastly, regarding the applicant's argument that the Commission merely accepted commitments concerning routes but not the relevant markets on each of the proposed routes, when requested to clarify that argument at the hearing, the applicant failed to identify those markets and put forward no relevant evidence to prove a manifest error of assessment.

139 It follows from the foregoing that the applicant has not shown that the Commission committed a manifest error of assessment. Therefore the first part of the plea must be rejected.

The second part, alleging that the commitments are not attractive to low-cost airlines

– Arguments of the parties

140 According to the applicant, the remedies are unattractive to low-cost or non-network carriers because they involve commercial links and relationships which raise costs. The most likely competitor to enter the Paris-Amsterdam route is a low-cost carrier. Of the nine markets affected in Europe, the applicant considers that only three carry a sufficient number of passengers to be considered profitable by a low-cost carrier. In addition, substantial investments in advertising would be required on these routes to increase customer awareness of the new entrants in order to counter the presence of the parties to the merger and of Alitalia. Lastly, hubs do not offer attractive conditions for low-cost carriers because of congestion, which gives rise to delays and therefore costs.
141 The Commission challenges the applicant's view that the remedies are unattractive to low-cost airlines.
– Findings of the Court
142 The contested decision indicates that the Commission did not merely accept a divestiture of slots, since other commitments reinforced that measure in order to encourage all airlines, including the low-cost carriers, to enter the markets affected.
143 Under the commitment in respect of frequent flyer programmes, passengers on flights provided by competing airlines on the markets affected are able to obtain 'miles' from the merged entity, so that it confers a non-negligible advantage on those passengers and therefore, indirectly, on the competing airlines (paragraph 6 of the commitments package). If the applicant does not wish to take part, for example, in the frequent flyer programme because of its own needs and organisation, that is its own commercial decision. Accordingly, a strategic choice of that sort does not prove that the commitments were inadequate or, consequently, that the Commission committed a manifest error of assessment.
144 The low-cost airlines could also benefit from interline agreements which provide for round trips to be offered, one leg of which is provided by the merged entity (paragraph 5 of the commitments package). Moreover, the commitments stipulate that at Paris the airlines can acquire slots at either CDG or Orly, so as to satisfy the different organisational and commercial preferences of the airlines.
145 The fact that, of the nine routes identified by the Commission as raising competition problems, only three are profitable for a low-cost airline does not prove that the Commission committed a manifest error of assessment. The commitments at the end of phase I are intended to dispel the serious doubts harboured by the Commission regarding the merger's compatibility with the common market: they cannot exempt new entrants from the costs attendant upon market entry, since those investments are logically inherent in any commercial activity.
146 Moreover, the small number of passengers on certain affected markets, fewer than 70 000 passengers a year, does not show that the commitments are not attractive to low-cost airlines. It is stated in the Commission's pleadings that the applicant expressed an interest in entering that type of market, as demonstrated by its entry in 2003 on the Amsterdam-Bristol market, a route which involved only 59 314 passengers a year.
147 Furthermore, the presence of large companies in a market may make it less easy for a new competitor to enter the market, but this cannot be considered an absolute barrier to such entry, as is demonstrated in particular by the increased number of low-

cost airlines which enter markets in which powerful airlines already operate.

148 As to the applicant's argument that hubs do not offer attractive conditions to low-cost airlines because of congestion and periods of peak travel which give rise to delays and consequential costs, the Court observes that during the administrative procedure the applicant endeavoured to show that the divestiture of slots was not sufficient to encourage new entrants. That argument, however, contradicts the tenor of its reply to the Commission of 14 January 2004, in which it explains that 'with a limited presence in Paris, [it] is still Air France's nearest ... competitor in terms of domestic air travel in France', that '[it] is actively seeking to establish a base of operations at [Orly]', that '[it] currently has four aircraft operating there ... [and] three additional aircraft operate at [CDG]' and lastly that '[it] prefers to use [Orly] rather than [CDG] in view of its proximity to the centre of Paris'.

149 Lastly, it should be noted that the Commission questioned 90 competitors about the market and thus did not restrict its investigation to the concerns of the low-cost airlines, which explains why the commitments might not satisfy the applicant's needs in every respect. The commitments are intended to maintain overall competition on the markets affected, which is not limited to that provided by airlines alone, since rail carriers may be active competitors in some markets, as the Commission pointed out (see, to that effect, paragraph 7 of the commitments package).

150 It follows from the foregoing that the applicant has adduced no relevant evidence to prove a manifest error of assessment on the part of the Commission.

151 Accordingly, the second part of the plea must be rejected.

The third part, alleging no divestiture of a viable business

– Arguments of the parties

152 The applicant submits that the Commission confined itself to reducing the barriers to entry rather than ensuring the divestiture of a viable business or of market shares to a competitor, which is a departure from its normal practice.

153 The Commission considers that it cannot be criticised by the applicant for failing to require the divestiture of a viable business since none of the parties had a business which could easily be divested. It also observes that the notice on remedies states that other types of commitment are acceptable.

– Findings of the Court

154 According to the notice on remedies, the divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. Whilst divestiture is the remedy preferred by the Commission, it may accept others. There may be situations where divestiture of a business is impossible. In such circumstances, the Commission has to determine whether or not other types of remedy may have sufficient effect on the market to restore effective competition (paragraphs 14 and 26 of the notice).

155 The Commission's pleadings indicate that the parties to the merger did not have a viable business to divest, since it found that the main barrier to entering the market was connected to the lack of available slots at the big airports.

156 The Commission has demonstrated to the requisite legal standard in this connection that the transfer of aircraft cannot effectively remedy the competition problems raised by the merger, since it is difficult, if not impossible, to check whether

the purchasers of those aircraft in fact use them on the affected markets. Moreover, a potential entrant can lease or buy a second-hand aircraft, as the use or possession of an aircraft does not appear to be the most immediate barrier to entry.

157 It is clear that the applicant has adduced no tangible evidence to prove that access to the slots was not the most significant barrier to entry.

158 The Court notes in this regard that, notwithstanding the arguments on which the applicant relies in this action, it has admitted that access to slots was the essential barrier to entry, since in its replies of 14 and 30 January 2004 it stated as follows:

'The lack of access to slots is the most obvious physical barrier to entry. Without access to slots ... airlines are precluded both from introducing new services and [from] establishing new bases of operations to expand their activities ... [It] is handicapped in this competition, however, by the lack of access to slots and other infrastructure that it needs to expand its network ... The lack of access to slots and other infrastructure inhibits [the applicant] from establishing bases of operations in cities ... like Paris ...'

159 Accordingly, the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment in authorising the merger following commitments based on restriction of the barriers to entry rather than the transfer of a viable business to a competitor.

160 Therefore, the third part of the plea must be rejected.

The fourth part, alleging that the divestiture of slots is inadequate

– Arguments of the parties

161 The applicant submits that the divestiture of slots does not encourage new entrants or succeed in restoring competition, as shown by the cases of Lufthansa/SAS/United Airlines (Cases COMP/D-2/36.201, 36.076 and 36.078) and Swissair/Sabena (Case IV/M.616). Furthermore, as a concentration brings about a lasting structural change in the market, any commitment must be of a permanent nature. Therefore it is irrelevant that the divestiture of slots was required for an unlimited period.

162 According to the applicant, the Commission wrongly limited itself to the barriers to entry constituted by slots and did not address hub dominance, or brand and frequency advantage of the parties to the merger. Moreover, the Commission failed to explain how the number of slots to be divested would ensure that the transfer of market shares was sufficient to enable the quasi-monopoly of the parties to the merger on the affected markets to be eliminated, especially as the slots were not divested 'en bloc'. The divestiture of slots is also inadequate since it ensures a maximum frequency of only six flights per day, and that on the Paris-Amsterdam route alone.

163 The applicant considers that the Commission manifestly erred in its assessment in authorising the parties to retain more than 50% of all the slots available on each of the routes specified in the commitments, without ensuring the entry of a single competitor on those routes. The applicant notes that on the Paris-Amsterdam route the parties will retain at least 59% of all frequencies, a figure which the applicant regards as prohibitive, given that the attraction of this route is limited by reason of the presence of Thalys, which has a market share of 45% on that route.

164 The Commission denies the assertion that the divestiture of slots is inappropriate and refers to its recent decisions (British Midland/Lufthansa/SAS (Case COMP/38.712) and British Airways/SN Brussels Airlines (Case COMP/A/38.477/

D2)).

165 The intervener observes that, for the first time, the divestiture of slots is required for an unlimited period, and stresses that the commitments are accompanied by all the procedural guarantees necessary to ensure their real impact on competition.

– Findings of the Court

166 As the Commission has rightly demonstrated (see paragraph 155 et seq. above), the main barrier to entry in the air transport sector is the lack of available slots at the large airports. Consequently, it is necessary to determine whether the Commission erred in finding that, in the present case, the divestiture of slots provided for in the commitments package could be an effective way to restore effective competition. In that context it is for the applicant to adduce evidence that the divestiture of slots as provided for by the commitments was not sufficient to remedy the competition problems raised.

167 The applicant relies merely on the fact that during the administrative procedure it suggested that the number of slots to be divested be greater, which in its view would have enabled new entrants to provide lasting competition with the parties to the merger.

168 It should be noted in that regard that in determining the appropriate number of slots to be divested the Commission took account of all the matters communicated to it by those participants in the market who were consulted. It is clear from its pleadings that it relied on the fact that, for most business passengers, the decisive factor is not the number of daily flights but the number of flights offered at peak times, enabling those passengers to make a round trip on the same day.

169 Furthermore, the Commission points out that numerous competitors considered the commitments to be satisfactory for the purpose of remedying the competition problems created by the merger. Of the 14 business customers consulted as part of the Commission's investigation of the market, 10 took the view that the divestiture of slots was sufficient, the six frequencies per day constituting in their view an alternative to the merged entity on the Amsterdam-Paris route. The applicant was the only low-cost airline which found them insufficient. Accordingly, in the light of the reaction received, the Commission was entitled to find that the applicant's proposal that some 22 600 slots should be divested at Orly, amounting to about 31 flights per day, was disproportionate.

170 Moreover, a new entrant will in practice be able to exceed six flights per day on that route owing to the blocked-space agreements, since the merged entity is required to make a certain number of seats on its flights available to the passengers of the new entrant (paragraph 9 of the commitments package).

171 As for the frequencies imposed for the other markets affected and which vary from two to four flights per day, the applicant has adduced no evidence to show that these are not sufficient to remedy the competition problems, since it concentrates its argument on the Paris-Amsterdam market.

172 As regards the applicant's argument that the slots should have been divested en bloc, rather than to various competitors, the commitments specify that preference should be given to the prospective new entrant likely to operate the greatest number of frequencies per day on the Paris-Amsterdam route (paragraph 3.4 of the commitments

package). Consequently, a divestiture en bloc remains a possibility where a new entrant is able to ensure a high number of daily frequencies on that route. The flexibility thus offered by the commitments enables a divestiture of slots to be made which can be adapted to the needs of potential new entrants, given that the new entrant will be able, in the case of Paris, to choose between Orly and CDG.

173 It follows from the foregoing that the applicant has adduced no relevant evidence to sustain its argument that the Commission failed to demonstrate how the divestiture of those slots would enable a transfer of market shares to be made such as to remove the dominance of the parties to the merger on the 14 markets affected.

174 It is also to be noted that the market shares held by the parties to the merger led the Commission to conclude that commitments should be offered on the markets affected and on which those parties enjoyed a market share of almost 50%, thereby respecting the presumption of dominance as laid down by the case-law (see, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60).

175 Accordingly, the fact that the parties to the merger may retain a sizeable share of the markets affected, as the applicant alleges is the case on the Paris-Amsterdam market, does not prove a manifest error of assessment on the part of the Commission. The Commission accepted significant commitments on that market in the knowledge, first, that the entry of new competitors on that route will be encouraged by the remedial measures and, second, that the improvements in the Thalys infrastructures which will be completed in 2007 will make it more competitive for those passengers for whom time is a priority. Those matters constitute sufficient factors to reduce the competitive strength of the merged entity.

176 It follows from the foregoing that the applicant has not demonstrated that the Commission committed a manifest error of assessment.

177 Therefore, the fourth part of the plea must be rejected.

The fifth part, alleging that the other remedial measures are inadequate

– Arguments of the parties

178 The applicant considers that the remedial measures do not guarantee the level of certainty and confidence required to ensure that a competitive structure will be restored. It notes that the parties to the merger supported their commitments relating to slots with so-called behavioural commitments within the ambit of Article 81 EC. The applicant infers from this that the remedial measures are ineffective and will not prevent the emergence or strengthening of a dominant position because they are neither economically nor strategically consistent. Furthermore, the Commission has made no provision in the contested decision for revocation in the event that the commitments are not fulfilled.

179 Lastly, the applicant considers that the Commission's approach is a breach of the principle of the protection of legitimate expectations, and adds that the terms of the commitments do not show how they can be fully effective.

180 The Commission claims that the applicant has failed to substantiate its argument. It notes in this regard that the network carriers considered the proposed commitments package sufficient to eliminate the competition problems. Furthermore, as regards the behavioural nature of the commitments in question, the Commission insists that the divestiture of slots, unlimited in duration, is not based on mere be-

havioural commitments, since the obligations imposed on the merged entity are conditions and not merely obligations.

– Findings of the Court

181 In the present case it is clear from the contested decision that the commitments entered into in respect of slots were reinforced by other, substantial measures favouring competition, such as a frequency freeze for six consecutive IATA seasons, interline agreements, blocked-space agreements, special pro-rate agreements, access to frequent flyer programmes, intermodal services and obligations pertaining to fares. Consequently, the criticism cannot be made that the Commission confined its decision to the question of access to slots.

182 As regards the applicant's argument that the commitments are weak because they are behavioural, it must be borne in mind that behavioural commitments are not by their nature insufficient to prevent the creation or strengthening of a dominant position, and that they must be assessed on a case-by-case basis in the same way as structural commitments (*EDP* v *Commission*, paragraph 44 above, paragraph 100; see also, to that effect, *Gencor* v *Commission*, paragraph 40 above, paragraph 319; Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 161, confirmed in Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 85).

183 In the light of the provisions of the contested decision relating to the divestiture of slots, the most important remedial measure in the present case, the commitments in question may be regarded as structural (paragraphs 2 and 14 of the commitments package). The parties to the merger undertake for a limited period, subject to exceptional circumstances which would justify lifting or amending the undertaking, not to use the slots divested. Therefore the parties to the merger are not able to recover slots once divested since those which are no longer used must be surrendered to the coordinator, which eliminates any behavioural aspect likely to affect the efficacy of the commitments (paragraph 2.2 of the commitments package).

184 It should also be noted that the commitments were significantly reinforced, since the parties to the merger undertook to reduce the bracket periods from 45 to 30 minutes for short-haul routes and from 120 to 90 minutes for long-haul routes, conditions which were regarded as fundamental by the new entrants in order to facilitate market entry (see, to that effect, recitals 159 to 167 of the contested decision).

185 It follows that in the present case the applicant has not shown that the remedial measures are ineffective, its argument in that regard being wholly inadequate.

186 Moreover, as regards the applicant's argument that the Commission failed to make the contested decision expressly subject to revocation should the commitments not be fulfilled, the Court observes that the contested decision lays down a fast-track procedure for resolving disputes where a new entrant, a new supplier of air transport services or an intermodal partner has reason to believe that the merged entity is not complying with the terms of the commitments made vis-à-vis that party (paragraph 12 of the commitments package).

187 It should further be noted that the commitments are subject to supervision by a trustee, who is responsible for monitoring the satisfactory discharge by the merged entity of the obligations entered into in the commitments, in so far as they fall within the scope of that trustee's mandate, and who may propose to the merged entity such

measures as he considers necessary to ensure fulfilment of the commitments (paragraph 11.2.1 of the commitments package).

188 It follows from the foregoing that the parties to the merger are not subject to mere declarations of intention but are subject in this case to obligations, any breach of which will result in revocation of the contested decision authorising the merger, pursuant to Article 6(3)(b) of Regulation No 4064/89. It follows that the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment as regards the other measures imposed on the parties to the merger, or that it breached the principle of the protection of legitimate expectations in failing to apply as it should have done the notice on remedies.

189 Lastly, as regards the applicant's argument that the wording of the commitments does not ensure their efficacy in preserving competition, it must be observed that in the circumstances of the present case the commitments cannot be considered to be of such an extent and complexity that the Commission found it impossible to determine with the requisite degree of certainty that effective competition would be restored in the market (see, to that effect, *BaByliss* v *Commission*, paragraph 35 above, paragraph 178). Similarly, the commitments accepted by the Commission were sufficiently specific to enable the Commission to assess their effects on the markets affected, since the commitments package sets out precisely the way in which the commitments will be implemented. Accordingly, that argument must be rejected as unfounded.

190 Therefore, the fifth part of the plea must be rejected.

The sixth part, alleging failure to identify a new entrant and to set a time-limit for that entry

– Arguments of the parties

191 The applicant observes that in previous decisions relating to the air transport sector the Commission has required the parties to identify in advance a potential new entrant for the services identified by the Commission as raising competition problems (Austrian Airlines/Lufthansa (Case COMP/37.730)). The Commission satisfied itself in the present case with the 'concrete interest' expressed by the airlines Volare, Meridiana and Virgin Express without ensuring that these declarations of intent would be translated into actual entry capable of countering the anti-competitive effects. If the Commission had carried out some simple research, Volare's financial difficulties would have been easily discovered, so that Volare could not be regarded as a suitable purchaser. Consequently, the applicant takes the view that the Commission is gambling on the entry of a new entrant, an attitude inconsistent with the Commission's duty to ensure that serious doubts as to the compatibility of the merger are eliminated.

192 In addition, the Commission merely asserted that the commitments 'reduce significantly the risk of lack of new entry'. However, it recognises that there remains a real risk that new entry will not occur, stating in the defence that 'even if no new competitor enters a particular route, the commitments package may fulfil its purpose' and adding that 'this would be the case if it constrains the merged entity's behaviour on such markets due to potential competition'.

193 The applicant further submits that the notice on remedies states that commitments must be capable of being implemented effectively and within a short period. Thus, and given the importance of the identity of a new entrant and uncertainties as

to the existence of potential entrants, the entry should have occurred before the merger was implemented. The applicant stresses that no new entrant has begun to operate on any of the slots divested. Thus, by failing to lay down a mechanism ensuring an effective entry within a precise period, the Commission has breached the requirements laid down by Regulation No 4064/89.

194 The Commission asserts that it was not necessary for the parties to designate a new entrant in advance because the Commission's consultation of the participants in the market before adopting the contested decision itself identified potential new entrants, such as Volare, Virgin Express and Meridiana.

195 As for the applicant's argument that the Commission merely imposed commitments 'reducing significantly the risk of lack of new entry', the Commission stresses that that citation was wrongly interpreted by the applicant since that passage of the defence was intended to show that the impact of the remedies was far-reaching and would thus 'increase the value of the slots released and thereby reduce significantly the risk of lack of new entry'. The Commission thus made a comparison in that passage between the merger as it actually stood, taking into account the remedies imposed, and previous alliance and merger decisions in the air transport sector.

196 Lastly, as regards the applicant's argument that the contested decision did not provide for fast and effective implementation of the commitments, the Commission points out that this was not pleaded in the application and is therefore inadmissible. In any event, the Commission considers that the fact that there has been no new entrant yet is irrelevant, since the validity of the contested decision must be judged by reference to the situation as it stood at the date of its adoption.

– Findings of the Court

197 Article 6(2) of Regulation No 4064/89 provides that the Commission may authorise a merger if the commitments proposed by the parties dispel the serious doubts as to the compatibility of the merger with the common market. Regulation No 4064/89 thus lays down the objective to be achieved by the Commission, but leaves it a wide discretion as to the form which the commitments in question may take. It does not require the notifying parties to identify a new entrant, even though it may be necessary in certain cases to do so, in particular where no competitor shows any interest in entering an affected market.

198 In this case the applicant has failed to show that identification by name was required, since various competitors, such as Meridiana, Virgin Express and Volare, expressed an interest during the administrative procedure in entering the affected markets following the commitments made by the parties to the merger.

199 It is stated in the Commission's pleadings that Volare had applied for slots on the Paris-Amsterdam, Amsterdam-Milan, Amsterdam-Venice and Amsterdam-Bologna routes. The Commission also stated at the hearing that Volare had obtained slots following Commission Decision 2004/841/EC of 7 April 2004 relating to a proceeding pursuant to Article 81 of the EC Treaty (COMP/A.38284/D2 – Air France/Alitalia) (OJ 2004 L 362, p. 17), very shortly before the contested decision was adopted, a fact which supported it in finding that the interest shown by Volare in the present case was credible.

200 That company did not enter those markets because of a change in the ownership

of Volare's shares, the Commission claims. If the lack of market penetration is linked to financial difficulties faced by Volare, as the applicant submits, and even if the Commission could have made a detailed investigation of the financial situation of that airline so as to ensure that its application for slots would be successful, the lack of any such verification does not amount to a manifest error of assessment such as to undermine the lawfulness of the contested decision. As stated in the Commission's pleadings, other competitors were likely to enter the markets affected, since in Europe there are numerous low-cost airlines inclined to enter these markets, including Ryanair, Virgin Express, Smartwings, Sterling, Air Service and SkyEurope.

201 Moreover, entry to a new market may require time to enable new entrants to assess whether entry to that market is likely to be profitable, in particular because of the investment required. It should be noted in this regard that the contested decision states that the divestiture of slots is unlimited in duration, thereby enabling new entrants to enter the markets affected at any time and without limitation as to duration (paragraph 2 of the commitments package).

202 Furthermore, if no new entrant enters the affected markets, there is in any event a certain competitive pressure on the parties to the merger because, if the merged entity decides to increase its prices, new competitors may be encouraged to enter those markets, which would become more attractive. According to the file, on the routes between Austria and Germany no airline was competing with Lufthansa and Austrian Airlines five years ago. However, the existence of substantial profit margins due to the high prices charged by those two companies attracted new entrants, thereby forcing Lufthansa and Austrian Airlines to react by adapting their price policy in order to remain competitive. It follows that the Commission was entitled to infer that it was very likely that a new competitor would enter the affected markets.

203 As for the argument that no new entrant has entered the affected markets, it is settled case-law that the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87; Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119).

204 Consequently, the contested decision must be assessed on the basis of the facts existing at the time when the measure was adopted and not in the light of subsequent events. The fact that at the date of the hearing no entrant had penetrated the affected markets is thus irrelevant.

205 As for the applicant's argument that the Commission did not ensure that a new entrant would enter shortly after the merger was authorised, the Court finds that that criticism, which was not put forward in the application, relates to the present plea, since it seeks to show that there was a manifest error of assessment with regard to the content of the commitments made. It follows that that argument is not a new plea in law as the Commission alleges and is consequently admissible.

206 The Commission was not required to identify a definite new entrant since various competitors had expressed an interest in entering the affected markets. Of the applicant's argument there therefore remains only the complaint that the Commission

failed to ensure that a new entrant was likely to enter those markets rapidly.

207 According to the notice on remedies, commitments must be capable of being implemented effectively and within a short period for the Commission to authorise a merger (paragraphs 10 and 19). In the present case, the contested decision requires the slots to be released one month after the merger (paragraph 13 of the commitments package). Accordingly, the merger parties were required to release the slots within a short mandatory period, thereby allowing and favouring the rapid entry of a new competitor.

208 Consequently, the complaint that the Commission failed to ensure that a new entrant would intervene rapidly is unfounded.

209 In the light of the foregoing, the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment by failing to identify a new entrant and by failing to set a target date for entry to the affected markets.

210 Therefore, the sixth part of the plea must be rejected.

The seventh part, alleging failure to take account of the Thalys high-speed train as a competitor

– Arguments of the parties

211 According to the applicant, the presence of Thalys deters new entrants from the Paris-Amsterdam route. It observes that Thalys already has a market share of around 45% on that route, which will probably increase as a result of improvements in the infrastructure which will reduce the journey time. Moreover, the Commission erred in finding that a frequency of six flights per day sufficed for time-sensitive passengers, whereas it accepted that such a frequency in the case of Thalys was insufficient (paragraph 71 of the contested decision).

212 The Commission denies that allegation and notes that Thalys is not competitive for time-sensitive customers, mainly owing to the duration of the train journey. This situation will only change with a reduction in the journey time, which would require significant upgrading of the infrastructure.

– Findings of the Court

213 The applicant's complaint is to be understood as seeking to show that by failing adequately to appreciate Thalys's competitive impact on the Paris-Amsterdam market the Commission committed a manifest error of assessment.

214 The contested decision indicates that on the Paris-Amsterdam route Thalys provides six frequencies per day, with a travelling time of four hours and nine minutes (one way), compared with about three hours by air from city centre to city centre (paragraphs 70 to 72 of the contested decision). Therefore, in the case of passengers who are not time-sensitive, Thalys may be regarded currently as a competitor. By contrast, the Commission was able to find that Thalys was not a competitor in respect of time-sensitive customers on the basis, inter alia, of the travelling time, since the return journey by train takes almost two hours longer. That being so, only reducing the journey time could alter the situation, something which would require, as the Commission points out, significant improvement of the infrastructure.

215 The applicant has adduced no evidence to show that in the case of Thalys the Commission erred in drawing a distinction between passengers who are time-sensitive

and those who are not. Consequently, the applicant's criticism that the Commission erred in finding that a frequency of six flights per day was sufficient for time-sensitive passengers, whereas it recognised in paragraph 71 of the contested decision that such a frequency was insufficient for Thalys to overcome the competition problems with regard to time-sensitive passengers, cannot be upheld.

216 As for the applicant's argument that Thalys deterred new entrants, it should be noted that Thalys's commercial growth preceded the merger, so that airlines wishing to enter that market had to take account of that competitive factor. Thalys's presence on the Paris-Amsterdam market thus prompted the Commission to ensure that not only the competition exercised by the airlines, but also that exercised by suppliers of other modes of transport, such as rail transport, would be preserved.

217 The remedies concerning intermodal services enable, for example, the company operating Thalys to sell a return ticket from Paris to Amsterdam permitting a traveller to take the train one way and return by plane. In order to make that option attractive, it is provided that the Thalys operator will be in a position, as regards the return flight, to benefit from all promotional tariffs offered by the merged entity and will thus be able to offer intermodal services at competitive prices (paragraph 7 of the commitments package). It is stated in this regard in the Commission's pleadings that Georg Verkehrsorganisation GmbH, a rail operator, is in talks with Air France to enter into an intermodal agreement for the Paris-Amsterdam market, which demonstrates the attraction of intermodal agreements.

218 Accordingly, the applicant's argument that Thalys deters new competitors on the Paris-Amsterdam route does not show that the Commission manifestly erred in its assessment of the competition. Therefore, the seventh part of the plea must be rejected.

219 It is clear from the foregoing considerations that the applicant has not demonstrated the existence of a manifest error of assessment on the part of the Commission, since it has not succeeded in showing that those commitments were not sufficient to dispel the serious doubts which had arisen as to the compatibility of the merger with the common market. Consequently, the fifth plea must be rejected in its entirety.

220 In those circumstances, the action must be dismissed.

9.

European General Court 6 July 2010, Case T-411/07.
Aer Lingus Group plc v European Commission.

(omissis)

Legal context

1 Under the heading 'Definition of concentration', Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p.1) ('the merger regulation') provides that:

'1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertak-

ing, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking …'
2 Under the heading 'Powers of decision of the Commission', Article 8 of the merger regulation provides at paragraph 4 that:
'Where the Commission finds that a concentration:
(a) has already been implemented and that concentration has been declared incompatible with the common market
…
the Commission may:
– require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,
– order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision. In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.'
3 Article 8(5) of the merger regulation provides that:
'The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:
…
(c) has already been implemented and is declared incompatible with the common market.'
4 Article 21 of the merger regulation, entitled 'Application of the Regulation and jurisdiction', provides at paragraph 3 that:
'No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.'

Facts at the origin of the dispute

Parties to the dispute

5 The applicant, Aer Lingus Group plc, is a public limited company incorporated under Irish law. Following its privatisation in 2006 by the Irish Government, the State retained 25.35% of its capital and, on 2 October 2006, Aer Lingus Group's shares were listed on the stock exchange. Aer Lingus Group is the holding company of Aer Lingus Ltd (those two companies being referred to collectively as 'Aer Lingus'), an airline based in Ireland which provides scheduled flights from and to Dublin, Cork and Shannon airports.
6 Ryanair Holdings plc ('Ryanair') is a company listed on the stock exchange

which provides scheduled flights in 40 countries, including between Ireland and other European countries.

Ryanair's bid for Aer Lingus and acquisition of the shareholding

7 On 5 October 2006, that is to say three days after Aer Lingus' shares were first listed, Ryanair announced its intention to launch a public bid for the entire share capital of Aer Lingus ('the public bid'). That public bid was launched on 23 October 2006, and the time-limit for accepting the bid was initially set as 13 November 2006, which was later extended by Ryanair until 4 December 2006, then again until 22 December 2006.

8 Just before announcing its intention to launch a public bid, Ryanair had acquired on the market a shareholding of 16.03% in the capital of Aer Lingus. On 5 October 2006 Ryanair increased that shareholding to 19.21%. Shortly thereafter Ryanair acquired further shares, so that it held 25.17% of Aer Lingus by 28 November 2006. That shareholding remained unchanged until August 2007 when, notwithstanding the adoption, on 27 June 2007, of the Commission of the European Communities decision referred to in paragraph 15 below, Ryanair acquired a further 4.3% of the capital of Aer Lingus, increasing its shareholding to 29.3%.

Examination and prohibition of the notified concentration

9 On 30 October 2006, the proposed concentration by which Ryanair was to acquire, for the purposes of Article 3(1)(b) of the merger regulation, control of Aer Lingus by the public bid was notified to the Commission in accordance with Article 4 of that regulation ('the notified concentration' or 'the concentration').

10 By email of 19 December 2006, Ryanair informed the Commission that its share acquisitions formed part of its plans to gain control of Aer Lingus.

11 By decision of 20 December 2006, the Commission found that the notified concentration raised serious doubts as to its compatibility with the common market and decided to initiate the detailed examination procedure, in accordance with Article 6(1)(c) of the merger regulation. The concentration is described in recital 7 in the preamble to that decision as follows:

'As Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than 10 days before launching the public bid, and the further 6% shortly thereafter, the entire operation comprising the acquisition of shares before and during the public period as well as the announcement of the public bid itself is considered to constitute a single concentration within the meaning of Article 3 of the merger regulation.'

12 The opening of the detailed investigation caused Ryanair's public bid to lapse pending a final decision in that case. Irish takeover rules require public bids subject to the Commission's jurisdiction to lapse if the Commission initiates the procedure provided for in Article 6(1)(c) of the merger regulation. However, in a press release dated 20 December 2006, Ryanair's CEO stated:

'Ryanair remains committed to acquiring Aer Lingus and will continue this process to – what we believe will be – the successful conclusion of this Phase II investigation.'

13 On 3 April 2007 the Commission sent Ryanair a statement of objections in accordance with Article 18 of the merger regulation. Point 7 of that statement describes the notified concentration in identical terms to those in the decision to initiate the

detailed examination procedure.

14 In its reply of 17 April 2007 to the statement of objections, Ryanair informed the Commission that it was committed to refraining from exercising the voting rights attached to its Aer Lingus shares until the conclusion of the detailed examination procedure. It also stated that those shares did not enable it to exercise control over Aer Lingus in any event.

15 Pursuant to Article 8(3) of the merger regulation, the Commission stated, on 27 June 2007, that the notified concentration was incompatible with the common market (Decision C(2007) 3104, Case COMP/M.4439 – *Ryanair/Aer Lingus*; 'the Ryanair decision'). That decision is the subject of Case T-342/07 *Ryanair* v *Commission*, in which Aer Lingus intervenes in support of the Commission.

16 Recital 12 to the Ryanair decision is worded as follows:

'As Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than 10 days before launching the public bid, and the further 6% shortly thereafter, and in view of Ryanair's explanations of the economic purpose it pursued at the time it concluded the transactions, the entire operation comprising the acquisition of shares before and during the public bid period as well as the public bid itself is considered to constitute a single concentration within the meaning of Article 3 of the merger regulation.'

Correspondence between Aer Lingus and the Commission during the procedure for the examination of the concentration

17 During the procedure for the examination of the concentration, Aer Lingus presented a number of submissions to the Commission in relation to Ryanair's shareholding in Aer Lingus.

18 As early as the preliminary examination procedure, Aer Lingus requested the Commission to treat Ryanair's shareholding and its public bid as a single concentration. Following the decision to initiate the detailed examination procedure, in which the Commission considered that those two elements formed part of a single concentration, Aer Lingus requested the Commission, by letter of 25 January 2007, then by letter of 7 June 2007, to require Ryanair to dispose of its shareholding in Aer Lingus and to take the necessary interim measures in accordance with Article 8(4) and (5) of the merger regulation. In the alternative, should the Commission conclude that it had no power to act under those provisions, Aer Lingus asked it to make a clear statement that national competition authorities were not precluded by Article 21(3) of the merger regulation from exercising their powers in connection with that shareholding.

19 On 27 June 2007, that is to say the day on which the Ryanair decision was adopted, the Directorate-General (DG) 'Competition' of the Commission wrote to Aer Lingus informing it that the Commission's services did not have the power to order Ryanair to divest its minority shareholding, or to take other measures to restore the situation prevailing before the concentration was implemented, under Article 8(4) and (5) of the merger regulation. DG Competition added that the Commission's position was without prejudice to the Member States' powers to apply, if necessary, their national legislation on competition to Ryanair's acquisition of a minority shareholding in Aer Lingus.

Correspondence between Aer Lingus and the Commission following the Ryanair decision,

invitation to act under Article 232 EC and the contested decision

20 The Ryanair decision prohibiting implementation of the Ryanair/Aer Lingus concentration contains no measure relating to Ryanair's 25.17% shareholding in Aer Lingus.

21 On 12 July 2007, Aer Lingus sent a memorandum to the Commission, the Irish Competition Authority, the United Kingdom's Office for Fair Trading and the German Bundeskartellamt (Federal competition authority), inviting those authorities to reach a common position as to the authority competent to act in relation to that shareholding. According to the applicant, that memorandum was addressed to the Office for Fair Trading and the Bundeskartellamt because those authorities have competence to take action in connection with minority shareholdings under their provisions on the control of concentrations, and to the Irish Competition Authority because both the companies in question are Irish companies and the consumers most affected are those who reside in Ireland.

22 By letter of 3 August 2007, the Commission's services reiterated their view that they did not have the power to order Ryanair to divest its shareholding, but that that did not prevent the Member States from applying their own legislation on competition.

23 On 17 August 2007, Aer Lingus sent a letter to the Commissioner for Competition asking the Commission to act under Article 232 EC by initiating a procedure under Article 8(4) of the merger regulation and by adopting interim measures under Article 8(5) of that regulation, or by formally stating that it did not have the power to do so. Aer Lingus also asked the Commission to adopt a position on the interpretation of Article 21 of the merger regulation as regards Ryanair's shareholding of 25.17% in Aer Lingus.

24 On 11 October 2007, Aer Lingus received the Commission's response ('the contested decision').

25 First, the Commission rejects the request of Aer Lingus that it initiate proceedings against Ryanair under Article 8(4) of the merger regulation. It notes that it is apparent from Article 3(1) and (2) of the merger regulation that a concentration arises only where an undertaking acquires control, that is the possibility of exercising decisive influence on another undertaking (contested decision, point 8). The Commission also points out that it is apparent from Article 8(4) of that regulation that, if it finds that a concentration has already been implemented and that the concentration has been declared incompatible with the common market, it may require the undertakings concerned to dissolve the concentration, in particular through the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration. It notes that it may also take any other appropriate measures to ensure that the undertakings concerned dissolve the concentration or take measures to restore the situation prevailing prior to the implementation of the concentration (point 9).

26 The Commission then applies those provisions to the case at hand and reaches the conclusion, in points 10 and 11 of the contested decision, that the notified concentration has not been implemented and that the contested shareholding does not grant Ryanair control of Aer Lingus. Those points read as follows:

'10. The Commission considers that the concentration assessed in the present case has not been implemented. Ryanair has not acquired control of Aer Lingus and the [Ryanair] decision also excludes that Ryanair acquires control of Aer Lingus in the future by way of the notified operation. The transactions that have been carried out during the Commission's proceedings can therefore not be considered as part of an implemented concentration.
11. In this respect it is necessary to point out that the 25.17% minority stake does not grant Ryanair *de jure* or *de facto* control of Aer Lingus within the meaning of Article 3(2) of the … [m]erger [r]egulation. Even though minority shareholdings may in certain circumstances lead to a finding of control …, the Commission has no indications that such circumstances are present in this case. In fact, according to the information available to the Commission, Ryanair's rights as a minority shareholder (in particular the right to block so-called "special resolutions" pursuant to Irish Company Acts) are associated exclusively to rights related to the protection of minority shareholders. Such rights do not confer control in the sense of Article 3(2) of the … [m]erger [r]egulation … In addition, Aer Lingus itself does not seem to suggest that this minority stake would lead to control by Ryanair over Aer Lingus and has not provided the Commission with any evidence which would suggest existence of such control.'

27 In addition, in points 12 and 13 of the contested decision, the Commission refutes the analysis suggested by Aer Lingus that Ryanair's minority shareholding represents a partial implementation of the concentration declared by the Commission to be incompatible with the common market, which should be dissolved in accordance with Article 8(4) of the merger regulation:

'12. The suggested interpretation of the acquisition of the minority shareholding as a "partial implementation" covered by Article 8(4) of the … [m]erger [r]egulation is difficult to reconcile with the wording of that provision, which clearly refers to a concentration that "has already been implemented". As the decisive element of a concentration under the .. [m]erger [r]egulation – the acquisition of control – is missing, there is no concentration which "has already been implemented" and the parties thus cannot be required to "dissolve the concentration". The Commission's competence is limited to situations in which the acquirer has control over the target. The purpose of decisions under Article 8(4) of the … [m]erger [r]egulation is to address the negative effects on competition that are likely to result from the implementation of a concentration as defined in Article 3 of the … [m]erger [r]egulation. In the present case, such negative effects cannot occur, since Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration.
13. In this respect, the current case clearly differentiates from the situation in past cases where Article 8(4) of the … [m]erger [r]egu1ation was applied, such as Tetra Laval/Sidel … or Schneider/Legrand …, where the public bid had already been successfully completed and the acquirer had acquired control of the target.'

28 In so far as Article 8(5) of the merger regulation uses the same expression as Article 8(4) to identify the situations in which the Commission may act, and given that, in the present case, no concentration has been implemented, the Commission rejects, for the same reasons, Aer Lingus' request to adopt interim measures pursuant to Article 8(5) of that regulation (see points 15 to 17 of the contested decision).

29 Second, in relation to the request for an interpretation of Article 21 of the merger regulation, regarding Ryanair's shareholding of 25.17% in Aer Lingus, the Commission states that paragraph 3 of that article merely imposes an obligation on the Member States and does not confer any specific duties or powers on the Commission. The Commission therefore considers that it does not have the power to give the binding interpretation of a provision addressed to the Member States and that it is not in a position to act in response to Aer Lingus' request for an interpretation (see points 20 to 25 and the last sentence of point 26 of the contested decision).

30 The Commission also states that, if a Member State fails to comply with Article 21(3) of the merger regulation, the Commission still has the power to start an infringement procedure under Article 226 EC (point 21 of the contested decision). Similarly, if Aer Lingus was of the opinion that a national competition authority was obliged to act with respect to Ryanair's minority shareholding pursuant to its national legislation on competition, it could have brought the matter before that authority and/or the competent national court. If a national court considered that an interpretation of Article 21(3) of the merger regulation was necessary to enable it to give judgment, it could have requested the Court of Justice to give a preliminary ruling pursuant to Article 234 EC in order to clarify the interpretation of that provision and to ensure a consistent interpretation of the Community law at issue (see point 23 of the contested decision).

Procedure and forms of order sought by the parties

31 By application lodged at the Registry of the Court on 19 November 2007, the applicant brought an action for annulment of the contested decision pursuant to the fourth paragraph of Article 230 EC.

32 By separate document lodged on the same day, the applicant also made an application pursuant to Article 242 EC for interim measures and for suspension of the operation of the contested decision.

33 By order of 18 March 2008 in Case T-411/07 R *Aer Lingus* v *Commission* [2008] ECR II-411, the President of the Court dismissed the application for interim measures and for suspension of operation of the decision.

34 By separate document lodged at the Registry on 19 November 2007, the applicant also made an application for an expedited procedure under Article 76a of the Rules of Procedure of the Court. By letter of 5 December 2007, the Commission presented its observations on that application.

35 By decision of 11 December 2007, the Court (Third Chamber) rejected the application for an expedited procedure.

36 By order of 23 May 2008, the President of the Third Chamber of the Court granted Ryanair leave to intervene in the dispute in support of the form of order sought by the Commission.

37 By fax received at the Registry on 4 August 2008, Ryanair stated that it considered that the observations submitted by the Commission in its pleadings were sufficient and that it had therefore decided not to lodge a statement in intervention. That fax contained the form of order sought by it in this dispute.

38 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure.

39 The parties presented oral argument and replied to the questions put by the

Court at the hearing on 7 July 2009.

40 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

41 The Commission contends that the Court should:

– dismiss the action as unfounded, in so far as it concerns its refusal to initiate a procedure under Article 8(4) of the merger regulation and to adopt interim measures under Article 8(5) thereof;

– declare the action inadmissible or, in the alternative, dismiss the action as unfounded, in so far as it concerns its refusal to provide an interpretation of Article 21(3) of the merger regulation;

– order the applicant to pay the costs.

42 Ryanair contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs occasioned by the intervention.

Law

43 The applicant raises two pleas in law in support of its action. The first plea alleges an infringement of Article 8(4) and (5) of the merger regulation and the second is based on an infringement of Article 21(3) of that regulation. Given that the applicant presents the second plea in a way which is closely related to the first, a fact which was confirmed at the hearing at which the applicant stated that the second plea could be regarded as part of the first, the Court will examine the two pleas together.

Arguments of the parties

44 In relation to the first plea, alleging an infringement of Article 8(4) and (5) of the merger regulation, the applicant submits that, in the contested decision, the Commission infringed those provisions by finding, following the Ryanair decision prohibiting implementation of the proposed concentration, that it did not have the power to require Ryanair to divest its minority shareholding in Aer Lingus, take appropriate measures to restore the situation prevailing before the concentration or take interim measures.

45 First of all, the applicant challenges the statement made in point 12 of the contested decision that 'In the present case, [the] negative effects [on competition] cannot occur, since Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration'. On the contrary, Ryanair's shareholding has significant negative effects on competition and if, in such circumstances, the Commission did not have power under Article 8(4) and (5) of the merger regulation to eliminate those effects, there would be a serious lacuna in the merger regulation and in the Community's competence to secure 'undistorted competition'.

46 The applicant claims that the significant negative effects on competition resulting from Ryanair's shareholding in Aer Lingus include the following: Ryanair used its shareholding to seek access to Aer Lingus' confidential strategic plans and business secrets; it blocked a special resolution relating to an increase in Aer Lingus' capital and requisitioned two extraordinary general meetings in order to reverse strategic decisions adopted by Aer Lingus. Ryanair has, moreover, used its position as a shareholder to mount a campaign against Aer Lingus' management and to threaten its directors with

litigation for breach of statutory duties towards it. Those facts weaken Aer Lingus as an effective competitor of Ryanair.

47 From an economic point of view, that type of minority shareholding between competitors in a duopoly inherently distorts competition. Ryanair has less incentive to compete with Aer Lingus since, as a shareholder, it wishes to maintain the value of its shareholding and ensure that Aer Lingus is profitable. Such a shareholding changes the interests of the parties by encouraging price increases and tacit collusion, which distorts competition. Aer Lingus' market and financial attractiveness is also reduced as a result of Ryanair's shareholding.

48 The statement challenged by Aer Lingus is also contrary to the Commission's previous practice as set out in Decision 2004/103/EC of 30 January 2002 setting out measures to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case COMP/M.2416 – Tetra Laval/Sidel) (OJ 2004 L 38, p. 1) ('the Tetra Laval decision'), in which the Commission found that Tetra Laval should not be allowed to retain a shareholding in Sidel, and in Decision 2004/276/EC of 30 January 2002 requiring undertakings to be separated adopted pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case COMP/M.2283 – Schneider/Legrand) (OJ 2004 L 101, p.134) ('the Schneider decision'), in which the Commission found that Schneider's shareholding of less than 5% of Legrand's capital would not lead to negative effects on competition. In that regard, the applicant challenges the Commission's statement made in point 13 of the contested decision that the situation in the present case differs from those in *Tetra Laval* and *Schneider*, in which the public bid had already been fully implemented and the purchaser had acquired control of the target. That distinction is not relevant as regards assessing the statement made in point 12 of that decision that there are no negative effects on competition 'in the absence of control'. In *Tetra Laval* and *Schneider* the Commission took precisely the opposite view, namely that even if the relevant shareholdings were reduced to a level which did not allow the exercise of 'control', a minority shareholding would still result in an unacceptable distortion of competition. Moreover, the concentration at issue here remains a prospective concentration. Whether or not the public bid lapsed is immaterial since Ryanair maintained, and still maintains, its intention to acquire Aer Lingus. Differences in national rules applicable to public bids cannot be advanced as justification for one acquirer's being able to maintain a minority shareholding while another is required to dispose of it. The effect on competition is the same in either case. In the present case, the adoption of the Ryanair decision should not have the effect of depriving the Commission of competence to examine the distortion of competition arising from a part of the concentration which it has just prohibited.

49 The applicant also relies on the practice of the United Kingdom Competition Commission, which in October 2007 provisionally found that the acquisition by BSkyB of 17.9% of ITV's shares was likely to lessen competition substantially owing to the loss of rivalry between those two companies and to BSkyB's ability to have a material influence on ITV's management.

50 Secondly, the applicant claims that Article 8(4) of the merger regulation must

be interpreted as applying in this case to Ryanair's shareholding acquired as part of the prohibited concentration. The same reasoning applies, *mutatis mutandis*, to the Commission's competence to adopt interim measures under Article 8(5)(c) of that regulation.

51 First of all, the merger regulation must be given a teleological interpretation. Faced with a choice between two possible interpretations of the regulation, both the Court of Justice and the General Court have indicated that the narrower interpretation would deprive the merger regulation of its effectiveness, whereas the broader interpretation was consistent with the text of the merger regulation, even if that was not explicitly stated. The Commission's interpretation of Article 8(4) and (5) of the merger regulation is contrary to the regulation's purpose, which is to ensure a system of undistorted competition in accordance with Article 3(g) EC. The Commission's approach leaves the European Union helpless in the face of the distortion of competition created by Ryanair's minority shareholding, even though that shareholding was acquired as part of a prohibited concentration.

52 With regard to the request for application of Article 8(4) of the merger regulation, requiring that a concentration 'has already been implemented' and 'has been declared incompatible with the common market', the applicant points out that the Commission gives a purely literal interpretation of that provision by stating in point 10 of the contested decision that 'the concentration assessed in the present case has not been implemented' and that '[t]he transactions that have been carried out during the Commission's proceedings can therefore not be considered as part of an implemented concentration'. That interpretation is erroneous because the Commission takes the view that the 'transactions' to be examined in the contested decision are distinct from the concentration examined in recital 12 to the Ryanair decision (see paragraph 16 above). That interpretation is also erroneous because the Commission equates the term 'implemented' used in Article 8(4)(a) of the merger regulation with 'acquire control' in the sense of Article 3(2) of that regulation. In the applicant's view, it is clear that the concentration was implemented in the present case by means of transactions which form part of the prohibited concentration and which allowed Ryanair to acquire (and to continue to hold) more than 25% of Aer Lingus. The fact that the concentration was never fully consummated, because the Commission prevented it, does not mean that the concentration was not implemented, albeit partially, through the transactions referred to in recital 12 to the Ryanair decision. In that regard, the Commission's claim, in point 12 of the contested decision, that the concept of a concentration being 'partially implemented' finds no support in the wording of Article 8(4) is correct but of little assistance, since neither is it possible on the basis of the wording of that provision to require full implementation in the sense of acquiring control. According to the applicant, the guiding principle of Article 8(4) of the merger regulation is not the acquisition of control, but the need to restore the *status quo ante*, by reversing transactions forming part of the prohibited concentration.

53 A coherent approach to the concept of 'implementation' should also examine the meaning of that term in the light of Article 7(1) of the merger regulation, which provides that a concentration with a Community dimension cannot be 'implemented' either before it has been notified or before it has been declared compatible with

the common market. It may be concluded from an examination of the Commission's practice in that regard that it considers that that provision makes it possible to prevent partial implementations, including transactions falling short of a transfer of control. In this case, the Commission obtained an undertaking from Ryanair to suspend the exercise of the voting rights attached to its shareholding in Aer Lingus, although the exercise of those rights is not equivalent to the exercise of control. The concern here was therefore indeed to prevent possible negative effects on competition.

54 The applicant also claims that, without having to assess the different language versions of the merger regulation, the concept of 'implementation of a concentration' used by Article 8(4) and (5) and Article 7 can have three meanings: the full implementation of the concentration, the partial implementation of the entire concentration or the full implementation of part of the concentration. That ambiguity is exposed in this case, in which the Commission prohibited a concentration which was defined as comprising two parts (an acquisition of shares in the market and a public bid) of which only the former had been implemented.

55 As regards the second plea, alleging an infringement of Article 21(3) of the merger regulation, the applicant claims that the Commission's erroneous conclusions concerning the application of Article 8(4) and (5) of the merger regulation have led it into error regarding the interpretation of Article 21(3). If it is the case that the Commission indeed has power to adopt divestment measures in connection with Ryanair's shareholding, the national competition authorities therefore have no such power under Article 21(3). That approach supports the 'one-stop shop' principle. If that is correct, the Commission, in the contested decision, infringed Article 21(3) of the merger regulation by failing to state, unequivocally, that that provision precludes the intervention of national competition authorities and thereby leaving open the possibility of such intervention. That infringement is all the more serious, given that the relevant national authorities have issued conflicting opinions. A coherent interpretation of Article 8(4) and (5) of the regulation would exclude any interpretation of Article 21(3) which would prevent the Member States from applying their national laws to Ryanair's shareholding once the shareholding stands in isolation from the public bid and which would also leave the Commission without power to examine that shareholding under Article 8(4) of the merger regulation. Otherwise Ryanair's shareholding would enjoy legal immunity from both European Union and national law.

56 The Commission disputes that line of argument. It notes, in particular, that the merger regulation applies only to 'concentrations' which satisfy the definition set out in Article 3 of that regulation. In that context, the acquisition of a minority shareholding, which does not confer 'control' as such, does not constitute a 'concentration' under the merger regulation. The Commission also submits that Article 21(3) of the regulation does not confer any specific duties or powers on it and that it thus does not have the power to give an interpretation of that provision when called upon to act under Article 232 EC.

Findings of the Court

57 In calling on the Commission to act, Aer Lingus submits in essence that the shareholding in Aer Lingus acquired by Ryanair before or during the public bid represents a partial implementation of the concentration declared incompatible by the

Commission. In order to restore the conditions for effective competition, it claims that the Commission should thus require, pursuant to Article 8(4) of the merger regulation, the disposal of all the shares acquired by Ryanair (see paragraphs 8, 23, 44 et seq. above).

58 In the contested decision, the Commission rejects that request that it initiate proceedings against Ryanair under Article 8(4) of the merger regulation, considering that the concentration notified by that undertaking has not been implemented and that the disputed shareholding does not grant Ryanair control of Aer Lingus. The Commission also considers that, in the absence of a concentration which has been implemented as defined by the merger regulation, the interpretation suggested by the applicant goes beyond the limits of its powers (see paragraphs 25 to 27 above).

59 In order to assess the lawfulness of the contested decision in the light of the power invested in the Commission to require an undertaking to dissolve a concentration, in particular through the disposal of all the shares acquired in another undertaking, the reference point must be the relevant moment established by Article 8(4) of the merger regulation, which envisages a 'concentration' which 'has already been implemented' and which 'has been declared incompatible with the common market' (see paragraph 2 above).

60 In that regard, the contested decision was indeed adopted at a time when the Commission had declared that the concentration notified by Ryanair was incompatible with the common market. Since the Commission did not address the issue of Ryanair's minority shareholding in Aer Lingus in the Ryanair decision, which found the notified concentration to be incompatible under Article 8(3) of the merger regulation, it could still do so in a separate decision adopted on the basis of the final sentence of Article 8(4) of that regulation.

61 However, as is correctly stated in the contested decision, the other condition laid down in Article 8(4) of the merger regulation is not satisfied, since the notified concentration has not been implemented. In the present case, from the moment when the decision finding incompatibility with the common market was adopted, it was no longer possible for Ryanair, *de jure* or *de facto*, to exercise control over Aer Lingus or to exercise decisive influence on that undertaking.

62 From a legal point of view, the concept of concentration used in the merger regulation is important since it provides the basis for the Commission's powers under that regulation. The merger regulation applies to all concentrations with a Community dimension (Article 1(1)). The concept of concentration is defined in Article 3 of the regulation. Under Article 3(1), a concentration is deemed to arise where there is a change of control on a lasting basis which results, for example, from the merger of two undertakings or the acquisition by an undertaking of the control of another undertaking. Article 3(2) states that that control is constituted by rights, contracts or any other means which confer the possibility of exercising decisive influence on the undertaking concerned.

63 Thus, any transaction or group of transactions which brings about 'a change of control on a lasting basis' by conferring 'the possibility of exercising decisive influence on the undertaking concerned' is a concentration which is deemed to have arisen for the purposes of the merger regulation. Such concentrations have the following

characteristics in common: where before the operation there were two distinct undertakings for a given economic activity, there will only be one after it. Unlike in the case of a merger in which one of the two undertakings concerned ceases to exist, the Commission thus has to determine whether the result of the implementation of the concentration is to confer on one of the undertakings the power to control the other, that is to say a power which it did not previously hold. That power to control is the possibility of exercising decisive influence on an undertaking, in particular where the undertaking with that power is able to impose choices on the other in relation to its strategic decisions.

64 It is apparent from the above that the acquisition of a shareholding which does not, as such, confer control as defined in Article 3 of the merger regulation does not constitute a concentration which is deemed to have arisen for the purposes of that regulation. On that point, European Union law differs from the law of some of the Member States, in which the national authorities are authorised under provisions of national law on the control of concentrations to take action in connection with minority shareholdings in the broader sense (see paragraphs 21 and 49 above).

65 Contrary to the applicant's claims, the concept of concentration cannot be extended to cases in which control has not been obtained and the shareholding at issue does not, as such, confer the power of exercising decisive influence on the other undertaking, but forms part, in a broader sense, of a notified concentration examined by the Commission and declared incompatible with the common market following that examination, without there having been any change of control within the above meaning.

66 The Commission is not granted such a power under the merger regulation. According to the actual terms used in Article 8(4) of the regulation, the power to require the disposal of all the shares acquired by an undertaking in another undertaking exists only 'to restore the situation prevailing prior to the implementation of the concentration'. If control has not been acquired, the Commission does not have the power to dissolve the concentration. If the legislature had wished to grant the Commission broader powers than those laid down in the merger regulation, it would have enacted a provision to that effect.

67 From a factual point of view, it is not disputed that in the present case Ryanair's shareholding in Aer Lingus does not confer on Ryanair the power to 'control' Aer Lingus. In addition to the information given in points 10 and 11 of the contested decision, Aer Lingus states that '[it] accept[s] the assumption, made in paragraph 11 of the [c]ontested [d]ecision, that Ryanair did not, as at 27 June 2007, have "control" within the meaning of Article 3(2) [of the merger regulation]'. Equally, Aer Lingus does not claim that Ryanair's shareholding of 29.3% in Aer Lingus from August 2007 confers control of the company on it, but merely states that that shareholding gives it 'substantial opportunities to seek to interfere with the management and commercial strategy of Aer Lingus'.

68 In addition, in response to the applicant's arguments in relation to the alleged negative effects on competition, the Commission was correct in the contested decision to reject the claim that those effects could actually be assimilated to a form of control in the present case (contested decision, point 11). It is worth noting generally in that

regard that the merger regulation does not seek to protect companies from commercial disputes between them and their shareholders or to remove all uncertainty in relation to the approval of important decisions by those shareholders. If the management of Aer Lingus considers that Ryanair's conduct as a shareholder is abusive or unlawful, it may bring the matter before the competent national courts or authorities.

69 In any event, although it is true that the facts put forward by the applicant suggest that the relations between its management and Ryanair are tense and that they have opposing views on a number of points, they still do not prove – as is required for the Commission to be able to have recourse to Article 8(4) of the merger regulation – that it is possible to exercise decisive influence on that undertaking.

70 Thus, in so far as concerns the claim that Ryanair used its shareholding to seek access to Aer Lingus' confidential strategic plans and business secrets, the only evidence provided in support of that claim is a letter in which Ryanair requests, in general terms, a meeting to be held with the management of Aer Lingus. The application does not contain any evidence that confidential information was actually exchanged during such a meeting. In any event, such an exchange of information would not be a direct consequence of the minority shareholding, but would constitute subsequent conduct on the part of the two companies which could potentially be examined under Article 81 EC.

71 Similarly, as regards the claim that Ryanair voted against a special resolution that would have allowed the board of directors to issue shares without having first to offer them to existing shareholders, as is generally required under company law, it is apparent from the comments of Aer Lingus' CEO, reported in *The Irish Times* of 7 July 2007 in an article entitled 'Ryanair blocks Aer Lingus bid to reduce holding' and cited by the Commission without being disputed by the applicant, that the failure of that resolution did not have a significant impact on the company.

72 In so far as concerns the claim that Ryanair requisitioned two extraordinary general meetings in order to reverse strategic decisions adopted by Aer Lingus, the Commission states, without being contradicted by the applicant, that the board of directors of Aer Lingus rejected those two requests and that the planned decisions were implemented in spite of Ryanair's opposition. That example illustrates the fact that, contrary to the applicant's claims, Ryanair is not in a position to be able to impose its will.

73 As regards the claim that Ryanair mounted a campaign against Aer Lingus' management, that claim should be understood as another reference to the two extraordinary general meetings requisitioned by Ryanair and to the correspondence and public statements relating thereto. As the Commission points out in its pleadings, Aer Lingus rejected those two requests and implemented its decision as planned. Even if it were true that Ryanair had disrupted the management of Aer Lingus for several weeks, that would still not prove that it was able to exercise decisive influence on that undertaking within the meaning of the merger regulation.

74 In response to the argument that a minority shareholding in a competitor undertaking in a duopoly inherently distorts competition because the company with such a shareholding has less incentive to compete with a company in whose profitability it is interested, it must be observed that this claim is disproved by the facts. The

Commission states in that regard, without being contradicted by the applicant, that after the acquisition of its shareholding in Aer Lingus, Ryanair entered four routes previously served only by Aer Lingus and has increased its frequencies on six other routes where it competes with Aer Lingus (see Ryanair's press releases entitled 'Ryanair announces 6 new routes from Dublin' of 15 August 2007 and '31st new route from Shannon base and 3 new routes from Dublin,' of 25 October 2007). That theoretical argument is not sufficient, in any event, to show, as such, a form of control by Ryanair of Aer Lingus able to justify the divestment of the minority shareholding at issue in the present case.

75 The same is true of the argument that Ryanair's shareholding has a material impact on Aer Lingus' shares, making them less favourable for the latter. In principle, the attractiveness of Aer Lingus both financially and on the stock market is not based solely on Ryanair's minority shareholding, but must take into account the entire capital of that undertaking, in which other significant shareholders may also have a stake. Furthermore, even supposing that Ryanair's shareholding may affect Aer Lingus' attractiveness, that would not be sufficient to show that there is control within the meaning of the merger regulation.

76 The bounds of the powers invested in the Commission for the purposes of merger control would be exceeded if it were accepted that the Commission may order the divestment of a minority shareholding on the sole ground that it represents a theoretical economic risk when there is a duopoly, or a disadvantage for the attractiveness of the shares of one of the undertakings making up that duopoly.

77 An examination of the Commission's previous practice shows, in any event, that all the decisions adopted to date by the Commission under Article 8(4) of the merger regulation concern concentrations which have already been implemented, in which the target company had ceased to be an independent competitor of the purchasing company. Unlike in the present case, those decisions did not concern the applicability of Article 8(4) to the concentration at issue, but merely the measures appropriate to restore the competition which had been eliminated by the implementation of the concentration. Those measures may vary from one case to the next depending on the circumstances of the specific case. The Commission's previous practice in relation to the treatment of minority shareholdings under Article 8(4) of the merger regulation can thus not usefully be invoked to call into question the criteria laid down in that provision.

78 Consequently, the Commission cannot be accused of infringing Article 8(4) of the merger regulation by considering that no concentration had been implemented in the present case and that it did not have the power to require Ryanair to dispose of its shareholding in Aer Lingus. Only if such a shareholding had enabled Ryanair to control Aer Lingus by exercising *de jure* or *de facto* decisive influence on it, which is not the case here, would the Commission have had such a power under the merger regulation.

79 The above assessment is not affected by the fact that the Commission considered, during the examination procedure, that the shareholding acquired by Ryanair on the market just before and during the public bid – which, in its words, constituted a 'single concentration'– should be regarded as falling within the scope of that bid. For at that stage, namely that of the examination procedure, the Commission is not

concerned with 'restoring the situation prevailing prior to the implementation of the concentration' in the event that it were to adopt a decision declaring incompatibility, even where the notified concentration has been implemented. Those concerns arise only once a final decision has been adopted and when it is necessary to draw consequences from that decision after it becomes apparent that the situation at hand is not in accordance with it.

80 During the examination procedure, the Commission seeks rather to prevent situations in which a concentration is implemented even though it might still be declared incompatible with the common market. That is the goal of Article 7 of the merger regulation, which seeks to ensure that one of the founding principles of the regulation is respected, namely that concentrations with a Community dimension cannot be implemented without first being notified to, and authorised by, the Commission.

81 Article 4(1) of the regulation, entitled 'Prior notification …', states that concentrations defined in the regulation are to be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. That principle is also set out in Article 7 of the merger regulation, entitled 'Suspension of concentrations'. Under Article 7(1), a concentration with a Community dimension is not to be implemented either before its notification or until it has been declared compatible with the common market. Article 7(2) states that paragraph 1 is not to prevent the implementation of a public bid or of a series of transactions in securities, by which control within the meaning of Article 3 is acquired from various sellers, provided that the concentration is notified to the Commission pursuant to Article 4 without delay and that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission.

82 It should be observed that the obligation to suspend the implementation of the concentration until it has been authorised by the Commission is subject to an automatic derogation in the case of public bids or acquisition of control by means of a series of transactions in securities involving various sellers. To be able to benefit from that derogation, the interested parties must notify the Commission of the concentration without delay and not exercise the voting rights attached to those securities. As the Commission submits in its pleadings, that derogation effectively transfers the risk of having the operation prohibited to the acquirer. If, after the examination procedure, the Commission considers that the notified operation must be prohibited, the securities acquired to implement the concentration have to be disposed of, as is illustrated in *Tetra Laval* and *Schneider*, which are referred to in the contested decision and by the applicant (see paragraphs 27 and 48 above).

83 In that regard, the acquisition of a shareholding which does not, as such, confer control for the purposes of Article 3 of the merger regulation may fall within the scope of Article 7. The Commission's approach must be understood as using the concept of 'single concentration' to limit the risk of finding itself in a situation in which a decision finding incompatibility would need to be supplemented by a decision to dissolve in order to put an end to control acquired even before the Commission has taken a decision on its effects on competition. When the Commission requested Ryanair not to exercise

its voting rights, whereby it was also pointed out that those voting rights did not grant Ryanair control of Aer Lingus (see paragraph 14 above), it merely asked Ryanair to avoid putting itself in a situation in which it would be implementing a concentration liable to give rise to a measure adopted on the basis of Article 8(4) and (5) if found to be incompatible with the common market.

84 For those reasons, the Commission was correct to consider, in points 12 and 13 of the contested decision, that Ryanair's minority shareholding in Aer Lingus could not be regarded, in the present case, as the 'partial implementation' of a concentration capable of giving rise to a measure adopted on the basis of Article 8(4) and (5) if found to be incompatible with the common market.

85 Given that Ryanair did not actually take control of Aer Lingus, the disputed shareholding cannot be assimilated to a 'concentration' which 'has already been implemented', even if the operation by which that shareholding was acquired has been declared incompatible with the common market.

86 None of the arguments raised by the applicant in its pleadings or at the hearing, which essentially reproduce the theory which the contested decision already addresses, is capable of calling the above assessment into question.

87 Consequently, in spite of the finding that there was a single concentration and the finding that the concentration was incompatible with the internal market, as set out in the Ryanair decision, the Commission justified to the required legal and factual standard, in the contested decision, its decision not to adopt a measure pursuant to Article 8(4) of the merger regulation.

88 The same reasoning is valid for Article 8(5) of the merger regulation, in relation to which the applicant raises the same challenges to the Commission's analysis on that point in the contested decision, which reproduces, *mutatis mutandis*, the analysis made in relation to Article 8(4) of that regulation.

89 Finally, it should be noted that the Commission stated, in the contested decision, that Article 21(3) of the merger regulation merely imposed an obligation on the Member States and did not confer any specific duties or powers on the Commission. It therefore considered that it did not have the power to give a binding interpretation of that provision and that it was not in a position to act in response to Aer Lingus' request for an interpretation (see paragraph 29 above).

90 Like the Commission, the Court points out that Article 21(3) of the merger regulation states that '[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension' and that it thus does not confer the power on the Commission to adopt a measure producing binding legal effects of such a kind as to affect Aer Lingus' interests. The Commission can therefore not be criticised for having reiterated, in its response, the legal framework applicable to the present case and the consequences to be drawn from it, in particular in so far as concerns the actions provided for in Article 226 EC and Article 234 EC (see paragraph 31 above).

91 In addition, the applicant's arguments in the present case invite the Court to examine a hypothesis which is invalid in so far as the application of Article 8(4) and (5) of the merger regulation is not based on erroneous conclusions as claimed by the applicant (see paragraph 55 above). Where there is no concentration with a Commu-

nity dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules in place to that effect.

92 It follows from the above that the action must be dismissed in its entirety.

(omissis)

10.

European Court of First Instance 17 December 2008, Case T-196/04. Ryanair Ltd v Commission of the European Communities.

(omissis)

Background to the dispute

1 The applicant, Ryanair Ltd, is Europe's original and largest low fares airline. It has pioneered in Europe the 'low cost' business model, which involves minimising costs and maximising efficiency in all areas of its business so as to offer the lowest fares in every market and thereby attract high passenger volumes.

2 Ryanair commenced its operations from Charleroi Airport (Belgium) in May 1997 by launching an air route to Dublin.

3 In 2000 negotiations took place regarding the establishment by Ryanair of its first continental base at Charleroi.

4 At the beginning of November 2001 Ryanair entered into two separate agreements ('the agreements at issue'), one with the Walloon Region, the owner of Charleroi Airport, the other with Brussels South Charleroi Airport (BSCA), a public sector company controlled by the Walloon Region which has managed and operated that airport as a concession holder since 4 July 1991.

5 Under the first agreement, the Walloon Region, in addition to changing the airport opening hours, granted Ryanair a reduction of some 50% as compared with the regulatory level of landing charges and undertook to compensate Ryanair for any loss of profit arising directly or indirectly from any change by decree or regulation of airport charges or opening hours.

6 Under the second agreement, Ryanair undertook to base between two and four aircraft at Charleroi Airport and to operate, over a fifteen-year period, at least three rotations a day per aircraft. It also undertook, in the event of its 'substantial withdrawal' from the airport, to reimburse all or part of the payments made by BSCA (see paragraphs 7 and 9 below).

7 BSCA, for its part, undertook to contribute to the costs incurred by Ryanair in establishing its base. That contribution consisted of:

– a payment of up to EUR 250 000 for hotel costs and subsistence for Ryanair staff;
– a payment of EUR 160 000 for each new route opened up to a maximum of three routes per Charleroi-based aircraft, in other words a maximum of EUR 1 920 000;
– a payment of EUR 768 000 in respect of the cost of recruiting and training flight crew assigned to the new destinations served by Charleroi Airport;
– a payment of EUR 4 000 for the purchase of office equipment;
– provision 'at minimum or no cost' of various premises for technical or office use.

8 In addition, under that agreement, BSCA invoices Ryanair EUR 1 per passenger for the provision of ground handling services, rather than EUR 10 in accordance with the published tariff for other users.

9 Finally, BSCA and Ryanair formed a joint company, Promocy, the objective of which is to fund the promotion of both Ryanair's activities at Charleroi and Charleroi Airport. The two parties undertook to contribute in the same proportions to the Promocy operation by a contribution of EUR 62 500 to form Promocy's share capital and by an annual contribution to Promocy's budget equivalent to EUR 4 per departing passenger.

10 Those measures were not notified to the Commission.

11 In a letter dated 11 December 2002 (SG (2002) D/233141) the Commission, having received complaints and following press reports, informed the Kingdom of Belgium of its decision to initiate the procedure provided for in Article 88(2) EC in respect of these measures. Further, by publication of that decision in the *Official Journal of the European Communities* on 25 January 2003 (OJ 2003 C 18, p. 3), it invited interested parties to submit their comments on the measures concerned.

12 On 12 February 2004, having analysed the comments of the interested parties and of the Kingdom of Belgium, the Commission adopted Decision 2004/393/EC concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ 2004 L 137, p. 1) ('the contested decision').

The contested decision

13 In the contested decision, after a description of the administrative procedure followed (recitals 1 to 6), the Commission first briefly summarises the facts and assessment made in the decision to initiate the formal examination procedure (recitals 7 to 15). It then sets out the comments by interested parties (recitals 16 to 75) and the comments of the Kingdom of Belgium (recitals 76 to 136).

14 In the actual assessment of the measures at issue, the Commission evaluates, in the first place, whether there is aid within the meaning of Article 87(1) EC (recitals 137 to 250).

15 In that regard, the Commission rejects application to the Walloon Region of the principle of the private investor in a market economy (the 'private investor principle'). It takes the view, in essence, that the fixing of landing charges falls within the legislative and regulatory competence of the Walloon Region and is not an economic activity that can be assessed by reference to the private investor principle. Rather than acting within the framework of its public powers, the Walloon Region, in the Commission's view, acted in an unlawful and discriminatory manner by granting to Ryanair, for a period of 15 years and by means of a contract under private law, a reduction in the level of airport charges which was not available to other airlines. The Commission concludes that the reduction in airport charges and the guaranteed indemnity constitute an advantage within the meaning of Article 87(1) EC (recitals 139 to 160).

16 However, in spite of the difficulties in doing so, the Commission undertakes an assessment of whether the private investor test can be considered to have been satisfied in the case of the measures adopted by BSCA (recitals 161 to 170). Taking the view that the latter did not act in accordance with the private investor principle,

the Commission decides that the advantages granted by BSCA to Ryanair constitute advantages within the meaning of Article 87(1) EC (recitals 161 to 238). The Commission observes in particular that, when BSCA made its decision to invest, 'it did not carry out an analysis consistent with all the hypotheses of the contract envisaged with Ryanair and Ryanair alone'. In so acting, BSCA took risks that a private investor acting in a market economy would not have taken. Those risks relate both to data essential to the business plan and to other parameters concerning relations between BSCA and the Walloon Region (recitals 184 and 185).

17 Since the other criteria for classification as aid, that is to say, those relating to specific character (recitals 239 to 242), the transfer of State resources in favour of Ryanair (recitals 243 to 246) and the impact on intra-community trade and competition (recitals 247 to 249), are, in its view, met, the Commission concludes that 'the advantages granted to Ryanair by the Walloon Region and by BSCA are State aid'.

18 The Commission notes in particular that the advantages in question, whether granted by BSCA or by the Walloon Region, were granted to Ryanair only and that they are therefore specific. It also states that those advantages, which were granted directly by the Walloon Region in the form of a 'compensation commitment' (involving commitment of regional resources where necessary) and of a reduction of landing charges (involving a loss of profit for the State), and indirectly by mobilisation of BSCA resources, involve the transfer of State resources in favour of Ryanair. Finally, it observes that those advantages, granted through the State taking responsibility for operating costs normally borne by an airline, not only distort competition on one or more routes and on a particular market segment, but also on the whole of the network served by Ryanair.

19 Secondly, the Commission examines whether that aid could be declared compatible on the basis of the exemptions provided for in the Treaty. The Commission essentially concludes that the aid granted by the Walloon Region is incompatible with the common market. The reductions granted to Ryanair are, in its opinion, discriminatory, unlawful under Belgian law and contrary to the principle of proportionality (recitals 263 to 266).

20 With regard to the aid granted by BSCA, the Commission considers that aid for the opening of new routes, where the amount does not exceed 50% of the start-up costs and the duration is less than five years, is compatible with the common market. Where those thresholds are exceeded, the Commission calls for the recovery of aid granted to Ryanair by BSCA (recitals 267 to 344).

21 Finally, the Commission sets out a summary of its policy guidelines relating to the financing of airports and air links (recitals 345 to 356).

22 The operative part of the contested decision is worded as follows:

'Article 1

The aid measures implemented by [the Kingdom of] Belgium in the contract of 6 November 2001 concluded between the Walloon Region and Ryanair, in the form of a reduction in airport landing charges that goes beyond the official tariff set in Article 3 of the Walloon Government Decree of 16 July 1998 laying down charges to be levied for the use of airports in the Walloon Region and the general discounts provided for in Article 7(1) and (2) of the said Decree, are incompatible with the common market

within the meaning of Article 87(1) of the Treaty.
Article 2
The aid measures implemented by [the Kingdom of] Belgium through the contract of 2 November 2001 concluded between Brussels South Charleroi Airport (BSCA) and Ryanair, in the form of discounts on ground handling services in comparison with the official airport tariff, are incompatible with the common market within the meaning of Article 87(1) of the Treaty.
[The Kingdom of] Belgium shall determine the total aid recoverable by calculating the difference between the operating costs borne by BSCA and linked to the ground handling services provided to Ryanair and the price invoiced to the airline. So long as the two-million-passenger threshold provided for in Directive 96/67/EC remains unattained, [the Kingdom of] Belgium may deduct from this total any profits realised by BSCA on its other strictly commercial activities.
Article 3
[The Kingdom of] Belgium shall ensure that the compensation guarantees granted in the contract of 6 November 2001 by the Walloon Region in the event of losses suffered by Ryanair through the exercise by the Walloon Region of its regulatory powers are void. The Walloon Region shall have with Ryanair, as with other airline companies, all the necessary freedom in fixing airport charges, airport opening hours or other provisions of a regulatory nature.
Article 4
The other types of aid granted by BSCA, including marketing contributions, one-shot incentives and provision of office space, are declared compatible with the common market as start-up aid for new routes, subject to the following conditions:
(1) the contributions must relate to the opening of a new route and be limited in time. In view of the intra-European destinations covered, the time period must not exceed five years following the opening of a route. The contributions may not be paid for a route opened as a replacement for another route closed by Ryanair in the preceding five years. In future, aid may not be granted for a route that Ryanair has provided in replacement for another route that it served previously from another airport located in the same economic or population catchment area.
(2) The marketing contributions, currently set at EUR 4 per passenger, must be justified in a development plan compiled by Ryanair and validated by BSCA for each route concerned. The plan shall specify the costs incurred and eligible, which must relate directly to the promotion of the route with the aim of making it viable without aid after an initial period of five years. At the end of the five-year period, BSCA shall a posteriori validate the start-up costs incurred by each airline, and BSCA shall where necessary enlist the help of an independent auditor in the task.
(3) With regard to the portion of contributions already paid by BSCA, a similar exercise must be carried out to validate this aid on the same principles.
(4) The one-shot contributions paid as a lump sum when Ryanair set up at Charleroi, or whenever a route was opened, must be recovered, except for any portion that [the Kingdom of] Belgium can justify as being directly linked to the costs that were incurred by Ryanair at the Charleroi airport hub and are proportional and incentive in nature.

(5) The sum total of aid from which a new route benefits must never exceed 50% of start-up, marketing and one-shot costs aggregated for the two destinations in question, including Charleroi. In the same way, the contributions granted for a destination must not exceed 50% of the actual costs for that destination. Specific attention shall be paid in these evaluations to routes that link Charleroi to a major airport, such as those included in Categories A and B as defined in the Committee of the Regions' outlook opinion of 2 July 2003 on the capacity of regional airports and identified in the present Decision, and/or to a coordinated or fully coordinated airport within the meaning of Regulation (EEC) No 95/93.
(6) The contributions paid by BSCA that at the end of the five-year start-up period exceed the criteria laid down must be repaid by Ryanair.
(7) The contributions paid, where applicable, for the Dublin-Charleroi route under the [agreements at issue] shall be recovered.
(8) [The Kingdom of] Belgium shall set up a non-discriminatory aid scheme intended to ensure equality of treatment for airlines wishing to develop new air services departing from Charleroi Airport in accordance with the objective criteria laid down in the present Decision.
…'

Procedure and forms of order sought by the parties

23 By application lodged at the Registry of the Court of First Instance on 25 May 2004 the applicant brought the present action.
24 By document lodged at the Registry of the Court on 1 November 2004 the Association of European Airlines (AEA) sought leave to intervene in the present proceedings in support of the Commission.
25 By registered letter of 14 January 2005 to the Registry of the Court the applicant requested that, in accordance with Article 116(2) of the Court's Rules of Procedure, certain confidential information be omitted from the communication of procedural documents to the intervener and produced, for the purposes of that communication, a non-confidential version of the pleadings or documents in question.
26 By order of 20 April 2005 the President of the Fourth Chamber of the Court of First Instance granted the AEA leave to intervene and reserved the decision on the merits of the application for confidentiality. The intervener lodged its statement in intervention and the other parties lodged their observations thereon within the prescribed periods. The intervener informed the Court that it had no objections to the application for confidentiality.
27 Pursuant to Article 14 of the Rules of Procedure and on the proposal of the Fourth Chamber, the Court, having heard the parties in accordance with Article 51 of those rules, assigned the case to a chamber sitting in extended composition.
28 The composition of the Chambers of the Court of First Instance was changed and the Judge-Rapporteur was assigned to the Eighth Chamber sitting in extended composition; the present case was therefore allocated to that chamber.
29 Upon hearing the Report of the Judge-Rapporteur, the Court (Eighth Chamber, extended composition) decided to open the oral procedure and, as measures of organisation of procedure, asked the principal parties to reply in writing to a number of questions. The parties acceded to those requests within the time allowed.

30 The parties presented their oral arguments and replied to the Court's questions at the hearing on 12 March 2008.

31 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

32 The Commission and the intervener contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

33 The applicant relies on two pleas in law in support of its action. The first alleges an infringement of the obligation to state reasons laid down in Article 253 EC. By its second plea, the applicant challenges the classification of the measures at issue as State aid and alleges, in that regard, an infringement of Article 87(1) EC.

34 The Court considers that the second plea in law should be examined first. In that plea the applicant complains in particular that the Commission either failed to apply or misapplied the private investor principle which is the appropriate test for determining whether measures constitute aid to all of the measures at issue and sets out several grounds of complaint. The applicant puts forward, in essence, several arguments to the effect that the Commission (i) failed, when examining the measures at issue, to take into consideration the fact that the Walloon Region and BSCA ought to be regarded as one single entity, (ii) erred by refusing to apply the private investor principle to the measures adopted by the Walloon Region and (iii) misapplied that principle to BSCA.

35 Before considering that plea, the Court will make some observations on the concept of State aid, within the meaning of Article 87(1) EC, and on the nature and scope of the review which the Court must carry out in the present case.

Preliminary Observations

36 For a measure to be classified as aid within the meaning of Article 87(1) EC, all the conditions set out in that provision must be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be likely to affect trade between Member States. Third, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourth, it must distort or threaten to distort competition (see Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraph 110 and case-law cited).

37 In the present case, it is clear that the only condition disputed by the applicant is whether there is an advantage.

38 In that regard, it is clear from the case-law that the expression 'aid', for the purposes of that provision, necessarily designates advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose (Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13, and Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 16).

39 The Court of Justice has held, in particular, that in order to determine whether a State measure constitutes aid it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60,

and Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41).

40 Finally, it must be noted that since aid, as defined in the Treaty, is a legal concept and must be interpreted on the basis of objective factors, the Community judicature must, as a general rule, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case T-98/00 *Linde* v *Commission* [2002] ECR II-3961, paragraph 40).

41 On the other hand, it must be remembered that the assessment by the Commission of whether an investment satisfies the private investor test involves a complex economic appraisal. When the Commission adopts a measure involving such an appraisal, it consequently enjoys a wide discretion and judicial review is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether there was any error of law, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or any misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see, to that effect, order in Case C-323/00 P *DSG* v *Commission* [2002] ECR I-3919, paragraph 43, and Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 127 and case-law cited).

42 It is by reference to those principles that the arguments of the parties must be examined: first, whether the private investor principle applies to the measures adopted by the Walloon Region.

Whether the private investor principle applies to the measures adopted by the Walloon Region

43 The applicant essentially claims that BSCA and the Walloon Region were one single economic entity. Accordingly, the private investor principle should have been applied to them both together. According to the applicant, the agreements at issue were envisaged by the parties as one single package of financial measures. The Commission should have considered the related measures to be part of one single package when examining whether they constitute State aid.

44 The applicant further maintains that, if the reason for the dual approach adopted by the Commission was that the private investor principle could not be applied to the Walloon Region, the Commission was wrong to conclude, in order to exclude application of that principle, that the Walloon Region did not act in the present case as an economic operator but as a regulatory authority.

45 The Court will first examine whether the Walloon Region and BSCA ought to have been regarded as one single economic entity when the measures at issue were considered and, as necessary, examine whether, notwithstanding the interests of the Walloon Region and BSCA being identical, the Commission could correctly exclude application of the private investor principle to the advantages granted by the Walloon Region by taking the view that its action, in the present case, was within the ambit of its public authority powers.

The existence of a single legal entity: 'Walloon Region – BSCA'

– Arguments of the parties

46 The applicant complains that when classifying the contested measures the Commission treated the Walloon Region and BSCA as separate entities. That distinction is artificial, since the Walloon Region controls BSCA and forms with it one economic entity. That distinction also has significant consequences for the substantive analysis, since it allowed the Commission to classify as aid the advantages obtained by the Walloon Region without referring to the private investor principle.

47 The applicant states that over 95% of the capital of BSCA is held, directly or indirectly (through the Société Wallonne des Aéroports (SOWAER) and Sambrinvest (Société de Développement et de Participation du Bassin de Charleroi)), by the Walloon Region. Moreover, all the board members of BSCA are appointed by and answerable to the Walloon Region. The applicant also claims that, throughout the negotiations which preceded conclusion of the agreements at issue, the Walloon Region and BSCA acted as a parent company and its subsidiary would have.

48 In so far as Charleroi Airport is owned by the Walloon Region, the latter and BSCA should be viewed as forming one single entity as regards their 'dealings' with the airport.

49 Accordingly, the approach taken by the Commission is artificial, since it ignores the close links between BSCA and the Walloon Region. In their respective capacities as the owner and the operator of Charleroi Airport, they operate as a single economic entity. The Commission should therefore have examined together the measures which they adopted in relation to Ryanair (see Case T-137/02 *Pollmeier Malchow* v *Commission* [2004] ECR II-3541, paragraph 50, which is based on Case 170/83 *Hydrothermg Gerätebau* [1984] ECR 2999, paragraph 11, and, by analogy, Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124). If the Commission had taken that path it would have had no reason to criticise BSCA's business plan.

50 The applicant maintains in that regard that the statement, in recitals 153 and 161 of the contested decision, that there was some degree of confusion in relation to the respective roles of the Walloon Region and the BSCA, indicates unity of conduct.

51 The Commission contends that those complaints are irrelevant: application of the private investor principle to the Walloon Region and BSCA together cannot affect the merits of the contested decision. When the Commission analysed the business plan, it took into consideration the agreements concluded with both the Walloon Region and BSCA. It therefore assessed the advantages flowing from the reduction in landing charges with reference to the private investor principle. The Commission states that it adequately identified the intrinsic weaknesses of the business plan. Consequently, the Walloon Region's status as the owner of the airport does not affect that analysis, in particular as regards the fact that the Walloon Region is responsible for the fire and maintenance costs and that BSCA's contributions to the environment fund are capped. Similarly, consideration of the Walloon Region and BSCA as one single entity would, in any event, have had no effect on the return anticipated in the business plan, since the reduction in landing charges brought no advantage to the Walloon Region.

52 At the rejoinder stage, the Commission placed on the file new documents from the Walloon authorities to support the finding that, even treating the Walloon Region as a private investor, the anticipated return was insufficient by reference to the private

investor principle.

– Findings of the Court

53 As is clear from the file, BSCA is a public undertaking controlled by the Walloon Region. Its share capital largely consists of public capital. More specifically, and as identified by the Commission itself, at the material time the Walloon Region owned, directly or indirectly, 96.28% of BSCA shares. On 2 November 2001, a contract was entered into by BSCA and Ryanair which imposed reciprocal obligations.

54 The Walloon Region is, for its part, the owner of the Charleroi airport infrastructure. On 6 November 2001 it entered into an agreement with Ryanair, whereby it undertook to grant to Ryanair, first, a reduction in landing charges and, second, an indemnity in the event of losses which that company might suffer following any change, as a result of legislation or regulation, in the airport charges or opening hours of Charleroi airport. It must be noted that, as the Commission moreover stated in paragraph 21 of the letter inviting interested parties to submit their comments on the measures at issue (see paragraph 11 above), that agreement solely contains undertakings given by the Walloon Region to Ryanair.

55 The Commission acknowledged, both in the decision to initiate the procedure and in the contested decision, the economic and legal links binding the Walloon Region to BSCA and in particular the fact that BSCA was an entity economically dependent on the Walloon Region.

56 The Commission stated, in paragraph 80 of the letter inviting interested parties to submit their comments on the measures at issue (see paragraph 11 above), in relation to whether the private investor principle was applicable to the present case, that 'the roles of the [Walloon] Region as a public authority and of BSCA as an airport management company had been greatly confused, which made the application of that principle very difficult'. The Commission also stated in paragraph 101 of that letter that 'the dominant influence of the Walloon Region on BSCA was visible first of all in the structure of the share capital' and that 'BSCA's form of organisation, according to its articles of association of June 2001, reserve[d] control of the company to category A shareholders, namely the [Walloon] Region and its specialised companies'. Lastly, the Commission stressed the fact that 'the Walloon Region's dominant influence on BSCA [was] undeniable when account is taken of how the public authorities have designed its overall environment since its creation in 1991'.

57 The conclusion that the Walloon Region and BSCA are closely linked is also clear in the contested decision. The Commission thus stated that the financial structure of BSCA was closely connected to that of the Walloon Region (see in particular recitals 161 to 166 and recital 237 of the contested decision), in particular as regards responsibility, under the concession, for the costs of fire and maintenance services (see recitals 208 to 216 of the contested decision). The Commission also observed, in the section dealing with whether in the present case there was a transfer of State resources, that 'BSCA [was] a public undertaking over which the Walloon Region exercise[d] both control and a dominant influence, and those measures [were] attributable to it' (see recital 246 of the contested decision).

58 Notwithstanding those various observations, the Commission considered the measures in question separately according to whether they had been granted by the

Walloon Region or by BSCA.

59 It is however necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context (see, to that effect, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 270), including those relating to the situation of the authority or authorities responsible for granting the measures at issue.

60 Accordingly, contrary to what is stated by the Commission, the financial links binding the Walloon Region to BSCA are not irrelevant, since it cannot a priori be excluded that the Walloon Region not only took part in the activity carried out by BSCA (see, by analogy, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 112), but also obtained financial consideration for granting the measures at issue.

61 In the present case, it must therefore be concluded that the Walloon Region and BSCA ought to have been regarded as one single entity for the purposes of application of the private investor principle. There remains the question whether the Commission was correct to refuse to apply the private investor principle to the measures adopted by the Walloon Region because of the role specifically played by the region, namely its alleged regulatory role.

Treatment of the Walloon Region as a legislative or regulatory authority and non-application of the private investor principle to the measures adopted by it

– Arguments of the parties

62 The applicant takes issue with the Commission's refusal to examine the measures granted by the Walloon Region by reference to the private investor principle. The applicant challenges the Commission's reasoning (recitals 139 to 160 of the contested decision) that the Walloon Region was not acting as an economic operator when it granted to Ryanair a reduction in landing fees and an indemnity, but was employing its public authority powers and using its legislative and regulatory competence.

63 The first argument is that such reasoning is contrary to the case-law. The applicant submits that application of the private investor principle depends on the nature of the economic activity affected by the State measures and not on the status of the body dispensing aid or the means which it employs in order to secure an economic advantage for an undertaking. The applicant adds that, while the private investor principle may not be applicable when the acts of a public authority fall within the exercise of its public powers, in particular when it imposes taxes or social charges (Case C-355/00 *Freskot* [2003] ECR I-5263, paragraphs 55 to 58, and 80 to 87), the principle may, conversely, be applicable in a situation where public authorities levy a parafiscal charge.

64 In the present case, in the contested decision, the Commission did no more than reproduce the statutory provisions which empower the Walloon Region to determine airport charges. There is however no explanation why the Commission took the view that the Walloon Region had acted not as an airport owner, but as a regulatory authority.

65 Furthermore, the applicant points out that it argued during the administrative procedure that the Commission's interference in the pricing policy of Charleroi airport amounted to discrimination between public and private airports, contrary to Article 295 EC. In reply to that argument, the Commission stated, in recital 157 of the contested decision, that 'the Walloon Region could … have decided that the onus was on BSCA to fix a fee in exchange for services rendered to users, provided certain principles and conditions were complied with'. Yet, according to the Commission, if the Walloon Region had acted in that way, BSCA's fixing of the landing fees would have constituted a commercial activity and not the exercise of regulatory powers. It would therefore have had to be assessed with reference to the private investor principle. The applicant however claims that, in relation to the nature of the activities in question and, consequently, application of the private investor principle, such activities do not mutate from 'regulatory' to 'commercial' or 'economic' merely because they are entrusted by a regional government to a public undertaking which is owned by it and controlled by it.

66 As regards more specifically the reduction in landing charges, the applicant claims that the provision of airport facilities to air carriers is an economic activity governed by Community competition law (Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 45, and Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraphs 108 to 124). The grant of discounts on landing charges in order to attract new customers is standard practice in the sector (State Aid NN 109/98, United Kingdom (Manchester Airport), 14 June 1999, paragraph 8).

67 The applicant notes that the Commission based its argument on the fact that Ryanair was the only company based at Charleroi to have received a reduction in landing charges and an indemnity. The Commission concluded that 'Article 87 of the Treaty [was] therefore likely to apply when a benefit arising from the granting of an exemption from the common law tariff system is not justified on objective economic grounds' (recital 140 of the contested decision).

68 In the applicant's opinion, that reasoning is erroneous for several reasons. First, the conditions offered to Ryanair were not the result of an 'exemption' granted unilaterally by the public authorities but the result of a commercial negotiation. Ryanair points out that the level of reduction which it was able to obtain (about 36%) is above the reduction margin (between 5 and 25%) which the Walloon Region can normally grant in accordance with local regulations. Secondly, the reductions granted to Ryanair were justified by clear, objective economic considerations. In order to improve its business, Charleroi airport contacted several airlines. Ryanair was ultimately the only airline willing to take the risk of establishing regular air services departing from that airport. The commitments entered into placed Ryanair in a situation which was of a different order from that of other air carriers then at Charleroi. In return for the price reduction, Ryanair undertook to increase seven-fold the total number of passengers annually carried from the airport, which at that time was about 20 000 people. Ryanair took on the risk of being the first airline to offer to carry such passenger numbers and becoming the principal occupant of that underused and little known regional airport. Given the duration of its commitment, Ryanair also gave up the option of withdrawing from Charleroi should its operations prove not to be sufficiently profit-

able. Thirdly, the changes made by the Walloon Region for the benefit of Ryanair were neither selective nor limited, but accessible to any third party, under non-discriminatory conditions. The agreement entered into with BSCA expressly provided that 'nothing in this contract shall prevent BSCA from trading with other air companies or accepting aircraft based by other companies' (Article 4.2 of that agreement). In addition, the Walloon Region confirmed by a press release in July 2001 that the advantages granted to Ryanair would be available to other airlines which sought to commence similar operations.

69 As regards the indemnity offered by the Walloon Region as compensation for any changes in its legislation, the applicant claims that this also does not constitute State aid. It is rather a commercial arrangement, comparable to a 'stabilisation clause', which is common practice in the sector. It would have been unreasonable for Ryanair to commit itself for so long a period and to take on such significant commercial risks without obtaining, in return, the assurance of the Walloon Region that it would not alter the terms of the agreement unless it provided compensation for any losses. To prevent the Walloon Region entering into such commitments would amount to depriving it of the possibility of acting in the same way as other commercial operators. The applicant emphasises that the indemnity is limited in its application and in no way circumscribes the sovereignty of the Walloon Region. It is therefore solely a commercial commitment intended to ensure the stability of the proposed economic activity.

70 Secondly, the approach adopted by the Commission is inconsistent. In that regard, the applicant highlights a contradiction: the Commission, on the one hand, declared that the private investor principle was not applicable to the Walloon Region and, on the other, took into consideration the advantages granted by the Region in order to assess the viability of BSCA's business plan by reference to that principle. By attributing to the Walloon Region the advantages resulting from the reductions in landing charges and the indemnity, the Commission has managed to circumvent application of the private investor principle and the difficulties of analysis which that involves.

71 The Commission disputes those objections.

72 First, the Commission takes issue with the applicant's interpretation of the case-law. It considers that *Freskot*, paragraph 63 above, supports the contested decision. The Court held there that the contribution to a compulsory insurance scheme for farmers did not constitute a 'service' within the meaning of the Treaty, inter alia because the charge levied under that scheme '[was] essentially in the nature of a charge imposed by the legislature' because it '[was] levied by the tax authority', because '[t]he characteristics of that charge, including its rate, [were] also determined by the legislature' and because 'it [was] for the competent ministers to decide any variation of the rate'. Those considerations can be directly transposed to the present case.

73 Secondly, the Commission points out that the contested decision was the first time the private investor principle was applied by it to State aid at an airport. It maintains that the private investor principle is incompatible with its guidelines of 10 December 1994 on the application of Articles 87 EC and 88 EC and Article 61 of the Agreement on the European Economic Area (EEA) to State aid in the aviation sector (OJ 1994 C 350, p. 5), according to which public investment in airport infrastructure

constitutes a general measure of economic policy. The State cannot act simultaneously as a public authority and as a private investor. The Commission considers that the distinction made between airport infrastructure and airport management is consistent with the dual approach to examining State aid in the aviation sector which distinguishes airport infrastructures from airport services.

74 Thirdly, the Commission submits that the applicant's arguments are contradictory. The Commission points out that it did not criticise the business plan for taking no account of the cost of the investment required by the Walloon Region in order to improve the airport infrastructure and deal with the increase in traffic resulting from Ryanair's establishment. That investment is substantial (EUR 93 million on investment directly connected with the implementation of the business plan alone). It is illogical to criticise the Commission for having failed to apply the private investor principle to the Walloon Region, when the contested decision does not relate to the latter's investment in infrastructure. If those infrastructure costs were included in the assessment under the private investor principle, the shortcomings of the business plan would only be compounded.

75 The Commission asks the Court to require the applicant to withdraw its pleas concerning the analytical framework for the measures adopted by the Walloon Region or to explain why the Walloon Region, as an investor in a market economy, made the investment necessary for the implementation of the business plan, and prove that the contested decision made a manifest error of assessment in this respect.

76 Finally, the Commission takes the view that, although reference was indeed made in the application to the issue of whether the value of the airport should be taken into consideration, this was done too summarily to permit the arguments dealing with that issue in the reply to be interpreted as other than new pleas in law which are inadmissible by virtue of Article 48(2) of the Rules of Procedure.

77 As regards, more specifically, the reduction in landing charges, the Commission takes the view that the fixing of landing charges to obtain access to infrastructure falls within the exercise of public authority powers. The Kingdom of Belgium did not dispute that the granting of discounts on landing charge rates requires adoption of a legislative act. However, in this case, analysis revealed that in granting a discount to Ryanair by means of a contract the Walloon Region acted neither according to the relevant law nor within its competence.

78 Those considerations are, the Commission argues, confirmed by the inseparable link between landing charges and the environmental fund set up by the Walloon Region, to which BSCA contributes. The expansion of the airport has adverse effects on the environment, which cannot be ignored by the Walloon Region. The environmental fund is intended to meet that need. The Commission takes the view that this demonstrates that the fixing of landing charges is a regulatory activity.

79 According to the Commission, the Walloon Region circumvented the regulatory obstacles by entering into a contract which provided, for the exclusive benefit of Ryanair, a discount on airport charges. If management of the airport had been granted to a private undertaking, Ryanair would not have been able to obtain a reduction in charges comparable to that which it received.

80 The Commission takes the view that the indemnity illustrates the fact that the

Walloon Region acted not as an undertaking but as a public authority, using its regulatory powers to control an economic activity. An undertaking would not have been in a position to grant such an indemnity and, in any case, would not have felt the need to do so. The indemnity has nothing to do with unilateral alteration of the agreement, which in any case is precluded, since the agreement with Ryanair made no provision for that possibility. It stems directly from the regulatory powers of the Walloon Region, which do not fall under the private investor principle, as shown by Article 2 of the agreement between Ryanair and the Walloon Region.

– Findings of the Court

81 The agreement entered into by the Walloon Region and Ryanair provides for, first, a discount on landing charges and, second, an indemnity in the event of any change in the airport opening hours or the level of airport 'taxes'.

82 The Commission states in recital 160 of the contested decision the following: 'The Commission … concludes that the principle of private investor in a market economy is not applicable to the action of the Walloon Region, and that the reduction in airport charges and the compensation guarantee constitute an advantage within the meaning of Article 87(1) [EC]. These advantages allow Ryanair to reduce its operating costs.'

83 In reaching that conclusion, the Commission took account of the following factors:

– the fixing of airport taxes falls within the legislative and regulatory competence of the Walloon Region (recital 144 of the contested decision);

– by fixing the level of airport taxes payable by users for the use of the Walloon airports, the Walloon Region was regulating an economic activity, but was not acting as a company (recitals 145 and 158 of the contested decision);

– the 'airport charges' fixed by the Walloon Region allowed the financing of a specified transfer of resources: 65% was allotted to the airport concession holder (BSCA) and 35% to an environment fund (recitals 146 to 150 of the contested decision);

– the Walloon Region infringed the relevant national regulations by granting a reduction to Ryanair by means of a contract under private law and thereby placed itself in a situation of 'confusion of powers' (recitals 151 to 153 of the contested decision);

– the applicant's assertion that the contested decision amounts to discrimination between 'private airports' and 'public airports' is unfounded, in light of the various methods of fixing charges in Europe (recitals 154 to 159 of the contested decision).

84 Before examining the merits of those grounds, the Court notes that, for the purposes of determining whether a measure of State aid constitutes an advantage within the meaning of Article 87(1) EC, a distinction must be drawn between the obligations which the State must assume as an undertaking exercising an economic activity and its obligations as a public authority (see, to that effect, as regards the distinction which must be made between the situation where the authority granting the aid acts as a shareholder in a company and the situation in which it acts as a public authority, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 22, and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 134).

85 While it is clearly necessary, when the State acts as an undertaking operating as

a private investor, to analyse its conduct by reference to the private investor principle, application of that principle must be excluded in the event that the State acts as a public authority. In the latter event, the conduct of the State can never be compared to that of an operator or private investor in a market economy.

86 The Court must therefore determine whether or not the activities concerned in the present case are economic activities.

87 It is clear from the case-law that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, and *Aéroports de Paris* v *Commission*, paragraph 66 above, paragraph 107).

88 Contrary to what is stated by the Commission in recital 145 of the contested decision, it must be held that the actions of the Walloon Region were economic activities. The fixing of the amount of landing charges and the accompanying indemnity is an activity directly connected with the management of airport infrastructure, which is an economic activity (see, to that effect, *Aéroports de Paris* v *Commission*, paragraph 66 supra, paragraphs 107 to 109, 121, 122 and 125).

89 On that point, the airport charges fixed by the Walloon Region must be regarded as remuneration for the provision of services within Charleroi airport, notwithstanding the fact, mentioned by the Commission in recital 147 of the contested decision, that a clear and direct link between the level of charges and the service rendered to users is weak.

90 Unlike the situation in *Freskot*, paragraph 63 above, the airport charges must be regarded as the consideration obtained for services rendered by the airport owner or concession holder. The Commission itself admits, in recitals 147 to 149 of the contested decision, that, both in the present case and in its practice in previous decisions, it was appropriate to regard those charges as 'fees' and not as 'taxes'

91 Accordingly, the provision of airport facilities by a public authority to airlines, and the management of those facilities, in return for payment of a fee the amount of which is freely fixed by that authority, can be described as economic activities; although such activities are carried out in the public sector, they cannot, for that reason alone, be categorised as the exercise of public authority powers. Those activities are not, by reason of their nature, their purpose or the rules to which they are subject, connected with the exercise of powers which are typically those of a public authority (see, a contrario, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30).

92 The fact that the Walloon Region is a public authority and that it is the owner of airport facilities in public ownership does not therefore in itself mean that it cannot, in the present case, be regarded as an entity exercising an economic activity (see, to that effect, *Aéroports de Paris* v *Commission*, paragraph 66 supra, paragraph 109).

93 In that regard, the Commission acknowledged, at the hearing, that the owner of a public airport may act both as a regulator and as a private investor. In addition, the Commission stated that if BSCA had not acted as an intermediary between the Walloon Region, as owner of Charleroi airport, and Ryanair, as a customer of that airport, it would have been possible to regard the Walloon Region as a private investor in a market economy. The Commission however maintains that in the present case the Walloon Region acted only as a regulatory authority in using its regulatory and fiscal

powers. The Commission points out, inter alia, that at the material time the powers of the Walloon Region in relation to setting airport charges, including aircraft landing charges, others being irrelevant to the present case, were laid down by the decree of the Walloon Government of 16 July 1998 on the fixing of fees to be levied for the use of airports in the Walloon Region (*Moniteur belge* of 15 September 1998, p. 29 491), as amended by a decree of the Walloon Government of 22 March 2001 (*Moniteur belge* of 10 April 2001, p. 11 845). Under Article 8 of that decree, a consultative committee of users, composed of a representative of the ministry responsible for transport, two representatives of the airport concession holder, a representative of the Transport Directorate General within the Ministry of Infrastructure and Transport and a representative of the airport users, was required to give an opinion on proposed changes to the system of fees. The Commission submits that those factors indicated the exercise of the powers of a public authority.

94 The Court considers, however, that that argument cannot be accepted, since it does not affect the fact that the activity concerned in the present case, namely the setting of airport charges, is closely connected with the use and operation of Charleroi airport, which must be described as an economic activity.

95 In that regard, the Commission stated, in recital 156 of the contested decision, the following:

'An airport always fulfils a public function, which explains its general submission to certain types of regulation, even if it belongs to and/or is managed by a private company. Private airport managers can be subject to this regulation and their fee-fixing powers are often contained within the framework of national regulators' instructions because of their monopolistic position. The airports' position of strength in relation to their users can thus be controlled by the national regulators who fix fee levels that must not be exceeded ("price caps"). Asserting that a private airport is free to fix its fees without being subject to certain forms of regulation is in any case inaccurate.'

96 Accordingly, the Commission itself, while refusing to apply the private investor principle to the measures adopted by the Walloon Region because of the regulatory nature of the powers available to it, pointed out that an airport was generally subject to some form of regulation, and moreover 'even if it belongs to and/or is managed by a private company'. Consequently, the argument that there are various methods of setting airport charges is not, by itself, capable of excluding application of the private investor principle to the advantages granted by the Walloon Region.

97 Nor, moreover, can the Court accept the argument that the Walloon Region infringed the relevant national regulations in granting a discount to Ryanair by means of a contract under private law, and thus placed itself in a situation of 'confusion of powers' (recitals 151 to 153 of the contested decision).

98 When examining the measures at issue, the Commission should have differentiated between the economic activities and those activities which fell strictly under public authority powers. In addition, whether the conduct of an authority granting aid complies with national law is not a factor which should be taken into account in order to decide whether that authority acted in accordance with the private investor principle or granted an economic advantage in contravention of Article 87(1) EC. It does not follow from the fact that an activity represents in legal terms an exemption

from a tariff scale laid down in a regulation that that activity must be described as non-economic.

99 The Commission's approach in the contested decision finds no support in its guidelines on the application of Articles 87 EC and 88 EC and Article 61 of the EEA agreement to State aid in the aviation sector. Those guidelines do no more than provide that 'the construction of infrastructure projects represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid' while stating that 'the Commission may evaluate activities carried out inside airports which could directly or indirectly benefit airlines'. Far from supporting the Commission's position, those guidelines note that the operation of airports, and the setting of associated charges, even by public bodies, constitutes an economic activity for the purposes of the application of competition law.

100 In addition, the Commission itself, by stating that 'the Walloon Region could … have decided that the onus was on BSCA to fix a fee in exchange for services rendered to users, provided certain principles and conditions were complied with' (see recital 157 of the contested decision), or by admitting that a system of promotional reductions in airport charges was not in itself contrary to Community law (recital 159 of the contested decision), recognises that the granting of a reduction in airport charges and an indemnity of the kind at issue in this case cannot be connected with public authority powers.

101 The mere fact that, in the present case, the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle, since such a scheme could have been put in place by a private operator.

102 In light of all of the foregoing, it must be concluded that the Commission's refusal to examine together the advantages granted by the Walloon Region and by BSCA and to apply the private investor principle to the measures adopted by the Walloon Region in spite of the economic links binding those two entities is vitiated by an error in law.

103 Since the examination together of the measures at issue required the application of the private investor principle, not only to the measures adopted by BSCA but also to the measures adopted by the Walloon Region, it is unnecessary to consider the last part of the plea in law, namely that there was an incorrect application of the private investor principle to BSCA. It cannot be excluded that the application of that principle to the single body made up of the Walloon Region and BSCA might have led to a different conclusion.

104 The Commission's argument that a re-assessment of all of the measures at issue by reference to the private investor principle would have led to a conclusion even more unfavourable to the applicant cannot be accepted. As the applicant stated, separate examination of the measures at issue, according to whether they were granted by the Walloon Region or by BSCA, substantially affected the Commission's analysis in so far as the Commission was able to classify as State aid the measures adopted by the Walloon Region without recourse to the private investor principle. It is clear from the case-law cited in paragraph 41 above that application of the private investor principle to the overall transaction involves a complex economic examination and assessment

which it is not for the Court to carry out. In that regard, it must be remembered that, in an action for annulment, the Court adjudicates on the legality of the assessments made by the Commission in the contested decision. It is not for the Court, in such an action, to reassess the wisdom of the investment and to rule on whether a private investor would have made the proposed investment at the time when the contested decision was adopted (see, to that effect, Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 170 and case-law cited).

105 Consequently, in light of the Commission's error of law, the claims of the applicant must be upheld and the contested decision must be annulled; there is no need to examine the arguments in support of the first plea in law.

(omissis)

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber, extended composition) hereby:

1. Annuls Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi;

2. Orders the Commission to bear its own costs and to pay those of Ryanair Ltd;

3. Orders the Association of European Airlines (AEA) to bear its own costs.

11.

European Commission Decision of 12 November 2008 on the loan of EUR 300 million granted by Italy to Alitalia No C 26/08 (ex NN 31/08) (notified under document number C(2008) 6743) (2009/155/EC)

(omissis)

Whereas:

1. PROCEDURE

(1) At a meeting on 23 April 2008 the Italian authorities informed the Commission that the Italian Council of Ministers had approved, on 22 April 2008, the granting of a loan of EUR 300 million to Alitalia through Decree-Law No 80 of 23 April 2008.

(2) Since it had not received notification from the Italian authorities prior to the decision to grant this loan, by letter of 24 April 2008 (D/422119) the Commission asked them to confirm the existence of this loan, to provide any relevant information allowing an assessment of the measure in respect of Articles 87 and 88 of the Treaty, to suspend granting of the loan and to inform the Commission of the measures taken to comply with this obligation in accordance with Article 88(2) of the Treaty.

(3) In that letter, the Commission also reminded the Italian authorities of the requirement on them to notify all plans to grant or alter aid and not to implement any planned measure before a final decision has been reached in the Commission's investigation procedure.

(4) By letter of 7 May 2008 the Italian authorities asked for an extension to the deadline which they had been given to reply to the Commission's letter of 24 April 2008. The Commission granted this request by letter of 8 May 2008 (D/423186), asking the Italian authorities to reply by 30 May 2008.

(5) By letter of 30 May 2008 the Italian authorities replied to the Commission's letter of 24 April 2008. In this letter, the Italian authorities informed the Commission, among other things, of the adoption, on 27 May 2008, of Decree-Law No 93, giving Alitalia the option of counting the value of the aforementioned loan as part of its capital.

(6) At the same time, the Commission received several complaints, including from various airlines, regarding the granting of the EUR 300 million loan by the Italian Government to Alitalia.

(7) By letter of 12 June 2008 (D/203822) the Commission notified the Italian authorities of its decision of 11 June 2008 to initiate the formal investigation procedure pursuant to Article 88(2) of the EC Treaty. In this decision, the Commission asked Italy and other interested parties to submit their comments within a certain time limit. The decision was published in the *Official Journal of the European Union*.

(8) By letter of 12 July 2008 (A/509783) the Italian authorities sent their comments to the Commission. The Commission also received comments from five interested parties. These were sent to the Italian authorities by letter of 3 September 2008 (D/433031). A list of these interested parties is annexed to this Decision.

(9) The Italian authorities have not commented on the comments from the interested parties.

2. DESCRIPTION OF THE MEASURE

(10)At the meeting on 23 April 2008 the Italian authorities submitted to the Commission the aforementioned Decree-Law No 80, granting a loan of EUR 300 million from the Italian State to Alitalia, a company in which it held a 49,9 % stake.

(11)The recitals to that Decree-Law state the following:

'Having regard to the financial situation of Alitalia […], as demonstrated by the information disclosed to the market, and its role as the carrier which provides the largest share of the public air transport service between the national territory and countries not belonging to the European Union, and the onward connections on these routes for passenger and cargo traffic from and to regional catchment areas;

Given the extraordinary need and urgency to guarantee, for purposes of public order and territorial continuity, the aforementioned public air transport service by granting Alitalia […] a short-term loan from the State, at market conditions, for the duration strictly needed to avoid compromising operational continuity until the new Government takes office, thus enabling it to take, with its full powers, the initiatives chosen to make possible the recovery of the company and completion of its liberalisation process.'

(12)In order to enable it to meet its immediate liquidity needs, Article 1 of this Decree-Law authorises the granting to Alitalia of a loan of EUR 300 million, which must be repaid as quickly as possible between the 30th day after transfer of its share capital and 31 December 2008. This Article also states that the loan is subject to an interest rate equivalent to the reference rates adopted by the Commission and, in particular, up to 30 June 2008, the rate indicated in the Commission notice on current State aid recovery interest rates and reference/discount rates for 25 Member States applicable as from 1 January 2008 and, with effect from 1 July 2008, the rate indicated in the Communication from the Commission on the revision of the method for

setting the reference and discount rates.
(13)By letter of 30 May 2008 the Italian authorities informed the Commission that, by means of the aforementioned Decree-Law No 93, the Italian Government had given Alitalia the option of counting the value of the loan as part of its capital, in order to cover its losses (see Article 4(3) of the aforementioned Decree-Law). The intention behind this was to allow the company to maintain the value of its capital, in order to ensure that its losses did not make its share capital and reserves fall below the legal limit, thereby preventing insolvency proceedings (*procedura concorsuale*), and to ensure that the possibility of privatisation remained open and credible.
(14)The loan repayment terms laid down in Decree-Law No 80 remain applicable in the context of Decree-Law No 93, except for the fact that the interest rate to which the loan is subject has been increased by 1 % (see Article 4(1) and (2) of Decree-Law No 93) and that, in the event of the company being liquidated, the amount in question will be repaid only after all the other creditors have been paid off, jointly and in proportion to the share capital (see Article 4(4) of Decree-Law No 93).
3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE
(15)In its Decision of 11 June 2008, the Commission found that the measure in question (hereinafter referred to as the measure) was a loan granted by the Italian State, the value of which could be counted as part of Alitalia's capital.
(16)On the subject of whether the measure in question could be regarded as aid, the Commission expressed its doubts as to whether the Italian State, in granting Alitalia the measure, acted as a prudent shareholder pursuing a structural policy — whether general or sectoral — guided by longer-term prospects of profitability on the capital invested than those of an ordinary investor.
(17)In this context, the Commission took the view, on the basis of the information at its disposal, that, irrespective of how the relevant funds were used, the measure in question provided Alitalia with an economic advantage it would not have had under normal market conditions. This assessment was based on the company's financial situation and on the conditions and circumstances under which the measure was granted.
(18)The Commission also expressed doubts as to whether the measure was compatible with the common market. On the basis of the information at its disposal at that stage of the procedure, it took the view that the measure could not be declared compatible with the common market in accordance with the Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter referred to as the 2004 guidelines). It pointed out that Alitalia had already received rescue and restructuring aid.
(19)Accordingly, the Commission decided to initiate the formal investigation procedure in order to allay its doubts both as to whether the scheme in question constituted State aid and as to its compatibility with the common market.
4. COMMENTS BY THE ITALIAN AUTHORITIES
(20)In their comments, the Italian authorities asserted that the measure in question did not constitute State aid within the meaning of Article 87(1) of the Treaty.
(21)They considered that the Italian State had acted as a shareholder whose objective

was to ensure that a company in which it held a stake had the financial resources necessary to meet its liquidity needs in the short term. The ordinary shareholder loan granted by Italy thus constituted a simple bridging loan intended to protect the value of the State's holding and would have been granted by any prudent shareholder pursuing a structural policy — whether general or sectoral — guided by longer-term prospects of profitability on the capital invested than those of an ordinary investor. In this context, the interest rates applied in the case in point were consistent with the nature and objectives of a shareholder loan. Although such financing is often not onerous, in the case in point it was considered to be onerous, taking into account the nature of the lender and the setting of the interest rate at a level allowing a direct and appropriate return on the capital.

(22)With regard to the Commission's claim that the doubts concerning the aid nature of the measure in question were substantiated by the fact that it was adopted at the same time as withdrawal of a takeover bid submitted to Alitalia on 14 March 2008 and by the fact that the existence of 'certain and immediate prospects of Alitalia being purchased by another investor' was not proven, Italy pointed out that the reasons preventing the privatisation process being finalised with the Air France- KLM group had already been made clear. According to the Italian authorities, however, the noncompletion of this process did not undermine the prospect of privatisation in a context making best use of the company's assets, while safeguarding its residual value for shareholders.

(23)Moreover, developments after 30 May 2008 suggested that this course could still reasonably be followed. In this context, the Italian authorities referred to the contract concluded on 9 and 10 June 2008 with which Alitalia charged Intesa Sanpaolo SpA (hereinafter referred to as Intesa Sanpaolo) with seeking out a bid to the Ministry of Economic Affairs and Finance, as shareholder in Alitalia, and to Alitalia, with the aim that one or more industrial or financial investors interested in participating in the recovery, development and relaunching of Alitalia, particularly through its capitalisation, would take lasting control of the company. This mandate had a duration of 60 days and could be extended by 30 days at the company's request.

(24)In the alternative, the Italian authorities asserted that, in any event, the measure was compatible with the common market in accordance with the 2004 guidelines.

(25)Firstly, Alitalia was a firm in difficulty within the meaning of those guidelines. Secondly, the measure in question was reversible and thus complied with the requirement of the 2004 guidelines according to which rescue aid must involve purely temporary forms of support and must not constitute structural measures.

(26)Thirdly, the process of privatisation of the company, together with the measure in question, which was adopted to allow completion of this process, complied with the requirements of point 25(b) of the 2004 guidelines. The EUR 300 million loan simply guaranteed the survival of the company, without allowing it to implement competitive strategies on the air transport market likely to lead to hypothetical economic consequences.

(27)Fourthly, with regard to the Commission's assertion that the State had not given an undertaking to communicate, not later than six months after the measure has

been implemented, a restructuring plan (paragraph 25(c) of the 2004 guidelines), the Italian authorities countered that drafting the plan was part of the process of privatising the company, which Italy had discussed in detail in its letter of 30 May 2008 to the Commission. In this context, the Italian authorities pointed out that, in the alternative case of full repayment of the loan, Decree-Law No 93 laid down that repayment must occur strictly as soon as possible between the 30th day following the date of transfer by the Ministry of Economic Affairs and Finance of its full shareholding, *i.e.* the date of loss of effective control, and 31 December 2008. They inferred from this that a timetable was indeed submitted at the same time as adoption of the disputed measure and that it substantially satisfied the requirements of the 2004 guidelines in this connection.

(28)Fifthly, in accordance with the requirements of paragraph 25(d) of the 2004 guidelines, granting of the loan in question was necessary by virtue of the company's immediate liquidity need caused by objective economic difficulties, which were recognised by the Commission in its Decision of 11 June 2008 (see recitals 18 to 20 of the Decision). In this connection, the Italian authorities pointed out that the loan simply aimed to safeguard, in the short term, the survival and assets of Alitalia, in order to allow the privatisation process to succeed. The total amount of EUR 300 million was strictly necessary and proportional to achieving these objectives, as demonstrated by Italy's presentation of the company's economic and financial situation in its letter of 30 May 2008 to the Commission (see pages 6 to 9).

(29)Sixthly, and lastly, application of the 'one time, last time' principle referred to in paragraph 25(e) of the 2004 guidelines was not contrary to the specific circumstances of the case in point.

(30)Although Alitalia had already received restructuring aid linked to the recovery plan over the 1996- 2000 period, and rescue aid in 2004, it could be exempted from the 'one time, last time' principle. The Italian authorities referred, in this context, to the Commission Decision of 1 December 2004 concerning the State aid which France was planning to implement for Bull (hereinafter the Bull Decision).

(31)They pointed out that application of the 'one time, last time' principle was aimed at avoiding a situation whereby repeated public intervention in favour of certain firms simply 'maintain[ed] the status quo, postpone[d] the inevitable and in the meantime shift[ed] economic and social problems on to other, more efficient producers or other Member States' (paragraph 72 of the 2004 guidelines). The possibility of waiving this principle was dependent on recognition of the existence of cases where these factors were not verifiable and the cumulation of aid granted over a given period to a single beneficiary was not sufficient to consider that the firm '[could] only survive thanks to repeated state support' (paragraph 72 of the guidelines).

(32)In this connection, privatisation of the company, which remained a possible and credible outcome, could lead, when achieved, to a real change as compared to the existing situation concerning the management of Alitalia, which would be subject to new supervisory bodies, and allow the company to return to profitability through the economic contributions of the shareholders of the new company. The Italian authorities also pointed out that all the external and unforeseen factors which, taken together,

had prolonged the privatisation process of Alitalia could undoubtedly be considered exceptional and unforeseen circumstances for which it was not responsible, in accordance with paragraph 73 of the 2004 guidelines.

5. COMMENTS BY INTERESTED THIRD PARTIES

(33)Five interested parties submitted their comments to the Commission under Article 88(2) of the Treaty. A list of these interested parties is annexed to this Decision.

(34)With regard to whether the measure in question constituted aid, four interested parties supported the Commission's position, believing that this measure constituted aid within the meaning of Article 87(1) of the Treaty.

(35)British Airways (BA) and Sterling Airlines asserted that, without the measure in question, Alitalia would go bankrupt under Italian law. Alitalia would thus lose its air operator's certificate in accordance with the civil aviation regulations and, in consequence, would have to cease operations.

(36)Neos pointed out, as regards the interest rate applicable to the measure in question for the purposes of repayment, that the 100 basis points added to the reference rate by no means reflected the risks incurred by the Italian authorities in granting the measure. Neos also supported the Commission's assessment in its Decision of 11 June 2008 concerning the lack of prospects for the privatisation of Alitalia when the measure in question was granted. Indeed, this circumstance would later be confirmed by the serious tensions during August between the Italian Ministry of Finance and the company's management board concerning the 'continuity of the company' and the approval of its half-yearly accounts.

(37)BA and Sterling Airlines recalled that Alitalia had benefited from similar measures in the past. Meanwhile, Ryanair expressed regret that the Commission had limited the scope of the formal investigation procedure initiated on 11 June 2008 to the measure in question, since, in its view, Alitalia had benefited from other illegal State aid measures since November 2005. Analysing these other measures would have reinforced the view that, in the circumstances in question, a private investor would not have agreed to grant the relevant measure.

(38)Both Neos and Ryanair denounced the distortion of competition which resulted from the support which Alitalia had received from Italy for many years.

(39)As regards compatibility of the measure in question with the common market, BA believed that the measure constituted rescue aid and must thus comply with the conditions set out in the 2004 guidelines. This aid had not been notified to the Commission before being implemented and did not satisfy the conditions of those guidelines.

(40)In this connection, BA pointed out that this measure could not be granted without infringing the 'one time, last time' principle in the guidelines (paragraph 25(e) of the 2004 guidelines), since Alitalia had already received restructuring aid approved by the Commission. BA added that the exemption from the 'one time, last time' principle under paragraph 73 of the guidelines was not applicable in the case in point, since Alitalia had not had to deal with unforeseen circumstances for which it was not responsible. In this context, BA and Sterling Airlines made clear that the very difficult situation facing the air sector and linked, in particular, to the increased oil price, affected all the participants in the sector. BA inferred from this that this argument could not be validly invoked by Alitalia as reason to derogate from the 'one time, last

time' principle in the 2004 guidelines. The company's need for financing was due to its incapacity to reform with a view to reducing its internal costs, despite the State aid which it had already received.

(41)Moreover, according to BA, the measure in question was not liquidity support in the form of loan guarantees or loans, but had the characteristics of an injection of capital guaranteeing the Italian Government effective control of the company (paragraph 25(a) of the 2004 guidelines).

(42)With regard to the condition in the 2004 guidelines linked to the existence of serious social difficulties, BA stressed that the insolvency of Alitalia would not cause serious disruption to passengers, owing to the existence of competitors on both national and international routes. As for adverse spillover effects on its competitors, these resulted from the preservation of Alitalia on the market despite its financial difficulties, the increase in its number of routes, particularly from Rome and Milan to Los Angeles, and the reduction in its fares. These commercial decisions were not rational given the company's financial situation and demonstrated its wish to increase its market share as compared to those of its competitors not in receipt of State aid (paragraph 25(b) of the 2004 guidelines).

(43)Moreover, the measure in question was not granted to Alitalia for a period limited to six months, as required by the 2004 guidelines (paragraph 25(c)).

(44)Lastly, BA pointed out that, as this commercial strategy was characterised by non-essential expenses being incurred, it could not be guaranteed that the aid in question was limited to the amount needed to keep the company in business for the period for which it was authorised, as this amount had to be based on the liquidity needs of the company stemming from losses (paragraph 25(d) of the 2004 guidelines).

(45)Ryanair criticised the Commission for not having already demanded the immediate suspension of the measure and asked that Alitalia be required to immediately repay the EUR 300 million that had already been granted to it by Italy. Ryanair also stressed that, contrary to the claims of the Italian authorities, no motive of public order and territorial continuity could be invoked to justify the granting of the measure in question to Alitalia. In this context, Ryanair referred to the reduction in Alitalia's market share on certain routes.

(46)By contrast, the European Travel Agents' and Tour Operators' Associations (ECTAA) and the Guild of European Business Travel Agents (GEBTA) considered that granting the measure in question aimed at preventing Alitalia's bankruptcy was likely to protect consumers in the absence of legislation protecting passengers in the event of the company going bankrupt. ECTAA and GEBTA added that granting the loan in question was the only reasonable solution to avoid Alitalia going bankrupt and to help it in its privatisation process. Given the prospects for relaunching the company reported in the press, granting this loan was economically justified in order to lead to a complete restructuring of Alitalia with a view to future profits.

6. SUMMARY OF PAST COMMISSION DECISIONS CONCERNING ALITALIA

(47)For the purposes of analysing the measure in question, it is worth recalling here that the Commission has previously taken the following Decisions in relation to Alitalia:

— Commission Decision of 15 July 1997 concerning the recapitalisation of Alitalia: in this Decision, the Commission considered that, subject to certain undertakings being met, the recapitalisation of Alitalia in the form of a capital injection of 2 750 billion Italian lire was State aid compatible with the common market under Article 87(3)(c) of the EC Treaty.
— Commission Decision of 18 July 2001 concerning the recapitalisation of Alitalia: since its Decision of 15 July 1997 had been annulled by the Court of First Instance, the Commission adopted a new Decision concerning the same recapitalisation. In this Decision, the Commission reached the same conclusion as in its Decision of 15 July 1997, namely that the recapitalisation of Alitalia was State aid compatible with the common market.
— Commission Decision of 19 June 2002, C 54/96 and N 318/02 — Third instalment of aid for the restructuring of Alitalia approved by the Commission on 18 July 2001 and new recapitalisation of EUR 1,4 billion: with this Decision, the Commission approved the abovementioned third instalment (EUR 129 million) and considered that the new recapitalisation was not State aid within the meaning of Article 87(1) of the Treaty.
— Commission Decision of 20 July 2004, N 279/04 — Urgent measures in support of the restructuring and relaunch of Alitalia (rescue aid): with this Decision, the Commission authorised rescue aid in the form of a State guarantee for a bridging loan of EUR 400 million.
— Commission Decision 2006/176/EC of 7 June 2005 on Alitalia's industrial restructuring plan: in this Decision, the Commission considered that the measures in question did not constitute State aid within the meaning of Article 87(1) of the Treaty.
7. ASSESSMENT OF THE MEASURE IN THE LIGHT OF ARTICLE 87(1) OF THE TREATY
(48)Following the formal investigation procedure initiated on the basis of Article 88(2) of the Treaty, and taking account of the arguments submitted in this connection by the Italian authorities and the interested parties, the Commission believes that the measure in question, namely the EUR 300 million loan granted to Alitalia, the value of which can be counted as part of the company's capital, constitutes State aid which is incompatible with the common market within the meaning of Article
87(1) of the Treaty and unlawful within the meaning of Article 88(3) of the Treaty.
7.1. Existence of State aid
(49)According to Article 87(1) of the Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
(50)Classifying a national measure as State aid presupposes that the following cumulative conditions are met: 1. the measure in question confers an advantage through State resources; 2. the advantage is selective; and 3. the measure distorts or threatens to distort competition and is capable of affecting trade between Member States.
(51)It is appropriate to set out the factors which allow the Commission to consider, at this stage, that the measure in question satisfies these cumulative conditions.

7.1.1. The existence of an advantage conferred through State resources
(52)It should first be pointed out that the measure in question is a loan, the value of which can be counted as part of Alitalia's capital, directly granted to the company by the Italian State, and thus involving the transfer of State resources. Moreover, this measure is the responsibility of the Italian State, since the decision to grant the loan was adopted by the Italian Council of Ministers on 22 April 2008 and supplemented by Decree-Law No 93 of 27 May 2008.
(53)As for whether there is an economic advantage, it should be assessed whether, in similar circumstances, a private investor could have been led to provide a capital injection such as that in the case in point. Here, the Court has stated that, although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term.
(54)The Court has also ruled that a private shareholder may reasonably provide the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after restructuring. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 87 of the Treaty.
(55)It should also be pointed out that, according to settled case-law, both the existence and the amount of aid must be assessed in the light of the situation prevailing at the time it was granted.
(56)In the case in point, for the purposes of applying the private investor criterion and the abovementioned principles, it is necessary to take account of Alitalia's financial situation and the characteristics of the State intervention in question.
7.1.1.1. Alitalia's financial situation
(57)With regard to the financial situation of Alitalia, the Commission notes that it was very precarious at the time of granting of the loan in question and adoption of Decree-Law No 93. Indeed, Alitalia recorded consolidated losses of EUR 626 million for the 2006 financial year and EUR 495 million for the 2007 financial year.
(58)Moreover, according to financial information published by the company, Alitalia recorded pre-tax losses of EUR 214,8 million in the first quarter of 2008, a 41 % increase on the same period in 2007. Furthermore, as at 30 April 2008, Alitalia's net debt stood at EUR 1,36 billion, an increase of 13 % on the December 2007 level. At the same time, the liquidity position, including short-term financial loans, was EUR 174 million as at 30 April 2008, a fall of 53 % as compared to the end of December 2007.
(59)This situation is shown equally clearly by Decree-Law No 80, which states, *inter alia*, that granting the loan in question should make possible the recovery of the company and allow it to meet its immediate liquidity needs (see recitals 57 and 58 above).
(60)In their reply of 30 May 2008 to the Commission, the Italian authorities also stated that Decree- Law No 93 was adopted as a result of the worsening financial situation of the company and was intended to enable it to safeguard its value and ensure that

it remained in business. In this context, they indicated that the measures taken were aimed at ensuring that its losses did not make share capital and reserves fall below the legal limit, thereby preventing insolvency proceedings (*procedura concorsuale*) and the placing of the company in liquidation.

(61)On 3 June 2008, the Italian authorities adopted Decree-Law No 97, which also referred to the financial situation of Alitalia described above and substantiated this analysis.

(62)In view of all these factors, it is possible to consider that Alitalia's financial situation was very precarious, both as at the date of granting of the EUR 300 million loan by means of Decree-Law No 80 and as at that of adoption of Decree-Law No 93, as indeed the Italian authorities admitted in their letter of 30 May 2008 to the Commission. The Commission considers it appropriate to point out in this connection that this assessment was in no way questioned by the Italian authorities in their comments on initiation of the formal investigation procedure.

(63)In this context, the Commission also considers it appropriate to point out that Alitalia's financial situation has worsened since 1997 and been very precarious since 2001, as demonstrated by the description of the company's financial situation in the Commission Decisions of 18 July 2001, 20 July 2004 and 7 June 2005 (previously cited, see recital 47 above). The State support measures which the company has benefited from since 1997 provide ample proof that the difficulties encountered by the company for almost ten years have been overcome repeatedly through the intervention of the State as shareholder.

7.1.1.2. Characteristics of the State intervention

(64)With regard to the conditions for granting of the measure in question, the Commission notes, firstly, that, according to Decree-Law No 80, the interest rate applicable is that indicated in the Commission notice on current State aid recovery interest rates and reference/discount rates for 25 Member States applicable as from 1 January 2008 and, with effect from 1 July 2008, the rate indicated in the Communication from the Commission on the revision of the method for setting the reference and discount rates. This rate was increased by 1 % by Decree-Law No 93.

(65)With regard to the Commission notice on current State aid recovery interest rates and reference/discount rates for 25 Member States applicable as from 1 July 2008, it is important to note that the rates therein are supposed to reflect the average level of the interest rates in force in the various Member States for medium- and long-term loans (five to ten years) where normal security is provided. The Commission considers that, even increased by 1 %, these rates cannot be considered appropriate, since the financial situation of the company in question is very precarious. Furthermore, this notice is based on the 1997 Commission notice on the method for setting the reference and discount rates, which states that 'the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan'. The Commission believes that even a premium on the reference rate of 100 basis points, as provided for by Decree-Law No 93, does not take sufficient account of the particularly precarious situation of Alitalia at the

time of granting of the measure.
(66)As for the Communication from the Commission on the revision of the method for setting the reference and discount rates, it is enough to note that, to the extent that it is applicable, since the loan was granted before its entry into force and the classification of a measure as aid is assessed in relation to the time of its granting, the Italian authorities have not replied to the doubts expressed by the Commission in its Decision of 11 June 2008. Accordingly, the doubts expressed by the Commission in this connection remain.
(67)Accordingly, on the basis of the foregoing, the Commission believes that, even if a private investor in a similar situation to that of the Italian State in the case in point had agreed to granting the measure in question to Alitalia, it would not have accepted the interest rate being that applicable to a company in a normal financial situation, even with a premium of 100 basis points.
(68)The Italian authorities' comments in their letter of 12 July 2008 cannot cast doubt over this assessment of the interest rates applicable to the measure in question. Indeed, in their comments the Italian authorities simply stated, without substantiating their position, that the interest rate was set at a level allowing a direct and appropriate return on the capital to be guaranteed.
(69)The Commission notes that the decision of the Italian Government to grant the loan in question was taken on 22 April 2008, following the withdrawal, on the same day, of the bid by the Air France- KLM group to purchase Alitalia, and that the adoption of Decree-Law No 93 was motivated by the company's worsening financial situation. Whatever the reasons for withdrawal of the Air France-KLM bid, which were linked, *inter alia*, to Alitalia's financial situation, the fact remains that the decision to grant the loan in question immediately followed this decision to withdraw the bid.
(70)In this connection, credence cannot be given to the Italian authorities' unsubstantiated claim that the non-completion of this deal did not undermine the prospect of privatisation in the absence of evidence demonstrating the reality of such a plan as at the time of granting the measure in question. The attempts to privatise the company to which the Italian authorities refer in their letter of 30 May 2008 and which concern the period between the end of 2006 and the end of 2007 are not enough to demonstrate that a real alternative takeover possibility existed when the measure in question was granted.
(71)With regard to the letter from Mr B. Ermolli to Alitalia, to which the Italian authorities referred in their letter of 30 May 2008 and which, in their view, demonstrated the interest of some Italian entrepreneurs and investors in drawing up a plan to relaunch the company, this can no longer be considered to be a prospect of privatisation.
(72)As for the developments after 30 May 2008 to which the Italian authorities refer in their letters and, more precisely, the contract concluded on 9 and 10 June 2008 between Alitalia and Intesa Sanpaolo, it is sufficient to point out that, for the purposes of assessing the measure in question, account must be taken of the circumstances prevailing as at the time when it was granted. In any case, the Commission would point out that the fact that Alitalia charged Intesa Sanpaolo in June 2008 with seeking a solution for privatisation of the company cannot be considered as a sure and immediate prospect of takeover of the company, as there was no certainty as at that date as to

the success of the task assigned to Intesa Sanpaolo.
(73)It should also be pointed out here that, when the measure in question was granted by the Italian State, none of Alitalia's private shareholders took action to support it alongside the State, in order to enable it to handle its immediate liquidity need.
(74)The almost simultaneous occurrence of withdrawal of the aforementioned take-over bid and granting of the loan by the Italian Government, the absence of other recovery prospects at the time of granting and the absence of financial intervention from Alitalia's private shareholders alongside that of the Italian State reinforce the conclusion that a shareholder of comparable size would not have agreed to grant this loan, given the seriousness of the situation.
(75)The Commission also believes that, given Alitalia's very precarious financial situation, such a private investor would not have agreed to grant it any loan, much less a loan the value of which could be counted as part of its capital, which, in the event of liquidation of the company, would not be reimbursed until after all the other creditors had been paid off, jointly and in proportion to the share capital (see Article 4(4) of Decree-Law No 93). Use of the loan initially granted to fill the gap in Alitalia's capital further strengthens the Commission's analysis that the measure in question constitutes State aid.
(76)In the light of all the foregoing, the Commission believes that, by granting Alitalia the measure in question worth EUR 300 million, the Italian State has not acted as a prudent shareholder pursuing a structural policy — whether general or sectoral — guided by longer term prospects of profitability on the capital invested than those of an ordinary investor.
(77)The Commission concludes from this that, regardless of the use of the relevant funds, the measure in question confers an economic advantage to Alitalia through State resources which it would not have received in normal market conditions.
7.1.2. Selective nature of the measure
(78)The granting of this loan gives Alitalia an economic advantage of which it is the sole beneficiary. Accordingly, the measure in question is selective.
7.1.3. Effect on trade between Member States and distortion of competition
(79)The Commission considers that the measure in question affects trade between Member States, as it concerns a company whose transport activity, by its very nature, directly concerns trade and covers several Member States. It also distorts or threatens to distort competition within the common market, as it is granted to only one company which is in competition with other Community airlines on its European network, particularly since the entry into force of the third air transport liberalisation package on 1 January 1993.
(80)Having regard to all of the foregoing, the Commission believes, on the basis of the information it has at this stage, that the measure worth EUR 300 million granted to Alitalia by the Italian State constitutes State aid within the meaning of Article 87(1) of the Treaty.
7.2. Classification of the aid measure as unlawful aid
(81)Under Article 88(3) of the Treaty, Member States must notify any plans to grant or alter aid. The Member State concerned may not put its proposed measures into effect until this procedure has resulted in a final decision.

(82)The Italian Government decided to grant the EUR 300 million loan on 22 April 2008 by means of Decree-Law No 80. The funds were thus made available to Alitalia on that date, as indeed the Italian authorities themselves confirmed at their meeting with the Commission on 23 April 2008. For its part, Decree-Law No 93, which provided for the option of counting the value of the loan as part of the company's capital, was adopted on 27 May 2008.
(83)However, the Commission notes that this measure was not notified to it by Italy either on the date of adoption of Decree-Law No 80 or on that of adoption of Decree-Law No 93. Accordingly, the Commission believes that Italy has acted unlawfully in granting the aid in question contrary to Article 88(3) of the Treaty.
7.3. Compatibility of the aid measure with the common market
(84)Since the Commission considers that the measure in question constitutes State aid within the meaning of Article 87(1) of the Treaty, it is necessary to assess whether it is compatible with the common market in the light of the exceptions provided for in paragraphs 2 and 3 of that Article. In this connection, it is necessary to bear in mind that the beneficiary of the aid measure is in the air transport sector.
(85)The Commission notes that the exceptions provided for in Article 87(2) of the Treaty, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, are irrelevant in the current context.
(86)As for the exception in Article 87(3)(b) of the Treaty, it is sufficient to note that the aid measure in question is not an important project of common European interest and does not seek to remedy a serious disturbance in the Italian economy. Nor does it seek to promote culture and heritage conservation within the meaning of the exception in Article 87(3)(d) of the Treaty.
(87)The Commission takes the view, in relation to the exception provided for in Article 87(3)(c) of the Treaty, which authorises aid to facilitate the development of certain economic activities where such aid does not affect trading conditions to an extent contrary to the common interest, that there is no basis for considering that the aid in question is compatible with the common market. Indeed, none of the exceptions provided for in this connection by the Commission's guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, as supplemented by the Commission Communication (concerning) Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, appear to apply in the case in point.
(88)Moreover, although, as an exceptional measure, the Commission has authorised some operating aid schemes in the air transport sector on the basis of the 1998 guidelines on national regional aid, as amended in 2000, to airlines operating from the outermost regions, with a view to offsetting the additional costs arising from the permanent disadvantages facing those regions, as identified in Article 299(2) of the Treaty, this exception is not relevant in the current context.
(89)The Commission would point out that, in their letters, the Italian authorities did not assert that the aforementioned exemptions were applicable in the case in point.
(90)As for the Italian authorities' argument concerning the need to guarantee the pub-

lic service provided by Alitalia for reasons of public order and territorial continuity, the Commission notes that this unsubstantiated assertion alone is not sufficient to enable it to consider that the aid measure in question is compatible with the common market.
(91)Lastly, the Commission believes that the aid measure in question cannot be declared compatible with the common market pursuant to the 2004 guidelines. Although Alitalia could be classed as a firm in difficulty within the meaning of those guidelines, the other cumulative conditions allowing the loan in question to be considered rescue aid are not met in the case in point.
(92)Firstly, the Commission notes that the Italian authorities have not demonstrated that the measure in question would not have adverse spillover effects in other Member States. In relation to this point, the Italian authorities merely asserted that the privatisation process and the granting, in this context, of the measure in question was a process of a general nature, since granting of the measure did not enable Alitalia to implement competitive strategies. The Italian authorities in no way detailed the serious social difficulties justifying granting of the measure in question.
(93)Secondly, the Italian authorities have not given an undertaking to send, not later than six months after the measure has been implemented, either a restructuring plan, a liquidation plan or proof that the loan has been repaid in full. In their letters, the Italian authorities referred to the existence of both a restructuring plan and a timetable for repayment of the measure in question. However, the Italian authorities' assertion that drafting of the restructuring plan is part of Alitalia's privatisation process undertaken since 2006 is not sufficient for it to be considered that the Commission has received a formal undertaking concerning sending of an actual plan for restructuring the company within six months of granting of the measure.
(94)Moreover, the supposed timetable for repaying the loan set out in Decree-Law No 93 does not allow the Commission to consider that the condition in paragraph 25(c) of the 2004 guidelines has been met. Indeed, the fact that the loan in question must be repaid as quickly as possible between the 30th day after transfer of Alitalia's share capital and 31 December 2008 does not allow it to be considered that the Italian authorities have undertaken to send proof of its full repayment within six months of granting of the measure by Decree-Law No 80, *i.e.* by 23 October 2008 at the latest.
(95)In any case, the Italian authorities glossed over the fact that Article 4(4) of Decree-Law No 93 states that, in the event of liquidation of the company, the amount in question will be repaid only after all the other creditors have been paid off, jointly and in proportion to the share capital, which, if this possibility came about, would undermine any prospect of repayment. Reference in this Decree-Law to the possibility of liquidation of the company cannot be considered as an undertaking by Italy to send a liquidation plan not later than six months after implementation of the measure.
(96)Thirdly, the Italian authorities have not demonstrated that the value of the aid in question is justified for the purposes of keeping the company in business (paragraph 25(d) of the 2004 guidelines).
Indeed, the Italian authorities merely asserted, in their letters, that the total value of the intervention in favour of Alitalia was strictly necessary and proportional to the aim of safeguarding the survival and assets of the company. In this context, contrary to the Italian authorities' assertion, the description of the company's financial situation

in their letter of 30 May 2008 to the Commission does not allow such a conclusion to be drawn.
(97)Fourthly, and in any event, it cannot be considered that Alitalia has complied with the condition linked to the 'one time, last time' rule — whether the aid is considered rescue aid or restructuring aid. It should be recalled that, according to the 2004 guidelines, if a company has already received rescue or restructuring aid in the past and if fewer than ten years have passed since granting of the rescue aid, since the end of the restructuring period, or since the end of implementation of the plan, the Commission will not authorise new rescue or restructuring aid.
(98)However, Alitalia has already received restructuring aid which was approved by the Commission by Decision of 18 July 2001 and rescue aid in the form of a State guarantee for a EUR 400 million bridging loan approved by the Commission by Decision of 20 July 2004. Since ten years have not passed since the latter aid was granted, Alitalia cannot receive the aid in question in the case in point.
(99)It is nevertheless true that the 2004 guidelines provide for exceptions to the 'one time, last time' rule. However, the Commission notes that the conditions of paragraph 73(a) and (b) have not been met in the case in point. Moreover, the Italian authorities have not asserted that these exceptions are applicable in the case in point.
(100)Furthermore, the Commission believes that the exception provided for in paragraph 73(c) of the 2004 guidelines linked to the existence of exceptional and unforeseeable circumstances for which the company concerned is not responsible does not apply in the case in point.
(101)Indeed, it should be pointed out that, for several years, Alitalia's financial difficulties have been recurrent, meaning that the difficulties encountered by the company and used to justify granting of the measure cannot be classified as exceptional, unforeseeable and beyond the control of the company.
(102)In this context, it is appropriate to refer to the description of Alitalia's financial situation given in the Commission Decisions of 18 July 2001, 20 July 2004 and 7 June 2005 (previously cited), which refer to the company's situation as being difficult since 1997 and worrying after 2001. Furthermore, Alitalia's very precarious financial situation as at the date of granting of the measure in question demonstrates the failure of the restructuring plan notified to the Commission in 2004, which was the subject of the latter's decision of 7 June 2005.
(103)The support measures granted to Alitalia by the Italian authorities in recent years are further proof of the recurrent nature of this precarious financial situation (see section 7 above).
(104)In this context, the very difficult situation facing the air transport sector, which is linked in particular to an acceleration in the increase in the price of oil during the first six months of 2008, does not, on its own, explain the particularly precarious financial situation of Alitalia for many years. It should be recalled, in this connection, that, according to the aforementioned Decree-Law No 80 of 23 April 2008, the reason for granting the loan was the company's financial situation and its immediate liquidity need and that Decree-Law No 93 was adopted as a result of the company's worsening financial situation and was intended to enable it to safeguard its value, thereby ensuring that it remained in business.

(105)While there is thus no doubt that the current economic situation is contributing to accentuating the difficulties facing Alitalia, the fact remains that its economic difficulties existed earlier and, moreover, that the current situation affects all air carriers.
(106)Accordingly, in the case in point, it is not possible to derogate from the 'one time, last time' principle of the 2004 guidelines.
(107)Italy's reference to the Bull Decision does not cast doubt on this analysis.
(108)In that Decision, the Commission considered that, in the specific circumstances of the case in point, the 'one time, last time' principle did not prevent authorisation of the aid notified by France, even though the period of ten years before granting of new restructuring aid had not passed. According to the Commission in that Decision, the philosophy of that principle, namely to prevent any unfair support, had been respected, since France had not propped Bull up artificially in the face of difficulties of a recurrent nature.
(109)However, it should be pointed out that the guidelines applicable to Bull were the 1999 guidelines rather than, in the current case, the 2004 guidelines. Unlike the 1999 guidelines, those for 2004 provide for account to be taken, for the purposes of application to rescue or recovery aid of the 'one time, last time' principle, not only of restructuring aid, but also of rescue aid previously granted to the company concerned. The Commission also points out that, under the 2004 guidelines, in order to prevent firms from being unfairly assisted when they can survive only thanks to repeated State support, rescue or restructuring aid should be granted once only (see paragraph 72).
(110)Furthermore, unlike the specific circumstances of the Bull case, the difficulties facing Alitalia and used to justify granting of the measure in question are not, as has previously been noted, linked to the current unfavourable situation in the air transport sector. Moreover, these difficulties are undoubtedly of the same nature as those which the company previously faced, as demonstrated by the description of its financial situation since 1997 (see recitals 57 and 58 above) and, unlike the facts in the Bull case, are recurrent in nature.
(111)Lastly, contrary to what the Commission noted in the Bull Decision, Alitalia received both restructuring aid and rescue aid in the form of a State guarantee, and the period which has been running since the granting of these aid measures is not close to completion.
(112)It follows from this that, even supposing that the other cumulative conditions under the 2004 guidelines allowing the loan in question to be considered rescue aid had been satisfied — which is not the case — the condition linked to the 'one time, last time' principle has not been satisfied in the case in point and it is not possible to derogate therefrom by applying one of the exceptions provided for in paragraph 73 of the guidelines.
(113)It follows from all of the foregoing that the aid measure in question is not compatible with the common market.
7.4. Recovery
(114)The Commission would point out that, pursuant to Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty, any aid which is unlawful and incompatible with the common market must be recovered from the beneficiary.

(115)Since the measure in question was granted unlawfully to Alitalia and is incompatible with the common market, it must be recovered from it.
(116)The Commission would point out again that, given Alitalia's very precarious financial situation and the conditions for granting of the measure in question, a private investor would not have agreed to grant it any loan, much less a loan the value of which is to be counted as part of its capital. Given the nature of the measure in question and the circumstances of its granting, the Commission believes that the aid to be recovered is the entirety of the loan.
(117)For the purposes of such recovery, account must also be taken of interest, from the date on which the aid in question was made available to the company, *i.e.* 22 April 2008, until the date of actual recovery.
7.5. Conclusion
(118)The Commission finds that Italy has unlawfully implemented an aid measure comprising a loan of EUR 300 million granted to Alitalia, which can be counted as part of the company's capital, contrary to Article 88(3) of the Treaty.
(119)In consequence, Italy must take all the necessary measures to recover this State aid which is incompatible with the common market. It must recover this aid from its beneficiary, namely Alitalia,
HAS DECIDED AS FOLLOWS:
Article 1
The EUR 300 million loan granted to Alitalia and capable of being counted as part of its capital, which was implemented by Italy contrary to Article 88(3) of the Treaty, is incompatible with the common market.
Article 2
1. Italy shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiary until they are actually recovered.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004and Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.
Article 3
1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Italy shall ensure that this Decision is implemented within four months following the date of its notification.
Article 4
1. Within two months following notification of this Decision, Italy shall notify the following information to the Commission:
(a) the total amount (principal and interest) to be recovered from the beneficiary;
(b) a detailed description of the measures already taken and those planned to comply with this Decision;
(c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until complete recovery of the aid referred to in Article 1. It shall immediately submit, on simple request by the Commission, any information on the measures already taken and those planned to comply with this

Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.
(omissis – footnotes omitted in the text)

12.

European Court of Justice 19 December 2012, Case C-288/11 P. Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission.
(omissis)
1 By their appeal, Mitteldeutsche Flughafen AG ('MF') and Flughafen Leipzig-Halle GmbH ('FLH') seek the partial setting aside of the judgment in Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Others* v *Commission* [2011] ECR II-1311 ('the judgment under appeal'), by which the General Court, in Case T-455/08, first, annulled Article 1 of Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport (OJ 2008 L 346, p. 1) ('the contested decision') in so far as it fixes at EUR 350 million the amount of State aid which the Federal Republic of Germany was planning to grant to Leipzig Halle airport for the purposes of the construction of a new southern runway and related airport infrastructure and, second, dismissed the action as to the remainder.
Background to the dispute and the contested decision
2 It is apparent from paragraphs 1 to 12 of the judgment under appeal that Leipzig-Halle airport is operated by FLH which is a subsidiary of MF, whose shareholders are the Länder of Saxony and Saxony-Anhalt and the cities of Dresden (Germany), Halle (Germany) and Leipzig. On 4 November 2004, MF decided to construct a new runway ('the new southern runway') which was to be financed by capital contributions of EUR 350 million to MF or FLH by their public shareholders.
3 The DHL group ('DHL'), operating in the express parcel delivery sector, which is wholly-owned by Deutsche Post AG, decided, after carrying out negotiations with several airports, to move its European air freight hub from Brussels (Belgium) to Leipzig Halle from 2008. On 21 September 2005, FLH, MF and DHL Hub Leipzig GmbH ('DHL Hub Leipzig') signed a framework agreement, under which FLH was required to construct the new southern runway and to honour other commitments for the duration of that framework agreement, such as the guarantee that DHL be granted continuous access to that runway and the assurance that at least 90% of the flights made by or for DHL could be carried out at any time from that runway.
4 On 21 December 2005, the Land of Saxony issued a comfort letter in favour of Leipzig airport and DHL Hub Leipzig ('the comfort letter'). That letter seeks to guarantee the financial performance of FLH during the framework agreement and commits the Land of Saxony to pay compensation to DHL Hub Leipzig in the situation where it is no longer possible to use Leipzig-Halle airport as envisaged.
5 On 5 April 2006, the Federal Republic of Germany, in accordance with Article 2(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), notified the framework agreement and the comfort letter to the Commission of the European

Communities.

6 By letter of 23 November 2006, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure under Article 88(2) EC. That procedure concerned the framework agreement, the comfort letter and the capital contributions.

7 On 23 July 2008, the Commission adopted the contested decision. It found, in that decision, that the capital contributions constituted State aid compatible with the common market, in accordance with Article 87(3)(c) EC. On the other hand, it considered that the comfort letter and the unlimited warranties provided for in the framework agreement constituted State aid which were not compatible with the common market and requested the Federal Republic of Germany to recover the part of the aid already put at DHL's disposal pursuant to those warranties.

8 As is apparent from paragraphs 62 and 67 of the judgment under appeal, the capital contributions were granted prior to the contested decision. That was confirmed by the Commission at the hearing.

The proceedings before the General Court and the judgment under appeal

9 By applications lodged at the Registry of the General Court on 6 October 2008, the Freistaat Sachsen and the Land Sachsen-Anhalt, in Case T-443/08, and MF and FLH, in Case T-455/08, brought actions for annulment of Article 1 of the contested decision in so far as the Commission declares in it, first, that the capital contributions constitute State aid for the purpose of Article 87(1) EC and, secondly, that that State aid amounts to EUR 350 million.

10 By orders of 30 March 2009 and 24 June 2010, the President of the Eighth Chamber of the General Court granted the applications for leave to intervene submitted by the Federal Republic of Germany and the Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV ('ADV') in the two cases and also decided to join those cases for the purposes of the oral procedure.

11 In support of their action, MF and FLH, supported by ADV, raised eight pleas alleging, essentially, as to the first, infringement of Article 87(1) EC, as to the second, that FLH could not be the recipient of State aid, as to the third, that it is impossible to treat FLH at the same time as both the donor and recipient of State aid, as to the fourth, infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, as to the fifth, infringement of primary law by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1) ('the 2005 Guidelines'), as to the sixth, put forward in the alternative, a breach of procedure, as to the seventh, an infringement of the division of competences as it follows from the EC Treaty and, as to the eighth, that the decision on the amount of the alleged aid was inherently contradictory and insufficient reasons were stated for it.

12 By the judgment under appeal, the General Court joined Cases T-443/08 and T-445/08 for the purposes of the judgment, dismissed the action in the former case as inadmissible and annulled, in the latter case, Article 1 of the contested decision in so far as it fixes at EUR 350 million the amount of the State aid which the Federal Republic of Germany intended to grant to Leipzig-Halle airport for the purposes of the construction of the new southern runway and related airport infrastructure, dismissing

the action as to the remainder.

13 In dismissing the first plea, in support of which the applicants in Case T-455/08 argued, inter alia, that the concept of 'undertaking', within the meaning of Article 87(1) EC, did not apply to regional airports so far as concerns the financing of airport infrastructure, the General Court first held, for the reasons set out at paragraphs 87 to 100 of the judgment under appeal, that, in so far as it was operating the new southern runway, FLH was engaged in an economic activity, from which that consisting in the construction of that runway could not be dissociated.

14 Next, at paragraphs 102 to 107 of the judgment under appeal, the General Court rejected the argument put forward by the applicants that the construction of the new southern runway constituted a measure falling within regional, economic and transport policy which the Commission could not review under the rules of the EC Treaty on State aid, in accordance with the Commission's Communication on the application of Articles [87 EC] and [88 EC] and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ 1994 C 350, p. 5) ('the 1994 Communication'). It observed, in this connection, that the airports sector had undergone developments, in particular so far as concerns its organisation and its economic and competitive situation, and that the case-law following from Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, confirmed by Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, ('the *Aéroports de Paris* judgments') had acknowledged, since 2000, that the managers of airports carried out an economic activity for the purposes of Article 87(1) EC.

15 Likewise, the General Court rejected, at paragraphs 108 to 116 of the judgment under appeal, the applicants' arguments concerning the alleged dissociability of the activities of construction and operation of airport infrastructure. It observed, inter alia, first, that the construction of the new southern runway was a precondition for its operation, second, that the entities concerned were in the present case the same, third, that, by basing its findings on the fact that the infrastructure at issue was operated by FLH for commercial purposes and that it was therefore infrastructure which could be used for such a purpose, the Commission had adduced enough evidence to substantiate the link between the construction and the operation of the new southern runway and, fourth, that the construction of that new southern runway was an activity which could be directly linked with the management of airport infrastructure and the fact that an activity was not carried out by private operators or the fact that it was not profitable were not relevant criteria for the purposes of ruling out characterisation of it as an economic activity.

16 Lastly, the General Court discounted, at paragraphs 117 to 119 of the judgment under appeal, the applicants' arguments seeking to cast doubt on the relevance of the *Aéroports de Paris* judgments before concluding, at paragraph 120 of that judgment, that the Commission had been fully entitled to consider the capital contributions to be State aid for the purposes of Article 87(1) EC.

17 In dismissing the fourth plea raised by the applicants in Case T-455/08 and alleging the infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, the General Court observed, at paragraphs 157 to 164 of the judgment under appeal, that the Commission had

not, contrary to what the applicants claimed, applied the 2005 Guidelines, but that it had implemented the principles stemming from the *Aéroports de Paris* judgments. Consequently, at paragraphs 166 to 172, 181 and 182 of the judgment under appeal, the General Court also dismissed the claims relating to infringement of the principles of protection of legitimate expectations, legal certainty and equal treatment, and the fifth plea put forward in that case, alleging an infringement of primary law by the 2005 Guidelines.

18 The General Court also rejected, at paragraphs 192 and 201 to 209 of the judgment under appeal, the applicants' sixth plea in that case, alleging a breach of procedure, in which the applicants argued, in the alternative, that the capital contributions should be treated as 'existing aid' within the meaning of Article 1(b)(v) of Regulation No 659/1999, and the seventh plea that they submitted in that case, alleging an infringement of the division of competences as it follows from the EC Treaty.

19 By contrast, the General Court upheld the eighth plea put forward by the applicants in support of their action in Case T-455/08, which alleged that the decision on the amount of the aid was inherently contradictory and that insufficient reasons were stated for it. The General Court held, in that connection, at paragraph 230 of the judgment under appeal, that the amount of EUR 350 million, set out in the operative part of the contested decision, was incorrect in the light of the recitals in the preamble to that decision in so far as it was apparent from those recitals that the sums covering public service duties did not constitute State aid and should therefore be deducted from the capital contributions.

Forms of order sought

20 MF, FLH and ADV claim that the Court should:

– set aside point 4 of the operative part of the judgment under appeal, by which the action brought in Case T-455/08 was dismissed as to the remainder, and the decision as to the costs;

– rule definitively on the dispute, allowing the action brought in Case T-455/08 in so far as that action seeks the annulment of the contested decision in so far as the Commission declares therein that the measure by which the Federal Republic of Germany provided capital contributions for the construction of the new southern runway and related airport infrastructure constitutes State aid for the purposes of Article 87(1) EC, and

– order the Commission to pay the costs relating to the appeal and to the proceedings at first instance.

21 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs of the appeal.

Appeal

22 In support of their appeal, the appellants raise five grounds alleging, first, infringement of Article 87(1) EC, second, infringement of the principles of non-retroactivity, the protection of legitimate expectations and legal certainty, third, infringement of Article 1(b)(v), Article 17 and Article 18 of Regulation No 659/1999, fourth, infringement of the division of competences as it follows from the EC Treaty and, fifth, infringement of the obligation to state sufficient reasons for judgments.

First ground of appeal, alleging infringement of Article 87(1) EC

Arguments of the parties

23 The appellants criticise the General Court for having characterised the financing of the construction of the new southern runway as State aid by holding that FLH should be regarded, in this respect, as an undertaking inasmuch as that construction was an economic activity for the purpose of the rules on State aid.

24 In their view, it is necessary to distinguish the activity of construction of airport infrastructure from that of its operation. Contrary to what is required under the consistent case-law of the EU judicature, the General Court failed to examine those activities separately and presumed that they were indissociable, merely stating, at paragraph 96 of the judgment under appeal, that runways are 'essential' for the purposes of the economic activities performed by the operator of an airport and that the construction of such runways allows that operator to carry out his main economic activity. Thus, the General Court did not check whether those activities could be differentiated from each other and disregarded the fact that they concerned different actors and sectors.

25 It is of little importance, in the assessment of whether an activity is economic in nature, whether that activity is a 'pre-condition' for another activity and there should be no distinction made between the main activities and the ancillary activities of the entity under consideration, the case-law requiring that that assessment be made in respect of each activity carried out by that entity.

26 Moreover, the distinction between the construction and the operation of infrastructure is a fundamental principle of the Commission's practice and stems, so far as airports are concerned, from point 12 of the 1994 Communication, which was not annulled, but merely completed by the 2005 Guidelines. The General Court was therefore incorrect to hold that the Commission was not required to apply the 1994 Communication, where that communication is not contrary to primary law, since the EC Treaty does not confer any exclusive competence on the European Union in respect of infrastructure policy.

27 Furthermore, in the interpretation of primary law, the EU judicature does not in any way require the application of the rules on State aid to measures relating to airport infrastructure and take the view that those rules need only apply in the case of the operation of the airport. The appellants refer, in this connection, to the judgments in Case T-238/98 *Aéroports de Paris* v *Commission* and Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, pointing out that the facts which gave rise to the first of those judgments concerned the activities of a big international airport whose economic situation was diametrically opposed to that of a regional airport such as Leipzig-Halle airport.

28 In addition, the General Court was incorrect to hold, at paragraph 115 of the judgment under appeal, that the fact that the activity of infrastructure construction was not performed by private operators was irrelevant, where the existence of a market presupposes that the activity concerned could theoretically be performed by such operators. The General Court merely assumed that the activity of the construction of the new southern runway was economic in nature without examining either the arguments put forward to dispute that there was a market in respect of that activity or the economic reality.

29 The activity of airport infrastructure construction could not be an economic

activity by nature where there was no prospect of making a profit, it being impossible to pass on the construction costs to users of that infrastructure by means of airport charges, contrary to what the General Court observed at paragraph 94 of the judgment under appeal. Private investors could not freely pass on those costs to the users, since those charges must be authorised by the competent authorities of the Land in which the airport concerned is located, which base their authorisation on criteria with no connection to the airport infrastructure construction costs. The construction of such infrastructure therefore is included among activities which have always been and are necessarily exercised by public entities.

30 Like the appellants, ADV, which is an association of undertakings operating German airports, considers that characterising the activity of the financing or the construction of airport infrastructure as an economic activity is contrary to European Union law.

31 According to that party, it is necessary, both legally and in the light of the facts, to make a functional distinction between the construction and the operation of such infrastructure. It observes, inter alia, that the General Court's finding that the construction of the new southern runway is essential to the operation of the airport and cannot be considered separately from it is too general and leads to regarding as economic all the activities upon which the activity of an airport operator is contingent, including measures falling within the exercise of State authority.

32 In practice, there is no private financing of the construction of new airport infrastructure, at least in small and medium-sized airports, and the involvement of private undertakings is limited to the acquisition and operation of infrastructure which already exists or has been constructed by the State. It is still impossible, despite developments in the airports sector, to finance the construction of costly airport infrastructure by income from its operation. Since it is not profitable, the activity therefore cannot be considered an economic activity.

33 ADV also claims that the General Court erred and contradicted itself in referring, like the Commission, to the *Aéroports de Paris* judgments. The finding that the economic nature of the airport infrastructure's construction stems from the economic nature of its operation cannot be inferred from that case-law. Neither the Commission nor to the General Court have explained in an acceptable manner, in law, why, contrary to the 1994 Communication, the financing of the construction of an airport should be subject to examination by the Commission. In actual fact, airport infrastructure construction is an essential element of services of general interest, so that that task typically falls within the exercise of State authority.

34 The Commission submits, primarily, that the argument adopted by the appellants, that the airport infrastructure construction constitutes an activity which must be assessed independently of the airport's operation, is manifestly inaccurate. In its view it has been shown, since the *Aéroports de Paris* judgments, that making airport facilities available in return for consideration constitutes an economic activity falling within the European Union competition rules. The construction costs of the facilities used by the airport operator are therefore investment costs which a commercial undertaking must normally bear. Therefore, in the opinion of that institution, the General Court did not err in law in holding that FLH was an undertaking and that the construction

of the new southern runway constituted a matter which was indissociable from its economic activity.

Findings of the Court

35 In support of their first ground of appeal, the appellants, supported by ADV, essentially repeat the arguments which they expounded before the General Court, according to which the construction or extension of airport infrastructure does not constitute an economic activity falling within the scope of European Union law on State aid, so that financing of it by means of public funds is not liable to constitute State aid.

36 In the appeal, it is necessary to consider whether, in the present case, the General Court infringed Article 87(1) EC in holding that the activity of FLH, operator of the Leipzig-Halle airport and recipient with MF of the capital contributions intended to finance the construction of the new southern runway, was, so far as concerns that construction, economic in nature and that therefore the Commission was fully entitled to find that those capital contributions constituted State aid for the purposes of that provision.

37 It must be pointed out at the outset, as the appellants and ADV argue, that the 1994 Communication states, in point 12 thereof, that '[t]he construction o[r] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids'.

38 In dismissing the appellants' arguments derived from that communication, the General Court, at paragraphs 104 to 106 of the judgment under appeal, observed as follows:

'104 However, it must be recalled that the question whether aid is State aid within the meaning of the Treaty must be determined on the basis of objective elements, which must be appraised on the date on which the Commission takes its decision (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others*, ... paragraph 95), and, moreover, that, although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or which contravenes the aims of those articles (see Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 65 and the case-law cited).

105 There have been developments in the airports sector, referred to in recitals 169 to 171 of the [contested decision], concerning, in particular, the organisation of the sector, and its economic and competitive situation. Furthermore, the [*Aéroports de Paris* judgments] recognised, as of 2000, that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply and that was confirmed by the judgment in *Ryanair* v *Commission* ... (paragraph 88).

106 Consequently, having regard to the case-law referred to in paragraph 104, the Commission was required, when it adopted the [contested decision], to take account of those developments and that interpretation and their implications for the applica-

tion of Article 87(1) EC to financing of infrastructure related to airport operations, unless it is not to apply point 12 of the 1994 Communication. Having regard to the foregoing, therefore, the Commission did not err in considering, in recital 174 of the [contested decision], that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000.'

39 Those assessments by the General Court are not vitiated by any error of law. The Commission was required, having regard to the factual and legal situation prevailing at the time of the adoption of its decision, to examine the capital contributions under the competences conferred upon it under Article 88 EC. The General Court was therefore fully entitled to reject the appellants' arguments relating to the 1994 Communication and also to examine the plea before it by establishing specifically, in the light of that situation and not of that communication, whether the construction of the new southern runway constituted an economic activity.

40 In this respect, having regard to the indissociable nature, in the present case, of the activities of operation and construction, which the appellants dispute, the General Court, after having recalled, in paragraph 89 of the judgment under appeal, that any activity consisting in offering goods or services on a given market is an economic activity (Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 22), first observed, correctly, at paragraph 93 of the judgment under appeal, that FLH, in the context of the operation of Leipzig-Halle airport, is engaged in an economic activity where it offers airport services in return for remuneration gained from, inter alia, airport fees (see judgment in Case C-82/01 P *Aéroports de Paris* v *Commission*, paragraph 78) on the regional airport services market. The General Court held, on this issue, in its definitive assessment of the facts, which has not been challenged by the appellants in this appeal, that the existence of such a market was, in the present case, proved by the fact that Leipzig-Halle airport was in competition with other regional airports to become DHL's European hub for air freight.

41 The General Court then held, at paragraph 94 of the judgment under appeal, that the operation of the new southern runway would form part of FLH's economic activity, the Commission having stated, at recital 177 in the preamble to the contested decision, that that infrastructure would be operated for commercial purposes by FLH which would demand fees for its use. It observed that, as the Commission stated at recital 15 in the preamble to the contested decision, those fees would constitute the main source of income for the purposes of financing that runway, which would allow FLH to increase its capacity and to extend its business of operating Leipzig-Halle airport.

42 Lastly, at paragraphs 95 to 100 of the judgment under appeal, the General Court held that it was not appropriate to dissociate the activity consisting in constructing the new southern runway from the subsequent use which would be made of that runway, observing, inter alia, at paragraph 99 of that judgment, that, having regard to its nature and its purpose, the construction of that runway did not, as such, fall within the exercise of State authority, which, moreover, the applicants were not expressly claiming. It must be observed, in this connection, that, in upholding the plea for annulment alleging that the reasons given for the amount of the aid were contradictory and inadequate, the General Court observed, at paragraphs 225 and 226 of

the judgment under appeal, that the Commission had conceded, at recitals 182 and 183 in the preamble to the contested decision, that certain expenses covered by the capital contributions –namely the expenses relating to security and police functions, to fire-protection measures and public security measures, to operating security measures, to the German meteorological service and to the air-traffic control service – fell within the performance of public duties and could not therefore be treated as State aid.

43 It is apparent from those findings that the General Court did not err in law in holding, essentially, that the Commission had correctly considered the construction of the new southern runway by FLH to constitute an economic activity and, consequently, the capital contributions, subject to the amount to be deducted from them in respect of expenses linked to the performance of public duties, to constitute State aid for the purpose of Article 87(1) EC.

44 Contrary to what is asserted by the appellants, supported by ADV, it seems that, for the purposes of establishing whether the construction of the new southern runway could be characterised as an economic activity by the Commission, the General Court, in accordance with the case-law (see Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 19; Case C-82/01 P *Aéroports de Paris* v *Commission*, paragraph 75, and *MOTOE*, paragraph 25), made an assessment of that activity and examined its nature. In doing so, it did not assume but established, taking account of the specific circumstances and without erring in law, that that activity could not be dissociated from the operation by FLH of the airport infrastructure, which constitutes an economic activity, the construction of the new southern runway moreover not being linked, as such, by its nature or purpose, to the exercise of State authority.

45 That finding cannot be called into question by the other arguments put forward by the appellants and ADV.

46 First, it is necessary to reject the argument that the construction of the airport infrastructure and the operation of the airport concern different actors and sectors since, on any view, as the General Court definitively held at paragraph 111 of the judgment under appeal, without that finding being called into question in the present appeal, the entities concerned were in actual fact the same.

47 Secondly, it is not important that the General Court observed, at paragraphs 96, 110 and 111 of the judgment under appeal respectively, that 'runways are essential for the purposes of the economic activities performed by an airport operator', that 'the objective of constructing a runway is linked to the main economic activity of an airport' and that the 'construction and extension of the runway [are] pre-conditions for its operation'. Those considerations are, admittedly, unsuitable, by reason of their general nature and because they might also apply to certain activities which fall within the exercise of State authority, for establishing the economic nature of a given activity of airport infrastructure construction. However, they do not affect the validity in law of the General Court's findings set out at paragraphs 40 to 42 above, from which it follows that, in the present case, the construction of the new southern runway constituted an economic activity.

48 Third, in response to ADV's assertion that airport infrastructure construction represents an essential element of services in the public interest and therefore typically constitutes a public duty, it is sufficient to observe that the General Court stated, at

paragraph 99 of the judgment under appeal, that the appellants themselves did not expressly claim that the construction of the new runway fell, as such, within the exercise of State authority.

49 Lastly, as regards the argument that the activity of airport infrastructure construction could not be carried out by private operators on account of the fact that there was no market for that type of activity because it was not envisaged to be profitable, this was rejected by the General Court. It observed, at paragraph 114 of the judgment under appeal, that it was apparent from its preceding findings that the construction of the new southern runway was an activity which could be directly linked with the operation of the airport, which is an economic activity. That being established, the General Court accordingly did not have to examine whether there was a specific market for the activity of airport infrastructure construction.

50 In addition, at paragraph 115 of the judgment under appeal, the General Court correctly pointed out that, furthermore, the fact that an activity is not carried out by private operators or the fact that it is not profitable were not relevant criteria for the purposes of whether or not it was to be characterised as an economic activity. As the General Court recalled at paragraphs 88 and 89 of that judgment, it is settled-case law that, first, in the field of competition 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, secondly, any activity consisting in offering goods or services on a given market is an economic activity (see, inter alia, Case C-82/01 P *Aéroports de Paris* v *Commission*, paragraph 75; *MOTOE*, paragraphs 21 and 22, and Case C-113/07 P *SELEX Sistemi Integrati* v *Commission* [2009] ECR I-2207, paragraph 69). It follows from this that whether or not an activity is economic in nature does not depend on the private or public status of the entity engaged in it or the profitability of that activity.

51 Moreover, in answer to the arguments put forward in this context by the appellants concerning the amount of the airport fees, it is appropriate to point out that, as observed at paragraph 41 above, the General Court held in the present case, at paragraph 94 of the judgment under appeal, that the airport fees would constitute the main source of income for the purpose of financing the new southern runway, as the Commission stated at recital 15 in the preamble to the contested decision. That finding of fact, from which it is apparent that, contrary to what the appellants claim, the construction costs of that runway are in part passed on to users, does not constitute, save where the clear sense of the facts or evidence has been distorted – which is not claimed in the present case – a point of law which is subject as such to review by the Court of Justice on appeal (see, inter alia, to that effect, Case C-487/06 P [2008] *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 97 and the case-law cited).

52 It follows that the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

Second ground of appeal, alleging infringement of the principles of non-retroactivity, the protection of legitimate expectations and legal certainty

Arguments of the parties

53 The appellants, supported by ADV, are of the opinion that the General Court erred in law in holding that the Commission had not applied the 2005 Guidelines.

They submit that, the Commission having *de facto* applied those guidelines, the General Court, by refusing to acknowledge this, infringed the principles of non-retroactivity, protection of legitimate expectations and legal certainty.

54 Concerning, first of all, the first of those principles, they point out that the decision on the capital contributions in favour of FLH was adopted at a time when the 1994 Communication was exclusively applicable. It was only at the end of 2005 that the Commission's policy changed, and that institution did not annul that communication but completed it by the 2005 Guidelines. Those guidelines expressly exclude any retroactive application.

55 As regards, next, the alleged infringement of the principles of protection of legitimate expectations and legal certainty, the appellants submit that, contrary to the considerations set out by the General Court at paragraph 167 of the judgment under appeal, there was neither, before the adoption of the decision of 4 November 2004 on the construction and the financing of the new southern runway, any decision-making practice which differed from the 1994 Communication nor any case-law providing that the rules on State aid were applicable to the financing of airport infrastructure construction, so that the sudden change in the Commission's approach was not foreseeable.

56 An analysis of the decisions taken by the Commission concerning the measures for financing of airport infrastructure confirms that, before the publication of the 2005 Guidelines, that institution had not taken any decision to that effect. It previously expressly dealt with those measures as general measures of economic policy not falling within the scope of the rules on State aid, even after the delivery of the *Aéroports de Paris* judgments. It was only in its decision of 19 January 2005 concerning State aid N 644i/2002 (Germany – Construction and development of regional airports) and its decision of 20 April 2005 concerning State aid N 355/2004 on Antwerp airport that the Commission envisaged for the first time the application of those rules to the construction and the development of airport infrastructure, while observing that those rules were in principle not applicable. However, assuming that those decisions were relevant, they could not have affected the legitimate expectations of the economic operators concerned, given that they were published in full not in the *Official Journal of the European Union* but, subsequently, on the Commission's internet site only in the language of procedure.

57 The General Court erroneously referred, in this connection, first, to the judgments in *Aéroports de Paris* and *Ryanair* v *Commission*, which concerned only the operation of such infrastructure, secondly, to the Commission's decision of 13 March 2001 on State aid N 58/2000 (Italy – Promotion of the Piedmont airport system) ('the Commission's decision of 13 March 2001'), which did not in any way call into question the fact that airport infrastructure financing measures constituted measures of general policy and, lastly, the notification made by the German government of State aid N 644i/2002, which concerned not an individual measure but an aid scheme. Member States often notify their national legislation, in the interest of legal certainty, even when they do not consider that legislation to contain any aid.

58 At the hearing, the appellants added that there was only a limited publication of the *Aéroports de Paris* judgments and the Commission's decision of 13 March 2001

in the *Official Journal*, that they were not available in German on the Commission's internet site and that the exchanges between the Commission and the Member States had not been published.

59 Lastly, the appellants claim that the General Court failed to examine the arguments which they put forward to argue that the 2005 Guidelines were not lawful. They submit that, apart from the fact that those guidelines are contrary to primary law in so far as they characterise the activity of airport infrastructure construction as economic activity, they are intrinsically contradictory inasmuch as they confirm the 1994 Communication while differing from it and thus infringe the principle of legal certainty.

60 The Commission disputes all of those arguments which, in its view, do not stand up against a straightforward reading of the contested decision, from which it is apparent that it relied, in order to prove that there was aid, not on the 2005 Guidelines but on Article 87(1) EC, as interpreted in the *Aéroports de Paris* judgments. It states that, in the light of the clarification in those judgments of the concept of State aid, which is an objective legal concept, it could not continue, without infringing that article, to apply point 12 of the 1994 Communication.

61 Furthermore, having regard to the *Aéroports de Paris* judgments and the decision-making practice which followed those judgments, there was no longer, in the Commission's view, any legitimate reason to believe, at the end of 2004, that the financing by the State of an airport runway could not under any circumstances constitute State aid. The principle of the protection of legitimate expectations was therefore not infringed. Moreover, since the 2005 Guidelines were not applied, the part of the ground of appeal relating to the infringement of the principle of legal certainty is manifestly redundant.

Findings of the Court

62 As regards, in the first place, the allegation relating to the infringement of the principle of non-retroactivity, the General Court, at paragraphs 157 to 160 of the judgment under appeal, observed as follows:

'157 ... it must be held that, as regards the classification of the capital contributions as State aid within the meaning of Article 87(1) EC, there is nothing in the [contested decision] which leads to the conclusion that the Commission applied the provisions of the 2005 Guidelines.

158 With regard, first, to the 'undertaking' and economic activity criterion, the Commission pointed out in recital 173 of the [contested decision] that it is clear from the [*Aéroports de Paris* judgments] that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply. Given the recent developments in the sector, the Commission considered, as indicated in recital 174 of the [contested decision], that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000, the year [of the judgment in Case T-128/98] *Aéroports de Paris* v *Commission* ... The Commission therefore concluded, in recital 176 of the [contested decision], that from the date of that judgment the State aid rules should apply in this sector, emphasising that that did not constitute retroactive application of the 2005 Guidelines inasmuch as the Court of Justice had simply clarified the concept of State aid.

159 That approach must be approved since the interpretation which the Court of Justice gives of a provision of European Union law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force (Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 159, and the case-law cited).

160 It follows that, with regard to the assessment of the economic activity criterion, the Commission was entitled to implement the principles flowing from the [*Aéroports de Paris* judgments] by applying them to the circumstances of the present case, in particular as regards the financing of airport infrastructures and that does not constitute retroactive application of the 2005 Guidelines.'

63 At paragraph 161 of the judgment under appeal, the General Court also observed that the statement, at recital 174 in the preamble to the contested decision, that, having regard to the developments in the airport sector, the Commission had, in its 2005 Guidelines, 'extended' the approach followed in the *Aéroports de Paris* judgments to all types of airports did not permit the inference that the Commission had applied those guidelines in the present case. Noting, at paragraphs 162 and 163 of the judgment under appeal, that the Commission had not applied the 2005 Guidelines either in its examination of the criteria of economic benefit and imputability to the State, the General Court concluded, at paragraph 164 of that judgment, that, as regards the characterisation of the capital contributions as 'State aid' for the purpose of Article 87(1) EC, the Commission had not applied the 2005 Guidelines. Consequently, it rejected the claim.

64 In doing so, the General Court did not err in law. First, as it follows from the examination of the first ground of appeal, it was fully entitled to hold, essentially, for the reasons referred to at paragraph 38 of this judgment, that the Commission had legitimately departed from the 1994 Communication. Secondly, it also correctly stated, essentially, that the Commission had not applied the 2005 Guidelines in order to characterise the capital contributions as State aid, but had assessed those contributions on the basis of conclusions which it had drawn from the *Aéroports de Paris* judgments as regards the application of Article 87(1) EC.

65 Accordingly, the General Court was likewise fully entitled not to examine the arguments put forward by the applicants as regards the lawfulness of the 2005 Guidelines, considering, at paragraph 182 of the judgment under appeal, the claims relating to those arguments to be ineffective.

66 Concerning, in the second place, the claims relating to the infringement of the principles of the protection of legitimate expectations and legal certainty, the General Court rejected them at paragraph 166 of the judgment under appeal on the grounds that they were based on the incorrect premise that the 2005 Guidelines had been applied retroactively. At paragraph 167 of that judgment, it also observed as follows:

'In any event, those complaints do not appear to be well founded. The [*Aéroports de Paris* judgments], from which it follows that the operation of an airport is an economic activity, date from 2000. In addition, the judgment in *Ryanair* v *Commission*, ... which concerns the situation before the adoption of the 2005 Guidelines, confirmed the [*Aéroports de Paris* judgments] in the context of the operation of a regional airport. Furthermore, it is clear from [the Commission's decision of 13 March 2001] that, at

that date, the Commission did not exclude the possibility that a measure in favour of the development of regional airport infrastructure might constitute State aid. In that decision, which, contrary to what the applicants claim, also concerned the financing of airport infrastructure, the Commission considered, essentially, in particular in recital 17, that although the measure in question must be regarded as State aid, it was compatible with the common market under Article 87(3)(c) EC. Finally, it must be pointed out that if the German authorities notified State aid N 644i/2002 in 2002 for reasons of legal certainty, as the applicants state ..., it is because they envisage the possibility that the measures in question, which are intended to improve regional airport infrastructure, could constitute State aid. Furthermore, in the context of the procedure concerning that aid, the Commission, on the basis of the [*Aéroports de Paris* judgments], informed the German authorities on 30 June 2003, essentially, that it was not certain that "aid for the construction and development of regional airports could be … regarded as a general infrastructure measure which is irrelevant for the purposes of State aid".'

67 It must be observed in this connection, as the General Court correctly held at paragraph 166 of the judgment under appeal, that the appellants' arguments in respect of those claims is based on the incorrect premise that the Commission applied the 2005 Guidelines retroactively in the contested decision. The General Court was therefore fully entitled to reject those claims at paragraph 169 of the judgment under appeal.

68 As to the remainder, in so far as those arguments seek to call into question paragraph 167 of the judgment under appeal, they must be rejected as ineffective since they concern grounds included in that judgment purely for the sake of completeness (see, to that effect, Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 148 and the case-law cited).

69 The second ground of the appeal must therefore be dismissed as in part ineffective and in part unfounded.

Third ground of appeal, alleging infringement of Articles 1(b)(v), 17 and 18 of Regulation No 659/1999

Arguments of the parties

70 According to the appellants, supported by ADV, if the capital contributions are to be regarded as State aid, they should, in any event, be characterised as existing aid since, at the date of the adoption of the decision in 2004 to extend Leipzig-Halle airport, there was no market; regional airports were not engaged in economic activity and were not in competition with other airports. Therefore, the measure at issue only became aid because of the subsequent development of the airports market. The General Court therefore erred in law in rejecting the plea raised in the alternative on that point.

71 The Commission contends that that ground is manifestly unfounded. First, the market conditions had already undergone a significant alteration at the time of the grant of the capital contributions, so that those contributions should be regarded as new aid. Secondly, Articles 1(b)(v), 17 and 18 of Regulation No 659/1999 are applicable only to aid schemes.

Findings of the Court

72 At paragraphs 191 to 193 of the judgment under appeal, the General Court, after

having set out the grounds on which it took the view that the capital contributions at issue had been granted at a time at which the Commission had already indicated that it considered that such financing was liable to constitute State aid, stated as follows:

'191 With regard to the applicants' argument that, as regards regional airports like Leipzig-Halle, there was no market at the time of the decision to develop the southern runway, since those airports did not engage in an economic activity and did not compete with each other, it is sufficient to recall that, in the context of the first plea in law, it was established that FLH is engaged in an economic activity and it competes with other airports ... and to note that nothing suggests that that was not the case when the capital contributions were granted. The development referred to by the Commission in the 2005 Guidelines took place prior to the decision to finance the southern runway in 2004. In point 5 of those Guidelines, the Commission refers to a development which took place "in recent years". Furthermore, the Commission already referred to that development in 2001 in [its decision of 13 March 2001], in particular in recital 11.

192 Under those circumstances, it cannot be considered that the capital contributions did not constitute aid at the time at which they were granted but became aid later as a result of the development of the common market.

193 It follows from the foregoing that the capital contributions were not existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999.'

73 By the present ground of appeal, the appellants are not in any way arguing that that reasoning is vitiated by one or a number of errors of law or a clear distortion of the sense of the facts but are merely disputing, by essentially repeating the arguments already submitted at first instance, the findings of fact made by the General Court at paragraph 191 of the judgment under appeal, claiming that there was no market at the time of the adoption of the decision to extend Leipzig-Halle airport in 2004.

74 It follows that the appellants are in fact seeking, by those arguments, a re-examination of the application submitted to the General Court and of the assessment of the facts made by that court in the judgment under appeal, which the Court of Justice does not have jurisdiction to undertake in appeal proceedings (see the case-law cited at paragraph 51 above and Cases C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 34 and 35, and C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraphs 46 and 47).

75 The third ground of appeal must therefore be dismissed as inadmissible.

Fourth ground of appeal, alleging infringement of the division of competences resulting from the EC Treaty

Arguments of the parties

76 The appellants, supported by ADV, claim that by holding, at paragraph 203 of the judgment under appeal, that the Commission had not overstepped its competences in treating the capital contributions as State aid, the General Court erred in law. It failed to have regard to the fact that the decision on transport infrastructure construction constitutes a decision on land use, adopted on the basis of provisions of public law of the Member State. By making the financing of extensions to infrastructure subject to State aid law, the General Court is conferring on the Commission competences which restrict the Member States' prerogatives as regards land use. That is also contrary

to the principle of subsidiarity.

77 According to the Commission, the General Court was fully entitled to hold that Article 88 EC authorises, and even obliges, it to examine and review State aid and that the examination of the aid's compatibility with the common market falls within its exclusive competence. The appellants' arguments are therefore, in its view, unfounded.

Findings of the Court

78 It is apparent from the examination of the first ground of appeal that the General Court did not err in law in holding that the Commission had legitimately considered the capital contributions to constitute State aid for the purpose of Article 87(1) EC. It was therefore also without vitiating its judgment by an error in law that the General Court, in dismissing the plea raised before it alleging an infringement of the division of competences stemming from the EC Treaty, stated, at paragraphs 203 to 205 of the judgment under appeal, as follows:

'203 In the present case, with regard ... to the complaint that the Commission infringed the powers of the Member States, it must be pointed out that, as is clear from consideration of the first plea in law, the Commission did not err when it considered that the capital contributions constituted State aid within the meaning of Article 87(1) EC. Consequently, it had power under Article 87(2) and (3) to assess the capital contributions ... It thus cannot have infringed the powers of the Member States in that regard.

204 With regard to the allegation that regional and economic policies, of which the development of the southern runway is part, are within the exclusive jurisdiction of the Member States, it must be stated that, even if that were true, the consequence of that fact would not be to deprive the Commission of its power to supervise State aid pursuant to Articles 87 and 88 EC where financing granted under such policies constitutes State aid within the meaning of Article 87(1) EC.

205 Finally, with regard to the fact that the Commission is unable to provide better supervision than that exercised at national level as is required by the second paragraph of Article 5 EC, it must be said that that argument is irrelevant since it is established that the Commission had the power under the EC Treaty to supervise the measure at issue in the present case since the measure in question was State aid.'

79 Having held that the Commission had correctly found that the measure at issue constituted State aid, the General Court could lawfully infer from this that the Commission had carried out the review of that measure which it was entrusted to perform under Article 88 EC and had therefore not overstepped its competences nor, consequently, those attributed to the European Union. Moreover, since the assessment of the compatibility of aid with the common market falls within its exclusive competence, subject to review by the EU judicature (see inter alia, to that effect, Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 30, and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 23), the General Court was fully entitled to hold that the Commission could not have infringed the principle of subsidiarity.

80 It follows that the fourth ground of appeal must be dismissed as unfounded.

Fifth ground of appeal, alleging infringement of the obligation to state sufficient reasons for judgments

Arguments of the parties

81 The appellants, supported by ADV, allege that the judgment under appeal lacks sufficient grounds, in so far as the General Court assumes that there is an economic activity by referring only to the contested decision, without examining the arguments to the contrary which they put forward or the economic reality.
82 The Commission observes that the General Court made a detailed examination of the arguments alleging infringement of Article 87(1) EC. In its view, that court therefore satisfied the obligation to state sufficient reasons for judgments.
Findings of the Court
83 It must be observed that the obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court. It has consistently been held that the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose that court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraphs 135 and 136).
84 The General Court satisfied that requirement by setting out clearly and unequivocally, at paragraphs 87 to 121 of the judgment under appeal, the grounds on which it rejected the appellants' arguments and held that the Commission had been fully entitled to find that the capital contributions constituted State aid for the purposes of Article 87(1) EC.
85 The fifth and last ground of appeal being, consequently, unfounded, it must be disregarded and, accordingly, the appeal must be dismissed.

13.

European Court of Justice 5 November 2002, Case C-467/98.
Commission of the European Communities v Kingdom of Denmark.
(omissis)
Grounds
1 By application lodged at the Court Registry on 18 December 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for:
- as its principal claim, a declaration that, by having individually negotiated, initialled and concluded, in 1995, an `open skies' agreement with the United States of America in the field of air transport, the Kingdom of Denmark has failed to fulfil its obligations under the EC Treaty, and in particular Articles 5 (now Article 10 EC) and 52 (now, after amendment, Article 43 EC) thereof, and also under secondary law adopted pursuant to that Treaty, and in particular Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8), Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of

conduct for computerised reservation systems (OJ 1989 L 220, p. 1), as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 (OJ 1993 L 278, p. 1; hereinafter `Regulation No 2299/89'), and Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1); and,

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

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

Legal background

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

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

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

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

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

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

7 Regulation No 2408/92, as its title indicates, concerns access for Community air carriers to intra-Community air routes. According to the definition given in Article

2(b) of that regulation, a Community air carrier is an air carrier with a valid operating licence granted in accordance with Regulation No 2407/92. Article 3(1) of Regulation No 2408/92 provides that Community air carriers are to be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community. Article 3(2), however, introduces the possibility for Member States, until 1 April 1997, to make an exception to that provision in relation to the exercise of cabotage rights.
8 Articles 4 to 7 of Regulation No 2408/92 govern, inter alia, the possibility of Member States imposing public-service obligations on given routes. Article 8 permits Member States, without discrimination on grounds of nationality or identity of the air carrier, to regulate the distribution of traffic between the airports within an airport system. Finally, Article 9 permits the Member State responsible, when serious congestion and/or environmental problems exist, to impose conditions on, limit or refuse the exercise of traffic rights, in particular when other modes of transport can provide satisfactory levels of service.
9 As stated in Article 1(1) of Regulation No 2409/92, that regulation lays down the criteria and procedures to be applied for the establishment of fares and rates on air services for carriage wholly within the Community.
10 Article 1(2) and (3) of that regulation provide:
`2. Without prejudice to paragraph 3, this Regulation shall not apply:
(a) to fares and rates charged by air carriers other than Community air carriers;
(b) to fares and rates established by public service obligation, in accordance with Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes.
3. Only Community air carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products.'
11 In addition to Regulations Nos 2407/92, 2408/92 and 2409/92, enacted in 1992, the Community legislature adopted other measures in relation to air transport, in particular Regulations Nos 2299/89 and 95/93.
12 In accordance with Article 1 thereof, Regulation No 2299/89 applies to computerised reservation systems (hereinafter `CRSs') to the extent that they contain air transport products when offered for use and/or used in the territory of the Community, irrespective of the status or nationality of the system vendor, the source of the information used or the location of the relevant central data processing unit, or the geographical location of the airports between which air carriage takes place.
13 However, Article 7(1) and (2) of the same regulation provides:
`1. The obligations of a system vendor under Articles 3 and 4 to 6 shall not apply in respect of a parent carrier of a third country to the extent that its CRS outside the territory of the Community does not offer Community air carriers equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.
2. The obligations of parent or participating carriers under Articles 3a, 4 and 8 shall not apply in respect of a CRS controlled by (an) air carrier(s) of one or more third country (countries) to the extent that outside the territory of the Community the parent or participating carrier(s) is (are) not accorded equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.'

14 Finally, it is undisputed that Regulation No 95/93 also applies to air carriers from non-member countries. However, Article 12 of that regulation provides:
`1. Whenever it appears that a third country, with respect to the allocation of slots at airports:
(a) does not grant Community air carriers treatment comparable to that granted by Member States to air carriers from that country; or
(b) does not grant Community air carriers de facto national treatment; or
(c) grants air carriers from other third countries more favourable treatment than Community air carriers,
appropriate action may be taken to remedy the situation in respect of the airport or airports concerned, including the suspension wholly or partially of the obligations of this Regulation in respect of an air carrier of that third country, in accordance with Community law.
2. Member States shall inform the Commission of any serious difficulties encountered, in law or in fact, by Community air carriers in obtaining slots at airports in third countries.'

Background to the dispute

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

15 Towards the end of the Second World War or shortly thereafter, several States which subsequently became members of the Community, including the Kingdom of Denmark, concluded bilateral agreements on air transport with the United States of America.
16 Wishing to replace that set of bilateral agreements by a single agreement to be concluded between the Community and the United States of America, the European Commission has since the early 1990s repeatedly sought to obtain from the Council a mandate to negotiate an air transport agreement of that kind with the American authorities.
17 Thus, on 23 February 1990 the Commission submitted to the Council a first request to that effect in the form of a proposal for a Council decision on a consultation and authorisation procedure for agreements concerning commercial aviation relations between Member States and third countries. That was followed, on 23 October 1992, by a second, slightly modified, proposal for a decision (OJ 1993 C 216, p. 15). Both proposals were based on Article 113 of the EC Treaty (now, after amendment, Article 133 EC), because the Commission took the view that the conclusion of international air transport agreements fell within the sphere of the commercial policy of the Community.
18 The Council declined to give effect to those initiatives by the Commission. It set out its position on the subject in its Conclusions of 15 March 1993, in which it indicated as follows:
- Article 84(2) of the Treaty constituted the proper legal basis for the development of an external policy on aviation;
- the Member States retained their full powers in relations with third countries in the aviation sector, subject to measures already adopted or to be adopted by the Council in that domain. In this regard, it was also emphasised that, in the course of bilateral

negotiations, the Member States concerned should take due account of their obligations under Community law and should keep themselves informed of the interests of the other Member States;
- negotiations at Community level with third countries could be conducted only if the Council deemed such an approach to be in accordance with the common interest, on the basis that they were likely to produce a better result for the Member States as a whole than the traditional system of bilateral agreements.
19 In April 1995, the Commission raised the matter once more, recommending the adoption by the Council of a decision authorising it to negotiate an air transport agreement with the United States of America. Following that latest request, in June 1996 the Council gave the Commission a limited mandate to negotiate with that country, in liaison with a special committee appointed by the Council, in relation to the following matters: competition rules; ownership and control of air carriers; CRSs; code-sharing; dispute resolution; leasing; environmental clauses and transitional measures. In the event of a request from the United States to that effect, authorisation was granted to extend the negotiations to State aid and other measures to avert bankruptcy of air carriers, slot allocation at airports, economic and technical fitness of air carriers, security and safety clauses, safeguard clauses and any other matter relating to the regulation of the sector. On the other hand, it was explicitly stated that the mandate did not cover negotiations concerning market access (including code-sharing and leasing in so far as they related to traffic rights), capacity, carrier designation and pricing.
20 The two institutions concerned added a number of declarations to the minutes of the Council meeting at which the negotiating mandate in question was conferred on the Commission. In one of those declarations, which was made jointly by both institutions (`the common declaration of 1996'), it was stated that, in order to ensure continuity of relations between the Member States and the United States of America during the Community negotiations and in order to have a valid alternative in the event of the negotiations failing, the existing system of bilateral agreements would be maintained and would remain valid until a new agreement binding the Community was concluded. In a separate declaration, the Commission asserted that Community competence had now been established in respect of air traffic rights.
21 No agreement has yet been reached with the United States of America following the conferment of the negotiating mandate on the Commission in 1996.
22 By contrast, as the documents before the Court show, the Community concluded a civil aviation agreement with the Kingdom of Norway and the Kingdom of Sweden in 1992, approved by Council Decision 92/384/EEC of 22 June 1992 (OJ 1992 L 200, p. 20), has reached an agreement in principle in that field with the Swiss Confederation, and, at the time when this action was brought, was negotiating with 12 European countries an agreement on the creation of a `common European airspace'.
The bilateral air transport agreement between the Kingdom of Denmark and the United States of America
23 A bilateral air transport agreement, known as a `"Bermuda" type agreement', was concluded between the Kingdom of Denmark and the United States of America on 16 December 1944 and amended in 1954, 1958 and 1966 with the aim of liberalising international air traffic (`the 1944 Agreement').

24 The documents before the Court show that, in 1992, the United States of America took the initiative in offering to various European States the possibility of concluding a bilateral `open skies' agreement. Such an agreement was intended to facilitate alliances between American and European carriers and conform to a number of criteria set out by the American Government such as free access to all routes, the granting of unlimited route and traffic rights, the fixing of prices in accordance with a system of `mutual disapproval' for air routes between the parties to the agreement, the possibility of sharing codes, etc.
25 During 1993 and 1994, the United States of America intensified its efforts to conclude bilateral air transport agreements under the `open skies' policy with as many European States as possible.
26 In a letter sent to Member States on 17 November 1994, the Commission drew their attention to the negative effects that such bilateral agreements could have on the Community and stated its position to the effect that that type of agreement was likely to affect internal Community legislation. It added that negotiation of such agreements could be carried out effectively, and in a legally valid manner, only at Community level.
27 During the negotiations held on 24 to 26 April 1995, representatives of the Danish and American Governments reached a consensus on the amendment of the 1944 Agreement. That consensus was subsequently confirmed by an exchange of diplomatic notes.
28 The following amendments were thus made to the 1944 Agreement in 1995. In the body of the text of that agreement, Articles 1 (Grant of Rights), 2 bis (Designation and Authorisation), 3 (Definitions), 4 (Safety), 5 (Application of Laws), 6 (Revocation of Authority), 7 (User Charges), 8 (Aviation Security), 9 (Pricing), 10 (Fair Competition), 11 (Commercial Opportunities), 12 (Customs Duties and Charges), 13 (Intermodal Services), 14 (Consultations) and 15 (Settlement of Disputes) were amended or added in order to make the agreement comply with the American `open skies' model agreement. In addition, Annexes I and II to the 1944 Agreement, containing lists of routes and opportunities for using them, were amended to bring them into line with the American `open skies' model agreement (in relation, for example, to routes, operational flexibility, charter flights, etc.). Finally, an Annex III, concerning the principles relating to the CRSs, was added.
29 Article 2 of the 1944 Agreement provides that `[e]ach of the air services so described shall be placed in operation as soon as the contracting party to whom the rights have been granted by Article 1 to designate an airline or airlines for the route concerned has authorized an airline for such route' and that `the contracting party granting the rights shall, subject to Article 6 [of that agreement], be bound to give the appropriate operating permission to the airline or airlines concerned'. Article 6 of the 1944 Agreement provides that each contracting party reserves the right to withhold or revoke a certificate or permit to an airline of the other party in any case where it considers it insufficiently established that a substantial part of the ownership and effective control are vested in nationals of one of the parties (`the clause on the ownership and control of airlines').

The pre-litigation procedure

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

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

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

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

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

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

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

36 It must be noted in that regard that an examination of the substance of the Com-

mission's principal claim does not necessarily require the Court to take a view on the question whether the amendments made in 1995 transformed the pre-existing 1944 Agreement into a new agreement.

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

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

39 It must be pointed out, moreover, that the amendments made in 1995 provide proof of a renegotiation of the 1944 Agreement in its entirety. It follows that, while some provisions of the agreement were not formally modified by the amendments made in 1995 or were subject only to marginal changes in drafting, the commitments arising from those provisions were none the less confirmed during the renegotiation. In such a case, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law (see, to that effect, Case C-62/98 Commission v Portugal [2000] ECR I-5171 and Case C-84/98 Commission v Portugal [2000] ECR I-5215).

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

41 The same is true of the clause relating to ownership and control of the airlines, the wording of which, as set out in paragraph 29 above, was already included in the 1989 Agreement. Furthermore, it must be regarded as undisputed that, as the Advocate General rightly pointed out in paragraphs 136 to 138 of his Opinion, the amendments made to the 1944 Agreement in its entirety in 1995 affect the scope of the provisions, such as that clause, which were not formally modified by the amendments or were modified only to a limited extent.

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

43 Since the Court is in a position to rule on the principal claim, there is no need to

rule on the alternative claim. The way in which the alternative claim is formulated shows that examination of it depends, not upon the extent to which the principal claim is allowed, but upon whether the Court considers itself to be in a position to rule on that claim.

Infringement of the external competence of the Community

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

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

Arguments of the parties

45 The Commission submits that, according to Opinion 1/76, subsequently clarified by Opinion 1/94 of 15 November 1994 ([1994] ECR I-5267) and Opinion 2/92 of 24 March 1995 ([1995] ECR I-521), the Community has exclusive competence to conclude an international agreement, even in the absence of Community provisions in the area concerned, where the conclusion of such an agreement is necessary in order to attain the objectives of the Treaty in that area, such objectives being incapable of being attained merely by introducing autonomous common rules.

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

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

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

tions of the system established by Community rules, and to compete in this way with their Community counterparts.

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

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

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

52 Referring to Article 84(2) of the Treaty, the Danish Government adds that, in the air transport sector, there are no provisions conferring on the Community institutions competence to negotiate with non-member countries, still less exclusive competence. It observes that, on the contrary, the Council, in its Conclusions of 15 March 1993, clearly adopted the view that the Member States continue to be entitled to negotiate air transport agreements with non-member countries. In that regard and contrary to the Commission's view on the matter, the examples referred to in paragraph 22 above in no way show that the Council conceded that an exclusive external competence of the Community in relation to air transport was necessary.

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

Findings of the Court

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

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

56 It is true that the Court has held that the Community's competence to enter into international commitments may arise not only from express conferment by the Treaty but also by implication from provisions of the Treaty. Such implied external competence exists not only whenever the internal competence has already been used in order to adopt measures for implementing common policies, but also if the internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, the competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4).
57 In a subsequent opinion, the Court stated that the hypothesis envisaged in Opinion 1/76 is that where the internal competence may be effectively exercised only at the same time as the external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.
58 That is not the case here.
59 There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to the United States of America, or to prevent them prescribing the approach to be taken by the Member States in their external dealings, so as to mitigate any discrimination or distortions of competition which might result from the implementation of the commitments entered into by certain Member States with the United States of America under `open skies' agreements (see, to that effect, Opinion 1/94, paragraph 79). It has therefore not been established that, by reason of such discrimination or distortions of competition, the aims of the Treaty in the area of air transport cannot be achieved by establishing autonomous rules.
60 In 1992, moreover, the Council was able to adopt the `third package', which, according to the Commission, achieved the internal market in air transport based on the freedom to provide services, without its having appeared necessary at the time to have recourse, in order to do that, to the conclusion by the Community of an air transport agreement with the United States of America. On the contrary, the documents before the Court show that the Council, which the Treaty entrusts with the task of deciding whether it is appropriate to take action in the field of air transport and to define the extent of Community intervention in that area, did not consider it necessary to conduct negotiations with the United States of America at Community level (see paragraph 18 above). It was not until June 1996, and therefore subsequent to the exercise of the internal competence, that the Council authorised the Commission to negotiate an air transport agreement with the United States of America by granting it for that purpose a restricted mandate, while taking care to make it clear, in its joint declaration with the Commission of 1996, that the system of bilateral agreements with that country would be maintained until the conclusion of a new agreement binding the Community (see paragraphs 19 and 20 above).
61 The finding in the preceding paragraphs cannot be called into question by the fact that the measures adopted by the Council in relation to the internal market in

air transport contain a number of provisions concerning nationals of non-member countries (see, for example, paragraphs 12 to 14 above). Contrary to what the Commission maintains, the relatively limited character of those provisions precludes inferring from them that the realisation of the freedom to provide services in the field of air transport in favour of nationals of the Member States is inextricably linked to the treatment to be accorded in the Community to nationals of non-member countries, or in non-member countries to nationals of the Member States.

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

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

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

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

Arguments of the parties

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

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

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

rules would be broken.
68 It follows from paragraphs 25 and 26 of Opinion 2/91 of 19 March 1993 ([1993] ECR I-1061), that Member States are not entitled to enter into international commitments, even in order to follow existing Community legislation, since this risks making that legislation excessively rigid by impeding its adaptation and amendment, thereby `affecting' it.
69 In the alternative, the Commission submits that, even if a complete set of common rules had not been established, that would be irrelevant to the outcome of this case since, as the Court confirmed in paragraphs 25 and 26 of Opinion 2/91, Community competence is recognised as established if the agreement concerned falls within an area already largely covered by progressively adopted Community rules, as is the case here.
70 Even if the absence of some common rules on certain matters relating to the commitments in question were to lead the Court to find that there was no exclusive Community competence in relation to those matters, the Kingdom of Denmark could not on its own, that is to say, without the participation of the Community, enter into the disputed commitments.
71 According to the Danish Government, it is clear from the `third package' of measures liberalising air transport, namely Regulations Nos 2407/92, 2408/92 and 2409/92, that those measures concerned the internal market. However, it does not result from the `third package' that the internal market cannot be distinguished from the external market. That is so, in particular, because the case since the traffic attributable to Community airlines is, for the most part, situated within the common market and the large majority of airlines established in the European Community guarantee only routes within the common market. The Danish Government claims further that the numerous bilateral air transport agreements concluded between Member States and non-member countries have not yet constituted an obstacle to the establishment of a properly functioning internal market in air transport.
72 An exclusive external competence of the Community can result from only three possible sources: first, complete Community harmonisation in the sector concerned; second, the adoption of Community rules on the status of persons and companies originating in non-member countries or, third, the adoption of Community rules conferring on the Community institutions competence to conclude treaties with non-member countries.
73 The Danish Government disputes that the bilateral commitments resulting from the amendments made in 1995 affect the Community legislation within the meaning of the AETR judgment. It considers, first, that no complete set of common rules has been established in the air transport sector. Further, it maintains that the commitments are not contrary to the Community provisions adopted in that sector. Finally, it claims that those provisions do not confer on the Community competence to conclude agreements with non-member countries.
74 In particular, Regulations Nos 2407/92, 2408/92 and 2409/92, which make up the `third package', cover neither the air transport services between the Community and non-member countries nor the traffic rights of airlines from non-member countries. The disputed commitments do not therefore affect the body of rules introduced by the `third package'. The Danish Government contends that the provisions in certain reg-

ulations relied upon by the Commission are unaffected by the commitments at issue. Likewise unaffected are the provisions of the regulations relating to slots and to CRSs.
Findings of the Court
75 It must be recalled that, as has already been found in paragraphs 54 and 55 above, whilst Article 84(2) of the Treaty does not establish an external Community competence in the field of air transport, it does make provision for a power for the Community to take action in that area, albeit one that is dependent on there being a prior decision by the Council.
76 It was, moreover, by taking that provision as a legal basis that the Council adopted the `third package' of legislation in the field of air transport.
77 The Court has already held, in paragraphs 16 to 18 and 22 of the AETR judgment, that the Community's competence to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that, in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.
78 Since those findings imply recognition of an exclusive external competence for the Community in consequence of the adoption of internal measures, it is appropriate to ask whether they also apply in the context of a provision such as Article 84(2) of the Treaty, which confers upon the Council the power to decide `whether, to what extent and by what procedure appropriate provisions may be laid down' for air transport, including, therefore, for its external aspect.
79 If the Member States were free to enter into international commitments affecting the common rules adopted on the basis of Article 84(2) of the Treaty, that would jeopardise the attainment of the objective pursued by those rules and would thus prevent the Community from fulfilling its task in the defence of the common interest.
80 It follows that the findings of the Court in the AETR judgment also apply where, as in this case, the Council has adopted common rules on the basis of Article 84(2) of the Treaty.
81 It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.
82 According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (AETR judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the

common rules (Opinion 2/91, paragraphs 25 and 26).
83 Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33).
84 The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).
85 On the other hand, it follows from the reasoning in paragraphs 78 and 79 of Opinion 1/94 that any distortions in the flow of services in the internal market which might arise from bilateral `open skies' agreements concluded by Member States with non-member countries do not in themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence of the Community.
86 There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to non-member countries or to prevent them prescribing the approach to be taken by the Member States in their external dealings (Opinion 1/94, paragraph 79).
87 It is in the light of those considerations that it falls to be determined whether the common rules relied on by the Commission in the present action are capable of being affected by the international commitments entered into by the Kingdom of Denmark.
88 It is undisputed that the commitments in question comprise an exchange of fifth-freedom rights by virtue of which an airline designated by the United States of America has the right to transport passengers between the Kingdom of Denmark and another Member State of the European Union on flights the origin or destination of which is in the United States of America. The Commission's first argument is that that commitment, particularly when viewed in the context of the combined effect produced by all the bilateral commitments of that type contracted by Member States with the United States of America, in that it allows American carriers to use intra-Community routes without complying with the conditions laid down by Regulation No 2407/92, affects both that regulation and Regulation No 2408/92.
89 That argument must be rejected.
90 As is clear from the title and Article 3(1) of Regulation No 2408/92, that regulation is concerned with access to intra-Community air routes for Community air carriers alone, these being defined by Article 2(b) of that regulation as air carriers with a valid operating licence granted by a Member State in accordance with Regulation No 2407/92. That latter regulation, as may be seen from Articles 1(1) and 4 thereof, defines the criteria for the granting by Member States of operating licences to air carriers established in the Community which, without prejudice to agreements and conventions to which the Community is a contracting party, are owned directly or through majority ownership by Member States and/or nationals of Member States and are at

all times effectively controlled by such States or such nationals, and also the criteria for the maintenance in force of those licences.
91 It follows that Regulation No 2408/92 does not govern the granting of traffic rights on intra-Community routes to non-Community carriers. Similarly, Regulation No 2407/92 does not govern operating licences of non-Community air carriers which operate within the Community.
92 Since the international commitments in issue do not fall within an area already covered by Regulations Nos 2407/92 and 2408/92, they cannot be regarded as affecting those regulations for the reason put forward by the Commission.
93 Moreover, the very fact that those two regulations do not govern the situation of air carriers from non-member countries which operate within the Community shows that, contrary to what the Commission maintains, the `third package' of legislation is not complete in character.
94 The Commission next submits that the discrimination and distortions of competition arising from the international commitments at issue, viewed on the basis of their effect combined with that produced by the corresponding international commitments entered into by other Member States, affect the normal functioning of the internal market in air transport.
95 However, as has been pointed out in paragraph 85 above, that kind of situation does not affect the common rules and is therefore not capable of establishing an external competence of the Community.
96 The Commission maintains, finally, that the Community legislation on which it relies contains many provisions relating to non-member countries and air carriers of those countries. That applies in particular, it maintains, to Regulations Nos 2409/92, 2299/89 and 95/93.
97 In that regard, it should be noted, first, that, according to Article 1(2)(a) of Regulation No 2409/92, that regulation does not apply to fares and rates charged by air carriers other than Community air carriers, that restriction however being stated to be `without prejudice to paragraph 3' of the same article. Under Article 1(3) of Regulation No 2409/92, only Community air carriers are entitled to introduce new products or fares lower than the ones existing for identical products.
98 It follows from those provisions, taken together, that Regulation No 2409/92 has, indirectly but definitely, prohibited air carriers of non-member countries which operate in the Community from introducing new products or fares lower than the ones existing for identical products. By proceeding in that way, the Community legislature has limited the freedom of those carriers to set fares and rates, where they operate on intra-Community routes by virtue of the fifth-freedom rights which they enjoy. Accordingly, to the extent indicated in Article 1(3) of Regulation No 2409/92, the Community has acquired exclusive competence to enter into commitments with non-member countries relating to that limitation on the freedom of non-Community carriers to set fares and rates.
99 It follows that, since the entry into force of Regulation No 2409/92, the Kingdom of Denmark has no longer been entitled to enter on its own into international commitments concerning the fares and rates to be charged by carriers of non-member countries on intra-Community routes.

100 It is clear from the documents before the Court that a commitment of that type was entered into by the Kingdom of Denmark by virtue of the amendments made in 1995 to Article 9 of the 1944 Agreement, which was rewritten. By proceeding in that way, that Member State thus infringed the Community's exclusive external competence resulting from Article 1(3) of Regulation No 2409/92.
101 That finding cannot be called into question by the fact that, in respect of the air transport to which Regulation No 2409/92 applies, the abovementioned Article 9 requires that regulation to be complied with. However praiseworthy that initiative by the Kingdom of Denmark, designed to preserve the application of Regulation No 2409/92, may have been, the fact remains that the failure of that Member State to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with Community law.
102 Secondly, it follows from Articles 1 and 7 of Regulation No 2299/89 that, subject to reciprocity, that regulation also applies to nationals of non-member countries, where they offer for use or use a CRS in Community territory.
103 By the effect of that regulation, the Community thus acquired exclusive competence to contract with non-member countries the obligations relating to CRSs offered for use or used in its territory.
104 It is not in dispute that the amendments made in 1995 to the 1944 Agreement added thereto an Annex III concerning the principles relating to CRSs, including those applying to CRSs offered for use or used in the territory of the Kingdom of Denmark. By acting in that way, the Kingdom of Denmark infringed the exclusive external competence of the Community arising from Regulation No 2299/89.
105 The finding in the previous paragraph cannot be called into question by the fact that it is stated in the memorandum of consultations of 26 April 1995, which was appended to the agreement containing the agreed amendments, that Annex III may be applied only to the extent that the provisions thereof do not conflict with the Community provisions concerned. The failure of the Kingdom of Denmark to fulfil its obligations results from the very fact that it entered into the international commitments on CRSs referred to in the previous paragraph.
106 Thirdly, and finally, as has been pointed out in paragraph 14 above, Regulation No 95/93 on common rules for the allocation of slots at Community airports applies, subject to reciprocity, to air carriers of non-member countries, with the result that, since the entry into force of that regulation, the Community has had exclusive competence to conclude agreements in that area with non-member countries.
107 However, as the Advocate General rightly pointed out in paragraph 107 of his Opinion, the Commission has not succeeded in establishing that, as it maintains, the clause relating to fair competition in Article 10 of the 1944 Agreement, as amended in 1995, also falls to be applied to the allocation of slots.
108 As the Commission stated in its application, the said Article 10 contains in point (a) a general provision guaranteeing the same competition opportunities for the air carriers of both contracting parties. The general terms in which such a clause is formulated do not, in the absence of relevant evidence clearly establishing the intention of both parties, permit the inference that the Kingdom of Denmark entered into a

commitment in relation to the allocation of slots. In support of its assertion, the Commission relied solely on a report of the American administrative authority according to which clauses of that type normally also cover the allocation of slots.
109 The failure to fulfil obligations with which the Kingdom of Denmark is charged in that respect therefore appears to be unfounded.
110 Article 5 of the Treaty requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.
111 In the area of external relations, the Court has held that the Community's tasks and the objectives of the Treaty would be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or of altering their scope (see Opinion 2/91, paragraph 11, and also, to that effect, the AETR judgment, paragraphs 21 and 22).
112 It follows from the foregoing considerations that, by entering into international commitments concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes and concerning CRSs offered for use or used in Danish territory, the Kingdom of Denmark has failed to fulfil its obligations under Article 5 of the Treaty and under Regulations Nos 2409/92 and 2299/89.
Infringement of Article 52 of the Treaty
Arguments of the parties
113 The Commission submits that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty because the Kingdom of Denmark does not accord to the nationals of other Member States, and in particular to airlines and undertakings of those Member States established in the Kingdom of Denmark, the treatment reserved for Danish nationals.
114 The terms `law' and `conditions' in Article 52 of the Treaty, on which the Danish Government relies, are not decisive. Those terms must be understood as also covering the rights and obligations arising from international agreements concluded by the Kingdom of Denmark with non-member countries.
115 The argument that a provision such as the clause on the ownership and control of airlines is traditionally included in bilateral agreements and is based on reciprocity is not convincing since it fails to recognise that such clauses may be negotiated in order to take account of a specific situation resulting from Community law. In any event, the Danish Government cannot shift its responsibility under Article 52 of the Treaty to the United States of America.
116 The Danish Government cannot validly rely on Article 56 of the Treaty (now, after amendment, Article 46 EC) in order to evade its obligations under Article 52 of the Treaty. It does not specify the nature of the overriding requirements which would justify application of Article 56 in the present case. The inclusion in bilateral agreements of a clause such as that on the ownership and control of airlines would seem rather to be justified by economic considerations which are not covered by Article 56 of the Treaty and which have to do with the fact that the parties to the agreement refuse to extend the commercial benefits to airlines belonging to nationals of countries with which no `open skies' agreement has been concluded.

117 The Danish Government claims that Article 52 of the Treaty does not apply to the situations governed by the clause on the ownership and control of airlines since they relate to traffic rights granted by the American authorities for flights to American airports.
118 It also maintains that, in accordance with the terms of Article 52 of the Treaty, freedom of establishment merely includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings `under the conditions laid down for its own nationals by the law of the country in which such establishment is effected'. According to the Danish Government, the reference to `law' suggests that the Member State of establishment has competence to grant the rights deemed to be of importance for the effective exercise of the right of establishment. That is not the case here. The actual application of the clause on the ownership and control of airlines is clearly outside the area of competence of the Danish authorities. In addition, the Danish Government contends that `conditions'
within the meaning of Article 52 of the Treaty cannot be extended in such a way as to include any advantage from which the nationals of the Member State of establishment may benefit in non-member countries by virtue of previously-concluded bilateral agreements.
119 A clause such as that on the ownership and control of airlines is perfectly customary in bilateral agreements concluded in the air transport sector and is based on reciprocity since the American authorities wish to reserve the right to refuse to grant traffic rights to airlines established in countries which do not grant American airlines equivalent rights in their territory.
120 The abovementioned clause does not result in any restriction of the freedom of establishment in the Kingdom of Denmark for nationals of other Member States. In addition, the Kingdom of Denmark has no influence on any recourse to that clause by the American authorities.
121 The Danish Government submits, alternatively, that the exception referred to in Article 52 is applicable in the present case. On the basis of the considerations set out in that article, the Danish Government claims that it will always reserve the right to refuse in certain cases to grant traffic rights to companies designated by the United States of America but owned by nationals of non-member countries. According to the Danish Government, it must be conceded as a reality inherent in negotiation policy that provisions containing exceptions authorising, in certain cases, the refusal to grant licences to specific airlines are inevitable in bilateral air transport agreements and that, by virtue of Article 56 of the Treaty, a provision such as that in the clause on the ownership and control of airlines is therefore compatible with Article 52 of the Treaty.
Findings of the Court
122 As regards the applicability of Article 52 of the Treaty in this case, it should be pointed out that that provision, which the Kingdom of Denmark is charged with infringing, applies in the field of air transport.
123 Whereas Article 61 of the EC Treaty (now, after amendment, Article 51 EC) precludes the Treaty provisions on the freedom to provide services from applying to transport services, the latter being governed by the provisions of the title concerning transport, there is no article in the Treaty which precludes its provisions on freedom of

establishment from applying to transport.
124 Article 52 of the Treaty is in particular properly applicable to airline companies established in a Member State which supply air transport services between a Member State and a non-member country. All companies established in a Member State within the meaning of Article 52 of the Treaty are covered by that provision, even if their business in that State consists of services directed to non-member countries.
125 As regards the question whether the Kingdom of Denmark has infringed Article 52 of the Treaty, it should be borne in mind that, under that article, freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58 of the EC Treaty (now the second paragraph of Article 48 EC) under the conditions laid down for its own nationals by the legislation of the Member State in which establishment is effected.
126 Articles 52 and 58 of the Treaty thus guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State (see Case C-307/97 Saint-Gobain v Finanzamt Aachen-Innenstadt [1999] ECR I-6161, paragraph 35), both as regards access to an occupational activity on first establishment and as regards the exercise of that activity by the person established in the host Member State.
127 The Court has thus held that the principle of national treatment requires a Member State which is a party to a bilateral international treaty with a non-member country for the avoidance of double taxation to grant to permanent establishments of companies resident in another Member State the advantages provided for by that treaty on the same conditions as those which apply to companies resident in the Member State that is party to the treaty (see Saint-Gobain, paragraph 59, and judgment of 15 January 2002 in Case C-55/00 Gottardo v INPS [2002] ECR I-413, paragraph 32).
128 In this case, the clause on the ownership and control of airlines does, amongst other things, permit the United States of America to refuse or withdraw the licences or authorisations in respect of an airline designated by the Kingdom of Denmark but of which a substantial part of the ownership and effective control is not vested in that Member State or in Danish or American nationals.
129 There can be no doubt that airlines established in the Kingdom of Denmark of which a substantial part of the ownership and effective control is vested either in a Member State other than the Kingdom of Denmark or in nationals of such a Member State (`Community airlines') are capable of being affected by that clause.
130 By contrast, the formulation of that clause shows that the United States of America is in principle under an obligation to grant the appropriate licences and required authorisations to airlines of which a substantial part of the ownership and effective control is vested in the Kingdom of Denmark or Danish nationals (`Danish airlines').
131 It follows that Community airlines may always be excluded from the benefit of the air transport agreement between the Kingdom of Denmark and the United States of America, while that benefit is assured to Danish airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the Kingdom of Denmark, accords to its own

nationals.
132 Contrary to what the Kingdom of Denmark maintains, the direct source of that discrimination is not the possible conduct of the United States of America but the clause on the ownership and control of airlines, which specifically acknowledges the right of the United States of America to act in that way.
133 It follows that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty.
134 With regard to that finding, it is irrelevant that clauses of that type are traditionally incorporated in bilateral air transport agreements and that they are intended to preserve the right of a non-member country to grant traffic rights in its airspace only on the basis of reciprocity. In this case, the failure to fulfil obligations with which the Kingdom of Denmark is charged results from the fact that, when renegotiating the 1944 Agreement, it maintained in force a clause which infringed the rights of Community airlines arising from Article 52 of the Treaty.
135 As for the Danish Government's arguments seeking to justify the clause on the ownership and control of airlines, it should be recalled that, according to settled case-law, recourse to justification on grounds of public policy and public safety under Article 56 of the Treaty presupposes the need to maintain a discriminatory measure in order to deal with a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see, to that effect, Case 30/77 R v Bouchereau [1977] ECR I-1999, paragraph 35; Case C-114/97 Commission v Spain [1998] ECR I-6717, paragraph 46; Case C-348/96 Calfa [1999] ECR I-11, paragraph 21). It follows that there must be a direct link between that threat, which must, moreover, be current, and the discriminatory measure adopted to deal with it (see, to that effect, Case 352/85 Bond van Adverteerders v Netherlands State [1988] ECR 2085, paragraph 36; and Calfa, paragraph 24).
136 In this case, the clause concerning the ownership and control of airlines does not limit the power to refuse or withdraw licences or authorisations in respect of an airline designated by the other party solely to the case where that airline represents a threat to the public policy or public security of the party granting those licences and authorisations.
137 In any event, there is no direct link between such (purely hypothetical) threat to the public policy or public security of the Kingdom of Denmark as might be represented by the designation of an airline by the United States of America and generalised discrimination against Community airlines.
138 The justification put forward by the Kingdom of Denmark on the basis of Article 56 of the Treaty must therefore be rejected.
139 In those circumstances, the claim that the Kingdom of Denmark has failed to fulfil its obligations under Article 52 of the Treaty appears to be well founded.
140 Having regard to the whole of the foregoing considerations, it must be held that, by entering into or maintaining in force, despite the renegotiation of the 1944 Agreement, international commitments with the United States of America
- concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes,
- concerning CRSs offered for use or used in Danish territory, and

- recognising the United States of America as having the right to refuse or withdraw traffic rights in cases where air carriers designated by the Kingdom of Denmark are not owned by the latter or by Danish nationals,
the Kingdom of Denmark has failed to fulfil its obligations under Articles 5 and 52 of the Treaty and under Regulations Nos 2409/92 and 2299/89.
(omissis)
On those grounds,
THE COURT
hereby:
1. Declares that, by entering into or maintaining in force, despite the renegotiation of the air transport agreement between the Kingdom of Denmark and the United States of America of 16 December 1944, international commitments with the United States of America
- concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes,
- concerning computerised reservation systems offered for use or used in Danish territory, and
- recognising the United States of America as having the right to refuse or withdraw traffic rights in cases where air carriers designated by the Kingdom of Denmark are not owned by the latter or by Danish nationals,
the Kingdom of Denmark has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and under Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services and Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems, as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993;
2. Dismisses the remainder of the application;
3. Orders the Kingdom of Denmark to pay the costs;
4. Orders the Kingdom of the Netherlands to bear its own costs.

14.

European Court of First Instance 15 September 1998, Joined cases T-374/94, T-375/94, T-384/94 and T-388/94.
European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission of the European Communities.
(omissis)
Grounds
Legal background
1 Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25) seeks to facilitate the adaptation of the Community's railways to the needs of the single market and to increase their efficiency. First, it ensures the management independence of the railway undertakings in order to enable

them to behave in a commercial manner. Article 5(3) provides in that regard that such undertakings are to be `free to:
- establish with one or more other railway undertakings an international grouping;
...
- control the supply and marketing of services and fix the pricing thereof ...;
...
- expand their market share, develop new technologies and new services and adopt any innovative management techniques;
- establish new activities in fields associated with railway business'.
2 Second, it provides for separating the management of railway infrastructure from the provision of railway transport services, separation of accounts being compulsory and organisational separation optional (Article 1 and Section III of the directive).
3 Finally, the directive constitutes a first step towards progressive liberalisation of the market for transport by rail in that, for the first time, it gives railway undertakings engaged in international combined transport and associations of railway undertakings a right of access to infrastructure within the Community, subject to certain conditions, as from 1 January 1993.
4 Article 10 of the directive provides:
`1. International groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States, for international services between the Member States where the undertakings constituting the said groupings are established.
2. Railway undertakings within the scope of Article 2 shall be granted access on equitable conditions to the infrastructure in the other Member States for the purpose of operating international combined transport goods services.
...'
5 Article 3 defines a railway undertaking as `any private or public undertaking whose main business is to provide rail transport services for goods and/or passengers with a requirement that the undertaking should ensure traction' and an international grouping of railway undertakings as `any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States'.
6 On 19 June 1995, with a view to the implementation of Directive 91/440, the Council adopted Directive 95/18/EC on the licensing of railway undertakings (OJ 1995 L 143, p. 70) and Directive 95/19/EC on the allocation of railway infrastructure capacity and the charging of infrastructure fees (OJ 1995 L 143, p. 75).

Facts

7 On 29 January 1993 the Commission received an application seeking a declaration that Article 2 of Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302) did not apply to a number of agreements concerning the carriage of passengers by rail through the Channel Tunnel or, failing that, exemption of the agreements under Article 5 of the regulation.
8 That application (`the notification') was lodged by European Night Services Ltd (`ENS') on behalf of British Rail (`BR'), Deutsche Bundesbahn (`DB'), NV Nederlandse Spoorwegen (`NS') and Société Nationale des Chemins de Fer Français

(`SNCF'). It had previously been approved by Société Nationale des Chemins de Fer Belges (`SNCB'), which at that time had an option to participate in ENS, although that option lapsed in July 1993. SNCB is still a party to one of the operating agreements concluded with ENS.

9 The first agreement notified concerned the formation, by the four railway undertakings mentioned above - BR, SNCF, DB and NS - either directly or through subsidiaries owned by them, of ENS, a company established in the United Kingdom whose business was to consist of providing and operating overnight passenger rail services between points in the United Kingdom and the Continent through the Channel Tunnel, on the following four routes: London-Amsterdam, London-Frankfurt/Dortmund, Glasgow/Swansea-Paris and Glasgow/Plymouth-Brussels.

10 By letter of 15 October 1997, however, ENS informed the Court that the rail services to and from Brussels had been abandoned in December 1994, that the London-Frankfurt/Dortmund route had been replaced by London-Cologne in August 1996 and that the only routes now envisaged were London-Amsterdam/Cologne.

11 On 9 May 1994, European Passenger Services Ltd (`EPS'), which was a subsidiary of BR when the ENS agreements were notified, was transferred by BR to the public authorities in the United Kingdom and now ranks as a railway undertaking within the meaning of Article 3 of Directive 91/440, in the same way as SNCF, DB and NS (all hereinafter referred to, including EPS, as `the railway undertakings concerned' or `the parent undertakings'). At the same time, BR's holding in ENS was transferred to EPS. By letter of 25 September 1997, ENS and EPS informed the Court that EPS's name had been changed to Eurostar (UK) Ltd (`EUKL') and requested that any reference to EPS be deemed to refer to EUKL and vice versa. They further announced that the holding of the United Kingdom public authorities in EPS had been transferred to London & Continental Railways on 31 May 1996. In the United Kingdom, virtually all of the railway track and associated infrastructure, previously owned by BR, is now owned by Railtrack, the railway infrastructure manager.

12 The second group of agreements notified comprised the operating agreements concluded by ENS with the railway undertakings concerned and with SNCB, under which each of them agreed to provide ENS with certain services, including traction over its network (locomotive, train crew and path), cleaning services on board, servicing of equipment and passenger-handling services. EPS and SNCF further agreed to provide traction through the Channel Tunnel.

13 In order to operate the night passenger services, the railway undertakings concerned have procured, through ENS, specialised rolling stock suitable for running on the different rail systems and through the Channel Tunnel, financed through long-term leasing arrangements over 20 years, extended to 25 years in January 1996, at a total cost of UKL 136.7 million, increased to UKL 158 million in January 1996, including the contract price, estimated spares costs, variations, deliveries, commissioning and testing and project team costs.

14 In the notification, ENS and the railway undertakings concerned stated that, on the market for the service in question, in competition with air, coach, ferry and car transport, ENS could achieve an overall market share of some 2.4% of the business segment and 5% of the leisure segment. Even if that market were defined more nar-

rowly, taking account only of the routes concerned, ENS's overall market shares would remain insignificant. None of the railway undertakings concerned could operate alone a comparable service on the routes served by ENS, nor was there any indication that any other group had expressed an interest in, or could derive any profit from, the same activity. The notifying parties further gave the assurance that the ENS agreements did not create any barriers to entry additional to those already in place for any other undertakings wishing to provide similar services, which could constitute `international groupings' within the meaning of Article 3 of Directive 91/440; such groupings would thus gain access to railway infrastructures - train-paths on the relevant lines - and would have no difficulty in finding qualified staff and suitable rolling stock.

15 Pursuant to Article 12(2) of Regulation No 1017/68, a notice concerning the notification of the ENS agreements was published in the Official Journal of the European Communities on 29 May 1993 (Notice 93/C 149/07, OJ 1993 C 149, p. 10). In it, the Commission informed the notifying undertakings that it took the preliminary view that the agreements notified could infringe Article 85(1) of the EC Treaty but that it had not at that stage taken a decision as to the applicability of Article 5 of Regulation No 1017/68. It invited all interested third parties to submit their observations within 30 days of the publication of the notice.

16 By letter of 23 July 1993, the Commission informed the notifying undertakings that there were serious doubts within the meaning of Article 12(3) of Regulation No 1017/68 as to the applicability of Article 5 thereof to the agreements notified.

17 On 4 June 1994, the Commission published a further notice in the Official Journal of the European Communities pursuant to Article 26(3) of Regulation No 1017/68 (OJ 1994 C 153, p. 15), in which it announced that the agreements notified could qualify for exemption pursuant to Article 85(3) of the Treaty and Article 53(3) of the Agreement on the European Economic Area (`the EEA Agreement'), provided - essentially - that new entrants would be able to purchase from the notifying parties the same rail services as those parties had undertaken to sell to ENS. At the same time, the Commission invited all interested third parties to submit their observations within 30 days of the publication of the notice. However, no third party responded to that invitation.

The contested decision

18 On 21 September 1994 the Commission adopted Decision 94/663/EC relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.600 - Night Services) (OJ 1994 L 259, p. 20, hereinafter `the decision' or `the contested decision'). It is based on Regulation No 1017/68, in particular on Article 5 thereof, under which the prohibition of restrictive practices laid down in Article 2, in terms almost identical to those of Article 85(1) of the Treaty, may be declared inapplicable with retroactive effect to certain agreements between undertakings.

19 The decision distinguishes two relevant service markets: the market for the transport of business travellers, for whom scheduled air travel, high-speed rail travel and the rail services to be operated by ENS are interchangeable modes of transport (point 26), and the market for the transport of leisure travellers, for whom substitute services may include economy-class air travel, train, coach and possibly private motor car (point 27).

20 Contrary to what the notifying parties had maintained, the Commission states that the geographic market does not include the whole of the United Kingdom, France, Germany and the Benelux countries, but is confined to the four routes actually to be served by ENS, namely London-Amsterdam, London-Frankfurt/Dortmund, Paris-Glasgow/Swansea and Brussels-Glasgow/Plymouth (point 29).
21 The decision goes on, referring to the 1993 Commission notice of 16 February 1993 concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty (OJ 1993 C 43, p. 2; hereinafter `the 1993 communication'), to find that ENS is a cooperative joint venture (points 30 to 37). It states that ENS's parent undertakings are not withdrawing permanently from the relevant market, since their technical and financial resources could easily enable them to set up an international grouping within the meaning of Article 3 of Directive 91/440 and to provide overnight passenger transport services. Furthermore, they continue to operate primarily on a market upstream from ENS's market, namely the market in necessary rail services which the railway undertakings sell to transport operators such as ENS. The ENS joint venture thus forms an agreement caught by Article 85 of the EC Treaty, as do the operating agreements between it and each of its parent undertakings and SNCB.
22 The decision then notes the restrictions of competition arising out of the ENS agreements (points 38 to 53).
23 First, those agreements have eliminated or appreciably restricted, as between ENS's parent undertakings, the scope for competition provided by Article 10 of Directive 91/440 (points 38 to 45). Both existing and new railway undertakings, including subsidiaries of existing ones, are entitled to the rights of access conferred by that provision, and Member States may enact domestic legislation which is more generous in the access it allows to infrastructure. Thus, for example, DB or NS would be entitled to form an international grouping with a railway undertaking in the United Kingdom to operate international transport services through the Channel Tunnel. Similarly, any of ENS's parent undertakings could itself take on the role of `transport operator', or set up a subsidiary specialising as a `transport operator', and provide international transport services by buying the necessary rail services from the railway undertakings concerned.
24 Second, given the commercial strength of the parent undertakings, the formation of ENS might impede access to the market by transport operators in a position to compete with it (points 46 to 48). ENS's parent undertakings continue to hold a dominant position in the supply of rail services in their Member States of origin, especially as regards special locomotives for the Channel Tunnel. In view of ENS's direct access to those services and of its special relationship with its parent undertakings, other operators could be placed at a disadvantage in competition for necessary rail services. Account also has to be taken of the fact that BR and SNCF control a significant proportion of available paths for international trains through the Channel Tunnel, by virtue of the usage contract concluded with Eurotunnel.
25 Finally, those restrictions of competition are enhanced by the fact that ENS forms part of a network of joint ventures between the parent undertakings. BR/EPS, SNCF, DB and NS take part to varying degrees in a network of joint ventures for the operation of goods and passenger transport services, in particular through the Channel

Tunnel. BR and SNCF are parties to the formation of Allied Continental Intermodal Services Ltd (`ACI'), which is to provide combined transport of goods, and BR and SNCB are parties to the formation of `Autocare Europe', which is to provide rail transport for motor vehicles (points 49 to 52).

26 However, according to the decision, the agreements in issue, although they do not fall within the exception for technical agreements under Article 3 of Regulation No 1017/68, since they do not have as their sole object and sole effect to apply technical improvements or to achieve technical cooperation within the meaning of that article (points 55 to 58), do meet the conditions laid down by Article 5 of that regulation and Article 53(1) of the EEA Agreement (points 59 to 70). The formation of ENS is likely to favour economic progress by, inter alia, providing competition between modes of transport, and users will benefit directly from the new services offered. The restrictions found to exist are, moreover, indispensable in view of the fact that the services involved are completely new, entailing substantial financial risks which could be borne by a single undertaking only with great difficulty. Subject, therefore, to the imposition of a condition to ensure the presence on the market of rail transport operators competing with ENS, the formation of ENS does not eliminate all competition on the relevant market.

27 The decision therefore declares Article 85(1) of the Treaty and Article 53(1) of the EEA Agreement inapplicable to the ENS agreements for a period of eight years, ending on 31 December 2002 (Article 1 of the decision) and subjects that exemption to the condition (`the condition imposed') that `the railway undertakings party to the ENS agreements shall supply to any international grouping of railway undertakings or any transport operator wishing to operate night passenger trains through the Channel Tunnel the same necessary rail services as they have agreed to supply to ENS. These services consist of the provision of the locomotive, train crew and path on each national network and in the Channel Tunnel. The railway undertakings must supply these services on their networks on the same technical and financial terms as they allow to ENS' (Article 2 of the decision).

Procedure

28 By applications lodged at the Registry of the Court of First Instance on 22 November 1994, ENS and EPS brought actions, registered as Cases T-374/94 and Case T-375/94 respectively.

29 By application lodged at the Court Registry on 5 December 1994, Union Internationale des Chemins de Fer (`UIC') and NS brought an action, registered as Case T-384/94.

30 By application lodged at the Court Registry on 13 December 1994, SNCF brought an action, registered as Case T-388/94.

31 By separate document lodged at the Court Registry on 6 February 1995, the Commission raised an objection of inadmissibility in Case T-388/94, under Article 114 of the Rules of Procedure of the Court of First Instance. The applicant lodged observations on that objection on 20 March 1995.

32 On 28 June 1995, the Court of First Instance (First Chamber, Extended Composition) made an order joining consideration of the objection of inadmissibility raised by the Commission to that of the merits. On the same day, it requested SNCF to answer

a number of questions in writing and to produce certain documents.
33 By orders of the President of the First Chamber (Extended Composition) of 9 August 1995, the applications of the International Union of Combined Rail-Road Transport for leave to intervene in support of the forms of order sought by the Commission in Cases T-374/94, T-375/94 and T-384/94, lodged at the Court Registry on 3 April 1995, were dismissed.
34 By order of the President of the First Chamber (Extended Composition) of 9 August 1995, the applications of SNCF for leave to intervene in support of the forms of order sought by the applicants in Cases T-374/94 and T-384/94, lodged at the Court Registry on 9 May 1995, were granted.
35 By orders of the President of the First Chamber (Extended Composition) of 14 July and 10 August 1995, the United Kingdom was granted leave to intervene in support of the forms of order sought by the applicants in Cases T-374/94, T-375/94, T-384/94 and T-388/94.
36 By decision of the Court of First Instance of 2 October 1995, the Judge-Rapporteur was transferred to the Second Chamber (Extended Composition), to which the cases were accordingly assigned.
37 By decision of the Court of First Instance of 8 November 1996, the case was referred to a Chamber of three judges.
38 By order of the President of the Second Chamber of 6 August 1997, Cases T-374/94, T-375/94, T-384/94 and T-388/94 were joined for the purposes of the oral procedure and the judgment.
39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry. It requested the parties, however, to answer a number of written questions, which they did within the period prescribed.
40 The parties presented oral argument and answered the questions put by the Court at the hearing on 22 October 1997.
Forms of order sought
41 In Cases T-374/94 and T-375/94, ENS and EPS claims that the Court should:
- annul the decision;
- require the Commission
(a) to issue a declaration as to the inapplicability of Article 2 of Regulation No 1017/68 and Article 85(1) of the Treaty, or
(b) to grant an exemption without the condition imposed and for a duration commensurate with the period of the commitment of the railways for the financing of the rolling stock, or
(c) alternatively, to grant the exemption subject to any condition necessary and proportionate to the alleged restrictions on competition and for a period commensurate with the period of commitment of the railways for the financing of the rolling stock; and
- order the Commission to pay the costs.
42 SNCF, intervening in support of the forms of order sought by the applicant in Case T-374/94, claims that the Court should:
- annul the decision; and - require the Commission either

(a) to issue a declaration as to the inapplicability of Article 2 of Regulation No 1017/68 and Article 85(1) of the Treaty, or
(b) to grant an exemption without the condition imposed and for a duration commensurate with the period of the commitment of the railways for the financing of the rolling stock.
43 In Cases T-374/94 and T-375/94, the Commission contends that the Court should:
- dismiss the applications;
- dismiss the arguments raised by SNCF; and
- order the applicants and the intervener to pay the costs.
44 In Case T-384/94, UIC and NS claim that the Court should:
- declare the contested decision void in its entirety;
- in the alternative, declare void Article 2 of the decision, as well as Article 1 thereof in so far as the duration of the exemption is limited to a period of less than 20 years;
- take any further or alternative measures which the Court may deem appropriate; and
- order the Commission to pay the costs.
45 SNCF, intervening in support of the forms of order sought by the applicants, claims that the Court should:
- declare the contested decision void in its entirety;
- in the alternative, declare void Article 2 of the decision, as well as Article 1 thereof in so far as the duration of the exemption is limited to a period of less than 20 years;
- take any further or alternative measures which the Court may deem appropriate; and
- order the Commission to pay the costs.
46 The Commission contends that the Court should:
- declare inadmissible and, in any event, unfounded, the application by UIC;
- dismiss the application by NS;
- dismiss the arguments raised by the intervener; and
- order the applicants and the intervener to pay the costs.
47 In Case T-388/94, SNCF claims that the Court should:
- annul the contested decision;
- in the alternative, annul Article 2 of the decision in that the condition imposed is unjustified, as well as Article 1 thereof in so far as the Commission granted an exemption for a period of less than 20 years;
- take any measures which the Court may deem appropriate; and
- order the Commission to pay the costs.
48 In its observations on the objection of inadmissibility raised by the Commission, SNCF claims that the Court should:
- find the application admissible; and
- order the Commission to pay the costs.
49 The Commission contends that the Court should:
- dismiss the application as inadmissible and, in any event, as unfounded; and
- order the applicant to pay the costs.
50 The United Kingdom, intervening in support of the forms of order sought by the applicants in Cases T-374/94, T-375/94, T-384/94 and T-388/94, claims that the Court should:
- annul the contested decision; and

- order the Commission to pay the costs.

Admissibility

(omissis)

Substance

81 In the pleas in law and arguments which they put forward, the applicants submit that the contested decision should be annulled for, in substance, four reasons: (a) none of the constituent elements of the conduct prohibited by Article 85(1) of the Treaty is established in the present case, since the ENS agreements do not restrict competition, and the decision is therefore vitiated by inaccurate and incomplete assessment of the facts, manifest error in law and a failure to state reasons; (b) in its application of the rules on competition, the Commission exceeded the limits of the regulatory framework laid down by Directive 91/440; (c) the Commission imposed disproportionate conditions on its granting of the exemption; and (d) the duration of the exemption granted for the notified agreements (eight years) is too short. Finally, in Case T-384/94, SNCF submits in addition that the contested decision should be annulled because the Commission considered that the ENS agreements did not qualify for the exception for technical agreements under Article 3 of Regulation No 1017/68.

The first plea: inaccurate and incomplete assessment of the facts, manifest error in law and/or breach of the obligation to provide an adequate statement of reasons for the contested decision in so far as the Commission concluded that the creation of ENS had as its object and effect the restriction of competition

82 This plea falls in two parts: first, that the relevant market was wrongly defined and that the ENS agreements have no appreciable effect on trade between Member States and, second, that those agreements have no restrictive effect on competition.

First part: definition of the relevant market and absence of any appreciable effect of the ENS agreements on trade between Member States

Arguments of the parties

83 - 89 *(omissis)*

Findings of the Court

90 First of all, it must be noted that, in order to assess the effects of the ENS agreements on competition and on trade between Member States, the Commission defined two relevant service markets in the decision: the market for the transport of business travellers, for whom scheduled air travel and high-speed rail travel are interchangeable modes of transport (the `intermodal' market for business travel), and the market for the transport of leisure travellers, for whom substitute services may include economy-class air travel, train, coach and possibly private motor car (the `intermodal' market for leisure travel) (see points 26 and 27 of the decision).

91 The Commission went on to consider, referring to Case 66/86 Ahmed Saeed Flugreisen and Silver Line Reisebüro v Zentrale zur Bekämpfung unlauteren Wettbewerbs [1989] ECR 803, that the relevant geographical market should be confined to the routes actually to be served by ENS (points 28 and 29 of the decision), namely:

- London-Amsterdam, - London-Frankfurt/Dortmund, - Paris-Glasgow/Swansea and - Brussels-Glasgow/Plymouth.

92 As that definition of the geographical market has not been challenged by the applicants, it follows that the ENS agreements fell to be assessed solely on the basis of the

four separate geographical markets listed above and solely in the context of an intermodal market comprising various modes of transport such as rail, air, coach and motor car. On that basis, therefore, it is necessary to examine whether the Commission correctly evaluated ENS's market shares in order to arrive at the conclusion that the ENS agreements would have an appreciable effect on trade between Member States, bearing in mind that, according to the applicants' notification, those market shares would not exceed the critical threshold of 5% and would, in any event, be insignificant.

93 It is to be noted here that the contested decision makes no reference to the market shares of ENS or of any other operators competing with ENS and also present on the various intermodal markets taken by the Commission as the relevant markets for the purposes of applying Article 85(1) of the Treaty. Consequently, even if - contrary to the applicants' submission - the ENS agreements were to restrict competition, the Court is not in a position, in the absence of any such data concerning the analysis of the relevant market in the contested decision, to make any finding as to whether the supposed restrictions on competition have an appreciable effect on trade between Member States and are thus caught by Article 85(1) of the Treaty, having regard, in particular, to the intermodal competition which is, according to the decision itself, a feature of the two service markets in question.

94 It was not until the stage of the proceedings before the Court that the Commission first referred to the notification submitted by the parties in support of its contention that `even on the basis of the conservative - and by nature therefore restrictive - forecasts of ENS which are based on a narrower definition of the market, the Night Services' share of the business segment of the market is 7%, and 8% in the case of the leisure segment of the market'. It was also during the written procedure that it first asserted that ENS's market share should be calculated, for the business segment, in relation to early morning and late evening flights rather than by reference to all the flights available round the clock on a given route and is thus in fact much larger.

95 It is settled law that whilst, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required under Article 190 of the Treaty to set out at least the facts and considerations having decisive importance in the context of the decision in order to make clear to the Court and the persons concerned the circumstances in which it has applied the Treaty (Case C-360/92 P Publishers Association v Commission [1995] ECR I-23, paragraph 39, Case T-290/94 Kaysersberg v Commission [1997] ECR II-2137, paragraph 150, and Joined Cases T-369/94 and T-85/95 DIR International Film and Others v Commission [1998] ECR II-357, paragraph 117). It is also clear from the case-law that, other than in exceptional circumstances, the statement of reasons must be contained in the decision itself, and it is not sufficient for it to be explained subsequently for the first time before the Court (Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931, paragraph 131, Case T-230/94 Farrugia v Commission [1996] ECR II-195, paragraph 36, and Case T-16/91 RV Rendo and Others v Commission [1996] ECR II-1827, paragraph 45).

96 It follows from the abovementioned case-law that when a Commission decision applying Article 85(1) of the Treaty suffers from serious omissions, such as the absence

of any reference to the market shares of the undertakings concerned, the Commission may not remedy that defect by adducing for the first time before the Court figures and other analytical data from which it may be concluded that the essential elements of a situation in which Article 85(1) applies are in fact present unless none of the parties had challenged the analytical data in question during the prior administrative procedure.

97 Here, according to the estimates put forward by the applicants in the notification, ENS's market shares were not expected to exceed 4%, and it was only on the basis of a narrower market definition that they might reach 7% for the business travel market and 8% for the leisure travel market (see point 2.1.2 of the summary of the notification), without even then having an appreciable effect on competition. It is thus clear that, as regards the effect of the ENS agreements on trade between Member States, the applicants and the Commission were starting from different premisses, the applicants considering that the agreements did not have an appreciable effect on intra-Community trade. The Commission was thus required to provide an adequate statement of its reasons for finding that the ENS agreements had an appreciable effect on trade between Member States.

98-102 *(omissis)*

103 That being so, where, as in the present case, horizontal agreements between undertakings reach or only very slightly exceed the 5% threshold regarded by the Commission itself as critical and such as to justify application of Article 85(1) of the Treaty, the Commission must provide an adequate statement of its reasons for considering such agreements to be caught by the prohibition in Article 85(1) of the Treaty. Its obligation to do so is all the more imperative here, where, as the applicants stated in their notification, ENS has to operate on markets largely dominated by other modes of transport, such as air transport, and where, on the assumption of an increase in demand on the relevant markets and having regard to the limited possibilities for ENS to increase its capacity, its market shares will either fall or remain stable. In addition, such a statement of reasons is necessary in the present instance in view of the fact that, as the Court of Justice held at paragraph 86 of its judgment in Musique Diffusion Française, cited above, an agreement is capable of exercising an appreciable influence on the pattern of trade between Member States even where the market shares of the undertakings concerned do not exceed 3%, provided that those market shares exceed those of most of their competitors.

104 There is, however, no such statement of reasons in the present case.

105 It must be concluded from the foregoing that the contested decision does not contain a sufficient statement of reasons to enable the Court to make a ruling on the shares held by ENS on the various relevant markets and, consequently, on whether the ENS agreements have an appreciable effect on trade between Member States, and the decision must therefore be annulled on that ground.

Second part: assessment of the restrictive effects of the ENS agreements on competition

Arguments of the parties

106 The applicants maintain that the ENS agreements do not restrict competition among the parent undertakings themselves, between the parent undertakings and

ENS or vis-à-vis third parties, and that there is no strengthening of the alleged restrictions of competition as a result of the presence of networks of joint ventures on the market for rail transport. They further maintain that the beneficial effects of the ENS agreements outweigh any alleged restrictions to which they might give rise. The decision, they claim, therefore contains an inadequate statement of reasons or, at the very least, manifest errors of assessment.

107 In the first place, as regards restrictions of competition among the parent undertakings and between them and ENS, the applicants submit that, in the light of the substantial difficulties facing the railway undertakings and ENS, it cannot be asserted that any appreciable competition could emerge in the relevant markets among the railway undertakings in respect of the new services to be offered by ENS. ENS and EPS refer to a letter of 27 April 1992 sent by Lazard Brothers to BR (Annex 7 to the notification) showing that none of the railway undertakings alone would have accepted those risks, a point with which the Commission agreed in its decision. Moreover, the procurement of rolling stock involves various fixed costs such that an undertaking could only make a profit by increasing output to a minimum efficient size such as that hoped for by ENS. Individually, none of the railway undertakings would have been in a position to increase the level of services to that minimum.

108 UIC and NS add that there can be no restrictions of potential competition among the parties to the ENS agreements since, under Directive 91/440, none of the railway undertakings is in a position to serve any one of the routes concerned on its own but is bound to participate in an international grouping. The London-Amsterdam route, for instance, could not have been served by SNCF and EPS without the participation of NS. Since EPS and NS are `obligatory trading partners' in any international grouping serving that route, the additional participation of SNCF, which is not an actual or potential competitor of NS or EPS on the route concerned, could thus not constitute a restriction of competition. As to the fact that ENS serves a route one of whose destinations is Belgium without the Belgian railway undertaking SNCB being a party to the ENS agreements, the applicants stress that SNCB's supply of `necessary services' to ENS is the result of a purely commercial decision and not of any obligation imposed by Community law.

109 Since the four routes served by ENS are to be considered as forming four different geographical markets (decision, point 29), it also follows that the four connections must be held not to compete with each other, so that combining their operation in one grouping does not constitute a restriction of competition.

110 The Commission's argument that the ENS agreements restrict competition between the parties to the agreements and new railway undertakings, including subsidiaries of existing ones, is unfounded. To the extent that it concerns new undertakings, it is irrelevant for the purpose of analysing possible restrictions of competition among the participating undertakings. The assertion that the parent undertakings could set up, in countries served by ENS other than their own countries of establishment, subsidiaries which could acquire the status of `railway undertakings' within the meaning of Directive 91/440 and with which each of the railway undertakings concerned could organise night services by means of a grouping excluding any other participant in ENS, is hypothetical. None of the railway undertakings participating in ENS has

subsidiaries of such a kind; nor, moreover, are they able to set up subsidiaries having the status of railway undertakings in Member States where other railway undertakings are established, at least until the two draft directives complementing the regulatory framework of Directive 91/440 have been implemented. Even if such a framework already existed, moreover, it would be totally unrealistic from a business point of view to assume, for instance, that DB would set up its own railway undertaking in the Netherlands in order to operate, together with EPS, a night train connection between the United Kingdom and Amsterdam without the involvement of NS. In any event, the Commission's findings are all the more challengeable in that cooperation in ENS is not exclusive, there being nothing in the ENS agreements to prevent participants from engaging in a grouping competing with ENS.

111 SNCF adds that, contrary to the Commission's contention, the individual railway undertakings do not have the possibility of setting up a subsidiary in another Member State with a view to forming a grouping with it, because there are statutory monopolies in the Member States and the Council has not adopted any legislation conferring such a right of establishment. Moreover, the fact that a number of railway undertakings participate in the ENS agreements is of no consequence, since they operate on different networks and are thus not in competition on each of the other geographical markets considered. Finally, SNCF stresses that the financial risks involved in setting up ENS cannot be borne by a single undertaking, as the Commission accepts at point 63 of its decision.

112 Similarly, the Commission's argument that each railway undertaking could perform the role of railway `transport operator' outside its country of establishment by buying the necessary services from the railways concerned is based on an unrealistic description of the market and is incompatible with the regulatory framework of Directive 91/440. There is no justification for supposing, for example, that DB would be interested in setting up a special structure and negotiating rights of access with the United Kingdom infrastructure manager, SNCF and NS in order to set up a night train connection between London and Amsterdam. Such behaviour would, in any event, be commercially unfeasible, since none of the participants in ENS has the financial and commercial means to do so.

113 The Commission's reasoning is also based on a market model which is incompatible with the regulatory framework of Directive 91/440. By drawing an artificial distinction between railway undertakings and a hypothetical new category of market participants called `transport operators', it creates access and transit rights which do not derive from the directive. The conclusion from its analysis, moreover, is that the formation of any international grouping automatically restricts competition simply because its participants could also have formed another grouping. Such reasoning is all the more unacceptable in that it makes it impossible for the participating railway undertakings to assess how the services of ENS should be structured once the exemption granted has expired, thus discouraging further initiatives for innovative international transport services by the railway undertakings in the Community.

114 In the second place, as regards the alleged restrictions on access by third parties (points 46 to 48 of the decision), the applicants maintain that the Commission's analysis is wrong in both fact and law. First, the possibility that third parties might be

excluded should be assessed in relation to the relevant intermodal markets on which the joint venture will be operating and for which, according to points 26 and 27 of the decision, there are other, interchangeable, modes of transport. The analysis in question, however, is based on another market definition, that of the market in necessary rail services, which diverges from the definition explicitly adopted in the decision.

115 Second, the Commission's assessment is based on the false premiss that ENS should be treated as a `transport operator' to which the parent undertakings provide rail services. However, ENS is not a transport operator but an international grouping of railway undertakings within the meaning of Directive 91/440, formed in order to enable the parent undertakings to provide international passenger rail services, in accordance with Article 10(1) of the directive. The fact that the parent undertakings opted for a grouping in the form of a company is irrelevant in that connection with regard to the legal status of ENS. Thus, contrary to the Commission's contention, since the parent undertakings themselves provide transport services to travellers via the grouping in question, there cannot be an upstream market for the provision of rail services to operators and a separate market on which ENS operates, as stated in the decision. In any event, the Commission's findings are based on the false assumption that any `transport operator' of any kind (for example, a hotel chain) is entitled to claim the supply of locomotives.

116 Third, the Commission's argument is based on the erroneous assumption that EPS is a wholly-owned subsidiary of BR and/or the railway infrastructure manager Railtrack and holds a dominant position in the United Kingdom, whereas in fact EPS has been transferred by BR to the United Kingdom Government (see paragraph 11 above) and its position is far from dominant in any market. EPS reminded the Commission in a letter of 30 June 1994 (Annex 9 to its application) that it is not an infrastructure owner or manager and has access only to the reserved paths it needs over the UK network, forming a small minority of the paths on the routes in question. Similarly, EPS employs a small number of railway staff and owns a small fleet of locomotives. It does not, therefore, enjoy a dominant position as regards access to infrastructure in the United Kingdom.

117 Fourth, the Commission has not explained why the alleged commercial strength of the participating railway undertakings constitutes as such a barrier to market access for third parties. The argument based on the existence of actual or potential competitors and the competitive damage on the downstream markets brought about by the alleged special relationship between the railway undertakings and ENS is speculative. Even if the railway undertakings were alone in possessing locomotives and even if each of them refused to supply locomotives to a new operator, the effect on the properly-defined relevant markets would be minimal. In any event, under Directive 91/440, the participating railway undertakings are obliged, as infrastructure managers, to provide certain services to third parties. Moreover, the acquisition of (in particular second-hand) locomotives by operational or financial leases or otherwise does not constitute a major investment for third parties, and there is no evidence for the Commission's claim that only the railway undertakings concerned possess them or that any new entrant would experience difficulty in finding them. It is, moreover, possible to adapt existing locomotives to operate through the Channel Tunnel, rather than ordering

new or special locomotives. In any event, the mere fact that the setting-up of a joint venture necessitates certain major capital investments cannot be regarded as a barrier to market entry. As to the Commission's reference in its pleadings to the foreclosure effect arising out of the Channel Tunnel usage agreement, the applicants reply that it is an agreement which has been granted exemption by the Commission under Article 85(3) of the Treaty and stress that the paths to be used by ENS will be allocated to the quota reserved by the Eurotunnel Agreement for SNCF and BR and will not reduce the number of paths available for third parties.

118 In the third place, as regards the restrictive effect due to the presence of a network of joint ventures, the applicants point out that the other joint ventures concerned are located on product or service markets - the market for combined transport of goods and the market for the transport of vehicles by rail - different from those on which ENS will be active and that they do not engage in competing or even complementary activities. The decision contains no analysis to show how the alleged existence of a network of joint ventures for rail transport could have an appreciable effect on competition in the market for passenger transport and is, moreover, inconsistent with the principles set out by the Commission in its 1993 communication.

119 Finally, as regards the overall assessment of the ENS agreements, ENS and EPS state that the Court of Justice has consistently held (Case 56/65 Société Technique Minière v Maschinenbau Ulm [1966] ECR 235, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, Case 26/76 Metro v Commission, cited above, Case 258/78 Nungesser v Commission [1982] ECR 2015, Case 161/84 Pronuptia [1986] ECR 353 and Case C-234/89 Delimitis v Henninger Bräu [1991] ECR I-935) that the pro-competitive effects of an agreement must be weighed up against its anti-competitive effects. If the pro-competitive effects outweigh the anti-competitive effects and the latter are necessary in order to implement the agreement, then the agreement cannot be regarded as having as its object or effect the prevention, restriction or distortion of competition within the common market within the meaning of Article 85(1) of the Treaty.

120 The applicants submit that the agreements in issue have substantial pro-competitive effects on both the relevant service markets as defined in points 26 and 27 of the decision. In particular, the market for the transport of business travellers on the routes served by ENS is dominated by a small number of airline companies which, according to the International Passenger Survey conducted by the Office of Population Censuses and Surveys, held 74% of that market in 1991. ENS further showed, in its notification, that it was likely to have 7% of that market while the airline companies would hold 78% and that its formation would thus to some extent mitigate the domination of the market by air transport. The Commission has, moreover, accepted that the position was the same with respect to the leisure market. In fact, the pro-competitive effects of the agreements should outweigh any speculative anti-competitive effect.

121 The Commission considers that the fact that the participants in ENS have assumed significant commercial risks and incurred high expenses and costs does not mean that appreciable competition among the railway undertakings concerned on the relevant market is improbable. A railway undertaking established in one Member State is entitled to form an international grouping with another railway undertaking

established in another Member State and obtain from Eurotunnel, the infrastructure manager, the paths necessary to pass through the Channel Tunnel and thus operate international transport services (decision, point 42). Moreover, any railway undertaking party to the ENS agreement is entitled to take on the role of `transport operator' itself and to set up a subsidiary which, by buying the necessary services from the railway undertakings concerned, may likewise provide international transport services (decision, points 43 and 44). Thus, by entrusting the operation and marketing of those services to their joint venture ENS, the applicants have appreciably limited the scope for competition on that market (decision, point 45). Finally, it is clear from the decision of the German railway undertaking DB to form a joint venture with the Swiss and Austrian railways with a view to providing night services between German, Swiss and Austrian cities that the possibilities for a railway undertaking party to the ENS agreements to set up a subsidiary in the United Kingdom and/or other Member States in order to offer night train services are neither illusory nor unrealistic.

122 As regards the argument that each of the applicants is an obligatory trading partner for operation of the routes served by ENS, the Commission replies that ENS is not a railway undertaking within the meaning of the directive but a `transport operator' which obtains the necessary rail services from railway undertakings. Furthermore, the fact that the Brussels-Glasgow/Plymouth route was to be offered by ENS even though SNCB is not a party to the agreement demonstrates that the participation of all four railway undertakings established in the Member States concerned is not a sine qua non for the operation of the services involved.

123 In response to the applicants' argument that the railway undertakings concerned could not set up subsidiaries having the status of railway undertakings in the different Member States and thus form other international groupings in competition with ENS, the Commission contends that there is no legal obstacle to prevent railway undertakings from exercising their right of establishment in other Member States. The principle of freedom of establishment enunciated by Article 52 of the Treaty became fully effective at the end of the transitional period; the fact that when the contested decision was adopted the Council had not yet adopted the draft directive on the licensing of railway undertakings is thus irrelevant, the aim of such a directive being only to facilitate the exercise of the right of establishment, and not to create that right (Case 2/74 Reyners v Belgian State [1974] ECR 631).

124 With regard to the applicants' argument that the regulatory framework set up by Directive 91/440 does not allow the railway undertakings to set up a subsidiary in the form of a transport operator, the Commission stresses that, whilst Directive 91/440 applies admittedly only to railway undertakings whose main business is to provide rail transport services for goods and/or passengers, with a requirement that the undertaking should ensure traction (Article 3), transport operators which do not themselves qualify as railway undertakings within the meaning of Article 3 of the directive and thus do not have a right of access to railway infrastructure may none the less offer services and/or railway transport of goods by obtaining traction services and access to railway infrastructure from railway undertakings. That is precisely how ACI and ENS operate, as regards combined transport and passenger transport respectively.

125 The Commission points out that it had already put forward that point of view in

the letters it sent to the notifying parties on 29 October 1993 (defence, Annex 4) and 28 February 1994 and adds that, after the railway undertakings participating in ENS had been consulted, ENS's chairman sent a letter dated 13 April 1994 to the Commission (defence, Annex 6), confirming their agreement to provide overnight services to ENS's competitors on the same routes.

126 As regards the assertion that the ENS agreements contain no provision as to exclusivity and thus do not preclude the railway undertakings concerned from setting up different international groupings capable of competing with ENS, the Commission stresses that such a possibility is extremely unlikely since, during the administrative procedure, the railway undertakings concerned insisted on the need to combine their experience and financial resources in order to ensure the commercial success of ENS.

127 The Commission also denies the claim that it failed to make a proper assessment of the restrictive effects of the ENS agreement on third parties, and refers in that regard to points 46 and 48 of the contested decision. It considers that, whilst the formation of ENS creates no restrictions on entry by third parties to the other modes of transport which are interchangeable with the services offered by ENS, access by railway undertakings and transport operators to the rail transport segment of the relevant market could none the less be impeded because ENS is composed of powerful railway undertakings with control of both the utilisation of railway infrastructure and the provision of traction. In the Commission's view, it is not necessary that barriers to access affect each segment of a composite market of the kind in question here. The fact that a decision was taken exempting the Eurotunnel Agreement entered into by BR, SNCF and Eurotunnel under Article 85(3) of the Treaty, it adds, in no way renders irrelevant the assessment of the economic position of EPS and SNCF, which hold 75% of the path capacity reserved for international train services in the Channel Tunnel.

128 With regard to the restrictions of competition arising out of the supply of necessary rail services to ENS, the Commission recognises that, as regards train paths, international groupings are entitled under the directive to obtain access to infrastructure directly from the infrastructure managers. That does not apply, however, to transport operators as regards the provision of train paths or of traction and skilled crews. In view of the fact that traction may only be assured by railway undertakings, which possess both the special locomotives designed for traction in the Channel Tunnel and the skilled crew operating them, it is justifiable to take the view that economic operators seeking to obtain such services would be at a disadvantage if they did not get the same services on non-discriminatory terms from ENS's parent undertakings.

129 The network of joint ventures in which the parent undertakings take part, the Commission states, concerns the operation of goods and passenger transport services, namely: Intercontainer, in which all the notifying parties take part; ACI, set up by BR, SNCF and Intercontainer; and, finally, Autocare Europe. The contention that joint ventures relating to the combined transport of goods and the provision of rail transport for motor vehicles have no bearing on night passenger services such as those operated by ENS is unfounded since, according to the 1993 communication, competition is most severely restricted where undertakings competing within the same oligopolistic economic sector set up a multitude of joint ventures for complementary or unrelated products or services.

130 Finally, the Commission challenges the argument that the case-law cited by the applicants establishes that it is bound to apply a `rule of reason' and to balance the competitive benefits and harms of the agreement. Such an approach is required in the context of Article 85(3) of the Treaty but not in respect of the appraisal of restrictions of competition under Article 85(1).
131 The United Kingdom, in intervention, submits that in applying Article 85(1) of the Treaty to the ENS agreements the Commission failed to take account of the economic context and, in particular, of the state of competition that would exist in the absence of the agreements. The ENS agreements do not restrict competition because they are designed to facilitate, and are necessary for, the introduction of a service which is not currently operating and which none of the parties could reasonably be expected to introduce by itself.
132 Various passages in the decision vouch for the pro-competitive nature of the ENS agreements, the novelty of the service offered, the substantial financial risks involved, the financial and technical justification for collaboration - the pooling of know-how - and the need to wait several years before the investments made will yield profitable returns (points 59, 61, 63, 64 and 74 to 77 of the decision). It is thus significant that those findings appear in the decision solely in connection with the question of the exemption of the ENS agreements and not with the application of Article 85(1) of the Treaty.
133 Nor does the contested decision contain any sufficient explanation of how ENS's parent undertakings are or could be competitors on the market in question in any real sense. It contains no explanation of how real the prospect is of such competition, which shows either that the Commission did not carry out the required analysis of the economic context or that it has failed to comply with Article 190 of the Treaty.
134 In reply to the United Kingdom, the Commission submits that, whilst the analysis of an agreement must take account of its economic context, it does not follow that the rule of reason - a concept which the Court of Justice has hitherto declined to embrace - should be resorted to. That conclusion is not negated by its judgment in Case C-250/92 Gottrup-Klim v Dansk Landbrugs Grovvareselskab [1994] ECR I-5641, which concerns only the validity of ancillary restrictions in the specific context of cooperative organisations and may not, therefore, be regarded as the expression of a general principle. Consequently, it is necessary to balance the competitive benefits and harms of an agreement in relation to the granting of exemptions under Article 85(3) of the Treaty but not in respect of the appraisal of restrictions on competition - which were, contrary to the United Kingdom's contention, fully explained in the decision - in accordance with Article 85(1).
Findings of the Court
135 According to the contested decision, the ENS agreements have effects restricting existing and potential competition (a) among the parent undertakings, (b) between the parent undertakings and ENS and (c) vis-à-vis third parties; furthermore (d), those restrictions are aggravated by the presence of a network of joint ventures set up by the parent undertakings.
136 Before any examination of the parties' arguments as to whether the Commission's analysis as regards restrictions of competition was correct, it must be borne in mind

that in assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (judgments in Delimitis, cited above, Gottrup-Klim, cited above, paragraph 31, Case C-399/93 Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie [1995] ECR I-4515, paragraph 10, and Case T-77/94 VGB and Others v Commission [1997] ECR II-759, paragraph 140), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 Tréfilunion v Commission [1995] ECR II-1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).

137 It must also be stressed that the examination of conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established (Delimitis, cited above, paragraph 21). Furthermore, according to the Commission notice of 1993 concerning the assessment of cooperative joint ventures pursuant to Article 85 of the Treaty: `The assumption of potential competitive circumstances presupposes that each parent alone is in a position to fulfil the tasks assigned to the [joint venture] and that it does not forfeit its capabilities to do so by the creation of the [joint venture]. An economically realistic approach is necessary in the assessment of any particular case' (point 18).

138 It is in the light of those considerations, therefore, that it is necessary to examine whether the Commission's assessment of the restrictive effects of the ENS agreements was correct.

- Restrictions on competition among the parent undertakings

139 It is clear from the documents before the Court that, prior to the adoption of Directive 91/440, the railway undertakings in the Member States were neither actually nor potentially in competition with each other because most Member States provided for exclusive rights precluding, de jure or de facto, both the provision of international passenger services and access to the infrastructure (the national rail networks). Prior to the adoption of that directive, as the parties have stressed, the only basis on which such services were provided in the Community was that of the traditional cooperation agreements between the railway undertakings operating on the various networks concerned. However, following the adoption of Directive 91/440, conditions of competition on the market for rail transport changed and the railway undertakings operating on their national networks became to a certain extent potential competitors for international passenger services, provided that they formed `international groupings' with other railway undertakings established in other Member States for the purpose of providing international transport services between those Member States (Articles 3 and 10 of the directive).

140 It would appear from the Commission's arguments that the possibility of providing international services via international groupings is open not only to existing railway undertakings but also to new railway undertakings, including subsidiaries of existing railway undertakings, and that it was on the basis of that premiss that the Commission considered that the ENS agreements restricted competition among the parent undertakings inasmuch as (a) each of the parties to those agreements could form an international grouping either with an undertaking established in the United Kingdom or with its own subsidiary there and thus compete with ENS, (b) each of those parties could set up a subsidiary specialising as a `transport operator' and buy from those parties the same necessary rail services as they sold to ENS and (c) each railway undertaking could itself take on the role of transport operator and provide international night passenger services by buying the necessary rail services from the railway undertakings concerned.

141 With regard to the possibility for each of the parties to the ENS agreements to form an international grouping either with a railway undertaking in the United Kingdom or with its own subsidiary there and thus compete with ENS, it must first of all be borne in mind that since, in accordance with Article 10 of Directive 91/440, an international route may be served only by an international grouping formed by the railway undertakings established in each of the countries concerned, the only `obligatory trading partners' for the constitution of such an international grouping on each route are necessarily the railway undertakings established in each Member State concerned. As the applicants have pointed out, with regard to the example of the London-Amsterdam route, the only obligatory trading partners at the material time were NS and EPS; the fact that SNCF and DB were also members of the grouping could thus have no effect on existing competition since, in the context created by Directive 91/440, neither of those two railway undertakings could compete with EPS and NS on that route. The situation is the same for each of the three other routes actually to be served by ENS (see paragraph 9 above). Consequently, the fact that the four routes in question are operated jointly by EPS, DB, SNCF and NS cannot have the effect of an appreciable restriction of existing competition among the parent undertakings.

142 As regards the view that potential competition is restricted by the fact that each of the parent undertakings could set up subsidiaries in the Member States of the other parent undertakings and form, either with its own subsidiaries or with other railway undertakings established in the other Member States concerned, international groupings in direct competition with ENS, the Court considers this to be a hypothesis unsupported by any evidence or any analysis of the structures of the relevant market from which it might be concluded that it represented a real, concrete possibility. There is no indication either in the contested decision or in the documents before the Court that there are any railway undertakings with subsidiaries in other Member States having themselves the status of railway undertakings, such as to demonstrate any actual exercise of the right to freedom of establishment on the market for rail transport in the Community.

143 It should be stressed here that, as a measure of organisation of the procedure, the Court requested the Commission to indicate whether any railway undertakings established in the Member States had subsidiaries in other Member States having the status

of railway undertakings within the meaning of Directive 91/440 and, if so, to specify which railway undertakings had been set up since the entry into force of Directive 91/440. In its answer, the Commission admitted that it had no knowledge of other subsidiaries set up by ENS's parent undertakings either before or after the adoption of Directive 91/440, reiterating, however, its view that the right of establishment is conferred directly on any interested railway undertaking by Article 52 of the Treaty.

144 The Court considers that the Commission's argument in this regard, to the effect that there is in theory no legal obstacle precluding railway undertakings from exercising their right of establishment in a Member State other than that in which they have their registered office, fails to take account of the economic context and characteristics of the relevant market as they appear from the documents in the case and is thus not sufficient, without further support, to establish the existence of restrictions of potential competition among the parent undertakings or between them and ENS.

145 As the applicants have explained at length in their pleadings, it would be unrealistic, given the novelty and the specific features of the night rail services in question, for the parent undertakings to set up other subsidiaries in other Member States having the status of railway undertakings for the sole purpose of forming a new joint venture to compete with ENS. The prohibitive cost of the investment required for such services through the Channel Tunnel and the fact that there are no economies of scale in the operation of a single route, as opposed to the four routes to be operated together by ENS, show how unrealistic potential competition is among the parent undertakings and between them and ENS. It is, moreover, clear from the documents before the Court that, following the publication in the Official Journal of the European Communities of the Commission's notice inviting interested parties to submit their observations on the ENS agreements as summarised in that notice, no third parties took any steps during the administrative procedure to submit observations as a potential competitor capable of being affected or concerned by the implementation of the ENS agreements (see paragraph 17 above). Finally, it may also be seriously questioned whether ENS has any existing or potential competitors in this context in view of the fact that, as the Commission acknowledged in its answers to the written questions put by the Court, no subsidiaries have yet been set up in other Member States by any Community railway undertakings, whether before or after the adoption of Directive 91/440.

146 On the basis of the foregoing considerations, the Commission's finding that the ENS agreements are such as appreciably to restrict existing and/or potential competition among the parent undertakings and between them and ENS must be held to be vitiated by inadequate reasoning and/or error of assessment.

147 As regards the view that competition among the parent undertakings is restricted because each of the railway undertakings participating in the ENS agreements could either set up a subsidiary specialising as a transport operator or itself take on the role of transport operator and compete with ENS by buying the same necessary rail services, the Court considers that the Commission's assessment is here again based on an analysis of the market which does not correspond to the real situation. The Commission takes as its starting-point the assumption that in the market for rail passenger services there is in addition to railway undertakings another category of economic operators

- transport operators - providing the same services as railway undertakings - passenger transport - but by buying or hiring `necessary rail services' - locomotives, crews and access to infrastructure - from those undertakings. ENS, being, according to the decision, a transport operator, could thus be exposed to competition either from specialised subsidiaries set up by railway undertakings as transport operators or by those undertakings themselves acting directly on the market as transport operators, and its creation therefore restricts the parties' freedom to operate individually as transport operators on the relevant market.

148 However, the Commission's assessment in that regard cannot be examined without first answering the question whether international passenger services are provided not only by international groupings as provided for in Directive 91/440 but also by transport operators. As that question is raised, in substance, by the applicants in the context of their second plea in law, it will therefore be examined in that context (see paragraphs 161 to 189 below).

- Restrictions on competition vis-à-vis third parties

149 The contested decision stresses that third-party access to the relevant markets is likely to be impeded by the existence of a special relationship between ENS and its parent undertakings, placing other operators at a disadvantage in competition for the necessary rail services provided by the parent undertakings, and by the Channel Tunnel usage agreement entered into by BR, SNCF and Eurotunnel, which allows BR and SNCF to retain a significant proportion - 75% - of the path capacity reserved for international train services.

150 With regard, first, to the special relationship between ENS and the railway undertakings concerned, it must be noted that the Commission's analysis is based on the premiss that the market for rail passenger transport is split into two parts: an upstream market in the provision of `necessary rail services' (train paths, special locomotives and train crews) and a downstream market in passenger transport, on which transport operators such as ENS operate alongside railway undertakings. According to the decision, the parent undertakings could abuse their dominant position on the upstream market by refusing to provide necessary rail services to third parties competing with ENS on the downstream market.

151 Here again, however, the Commission's assessment cannot be examined without first answering the question whether there are also, in addition to international groupings, transport operators on the relevant markets, which will be examined in the context of the second plea in law, and the question whether the services provided to ENS by the parent undertakings may be categorised as `necessary or essential facilities', which falls within the scope of the third plea and must therefore be examined in that context (see paragraphs 190 to 221 below).

152 As regards, second, any restrictive effects arising out of the Channel Tunnel usage agreement, it must be borne in mind that the Commission's decision exempting that agreement from the prohibition in Article 85(1) of the Treaty (`the Eurotunnel decision') was annulled by judgment of the Court of First Instance of 22 October 1996 in Joined Cases T-79/95 and T-80/95 SNCF and British Railways v Commission [1996] ECR II-1491, on the ground that the Commission had made a factual error in its interpretation of the provisions of that agreement governing the allocation of train paths

in the tunnel as between SNCF and BR on the one hand and Eurotunnel on the other.
153 As a measure of organisation of the procedure, the Court requested the parties to state their position on the relevance of that judgment for the present case. In its answer, the Commission considered that it was irrelevant for the appraisal of the legality of the contested decision, point 47 of which indicates that even if BR and SNCF did not hold all the available paths for international trains they would still control a significant proportion of them. The applicants, however, took the view that the judgment confirms that access to the Channel Tunnel is not closed and that the Commission incorrectly assessed the restrictive effects of the tunnel usage agreement vis-à-vis third parties.
154 The Court considers that, since the Commission specifically took the `Eurotunnel agreement' as its basis in order to demonstrate in the contested decision that SNCF's and BR's allegedly privileged access to train paths in the tunnel placed undertakings competing with ENS at a competitive disadvantage, and since the Eurotunnel decision has been annulled by the Court of First Instance on the ground that it contained an error of fact in the interpretation of the provisions of the agreement relating to the allocation of train paths, the Commission cannot derive any valid argument from it with regard to the assessment of the ENS agreements.
- Aggravation of the restrictive effects on competition caused by the presence of a network of joint ventures
155 With regard, finally, to the alleged aggravation of the restriction of competition caused by the presence of networks of joint ventures (points 49 to 53 of the decision), it should first be noted that, according to the Commission's 1993 communication, special attention must be paid to the presence of networks of joint ventures set up by the same parents, by one parent with different partners or by different partners in parallel (point 17 of the communication). In particular, networks of joint ventures can restrict competition where competing parents set up several joint ventures for complementary products which they themselves intend to process or for non-complementary products which they themselves distribute, thus increasing the extent and intensity of the restriction of competition. Those considerations are also valid for the service sector (point 29 of the communication).
156 In the contested decision, the Commission considered that to be the case in the present instance, inasmuch as BR/EPS, SNCF, DB and NS were taking part to varying degrees in a network of joint ventures for the transport of both goods and passengers, in particular through the Channel Tunnel. It referred to the joint venture ACI, set up by, inter alia, BR and SNCF to provide combined transport of goods (Commission Decision 94/594/EC of 27 July 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.518 - ACI) (OJ 1994 L 224, p. 28, hereinafter `the ACI decision')), and Autocare Europe, to which BR and SNCB are parties, which provides rail transport for motor vehicles. In its pleadings, the Commission referred for the first time in addition to the joint venture Intercontainer, set up by 26 railway undertakings, including BR and SNCF, and also operating on the market for combined transport of goods.
157 The contested decision does not, however, specify what joint ventures set up by the parent undertakings concern passenger transport services. As a measure of organ-

isation of the procedure, the Court requested the Commission to specify the joint ventures operating on the passenger transport market in which, according to point 51 of the contested decision, ENS's parent undertakings are participating. In its answer, the Commission stated that it had no knowledge of any other joint ventures of ENS's parent undertakings for passenger transport. It noted, however, that `SNCF, SNCB and BR (subsequently to the latter's privatisation, London & Continental Railways Ltd) jointly take part in Eurostar for passenger transport between the United Kingdom and the Continent', although it did not assert that point 51 was in fact implicitly referring to Eurostar. The Court therefore considers that, as regards the alleged presence of a network of joint ventures set up by the parent undertakings, the contested decision is vitiated by an absence of reasoning.

158 As regards the participation of the parent undertakings in joint ventures for combined transport of goods, it follows from point 29 of the Commission's 1993 communication that when parent undertakings set up joint ventures for `non-complementary' services, competition may be restricted when those `non-complementary' services are marketed by the parent undertakings themselves.

159 There is no indication in the contested decision that the parent undertakings themselves market the services provided by ACI, Intercontainer and Autocare. As a measure of organisation of the procedure, the Court requested the applicants to specify whether the transport services provided by ACI, Intercontainer and Autocare were marketed by them or by another undertaking. From their answers it appears that none of the parent undertakings markets or sells services provided by any of those three undertakings. In any event, even if they did market those services, the contested decision does not explain how the participation of some or all of the parent undertakings in a network of joint ventures operating on markets different from that of ENS would restrict competition among them at the level of the creation of ENS. Consequently, the Commission's assessment of the aggravating effects on the restrictions of competition caused by the presence of a network of joint ventures does not contain a sufficient statement of reasons.

160 It follows from the foregoing that, as regards the assessment of the restrictions of competition arising out of the ENS agreements, the contested decision is vitiated by an absence or insufficiency of reasoning.

The second plea: infringement of Regulation No 1017/68 and of the regulatory framework established by Directive 91/440

Arguments of the parties

161 -179 *(omissis)*

Findings of the Court

180 According to the contested decision, the railway undertakings concerned are present on two markets - an upstream market for the supply of necessary rail services and a downstream market for the provision of passenger services. Operators on the latter market include not only railway undertakings but also a category of undertakings - transport operators - which, however, in order to operate on that market, must first purchase the necessary rail services provided by railway undertakings on the upstream market. ENS, in the Commission's view, is a specific instance of that category of transport operators, and thus any special treatment accorded to ENS by the notifying un-

dertakings should also be accorded to third parties, whether international groupings or transport operators, on the same technical and financial terms. Finally, it is specified in Article 2 of the decision that the necessary services in question consist of the provision of the locomotive, train crew and path on each national network and in the Channel Tunnel.

181 It must therefore be considered whether, by imposing on the parent undertakings the condition that necessary rail services must be provided not only to international groupings but also to transport operators like ENS, the Commission applied the rules on competition in a manner contrary to the regulatory framework set up by Directive 91/440, so that the contested decision is vitiated by misuse of powers or lack of competence, as the applicants contend. In order to answer that question, it must first be determined whether ENS is a transport operator, as claimed by the Commission, or on the contrary an international grouping within the meaning of Directive 91/440, as claimed by the applicants. The latter question must also be answered in order to consider whether the Commission was correct in its analysis of the restrictions on competition among the parent undertakings as a result of the fact that each of the railway undertakings participating in the ENS agreements could either set up a subsidiary specialising as a transport operator or itself take on the role of transport operator and compete with ENS by buying the same necessary rail services (see paragraphs 147 and 148 above).

182 Under Article 3 of Directive 91/440, an international grouping is defined as `any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States'. That provision does not lay down any specific mandatory form for such an association. The essential feature which is clear from that definition is merely that it must be a form of association under which the provision of international transport services is possible. The Court therefore considers that, failing a precise definition in Directive 91/440, use of the term `international grouping' cannot be confined, as the Commission contends, to `cooperative associations' among railway undertakings (`traditional joint operation agreements'), to the exclusion of any other form such as a cooperative, or even concentrative, joint venture.

183 That conclusion is not negated by the argument that, by virtue of Article 2 thereof, Directive 91/440 applies only to railway undertakings, that is to say undertakings whose main business is to provide rail transport services for goods and/or passengers and which themselves ensure traction (Article 3 of Directive 91/440), so that ENS, because it has to buy traction from the notifying undertakings, may not rely on the provisions of the directive or claim the status of an international grouping. In the first place, as the Commission has itself stressed in its pleadings, it was specified in a joint declaration by the Council and the Commission made when Directive 91/440 was adopted that the reference to traction did not necessarily imply ownership thereof. Whilst it is true that such declarations have no force in law, the Commission has none the less already incorporated that declaration into its practice when adopting decisions in the field, as may be seen from point 6 of its Decision 93/174/EEC of 24 February 1993 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.494 - Tariff structures in the combined transport of goods) (OJ 1993 L 73, p. 38), in which it is

stated that `"railway undertaking" means any undertaking, established or to be established in a Member State, which has the means to provide rail haulage, the concept of haulage not necessarily implying ownership of the haulage equipment or the use of the undertaking's own workforce'.

184 In the second place, since, as noted above, an international grouping may take the form of a cooperative joint venture, as is the case for ENS, the very nature of such a form means that the parent undertakings may, as railway undertakings exercising the rights conferred on them by the directive, provide their joint venture with the equipment and staff required to perform its role on the market not directly but on the basis of cooperation agreements entered into with it, without thereby affecting that joint venture's legal status as an international grouping within the meaning of Directive 91/440. As the applicants explained in their written answers to the questions put by the Court and at the hearing, without being contradicted by the Commission, the decision to provide ENS with locomotives and train crews on the basis of operating agreements was due solely to tax considerations and not to the fact that ENS was supposed to operate on the market as a transport operator. The fact that ENS is not registered as a railway undertaking in the United Kingdom, as the applicants stated in their answers to the written questions put by the Court, has no effect on its legal status as an international grouping since, as the Commission itself stated at the hearing, the parent undertakings' operating licences are sufficient to enable ENS's trains to run on the routes concerned.

185 In the third place, it appears from the papers before the Court that in the economic context of the rail sector, as the applicants have argued, the activity of transport operator is unknown in the field of passenger services. Nor, moreover, has the Commission provided any instances of such a category of undertakings in that field, either in the contested decision or in its pleadings. Its reference to ACI is not relevant here. That reference ignores the specific features of the market for rail passenger services, a market quite distinct from that for combined transport of goods, on which ACI does operate as a transport operator. More particularly, on the market for combined transport of goods, railway undertakings do not sell transport services directly to consignors, except in very exceptional cases involving large consignments. Combined transport services are rather arranged and sold to consignors by combined transport operators, which may be subsidiaries of railway undertakings. Such operators are transport undertakings with their own specific equipment - handling equipment and specialised wagons - and, in order to perform those services operators must purchase rail traction and access to infrastructure from railway undertakings, the only parties able to supply them (see the ACI decision, cited above, points 6 to 8, and Commission Decision 94/210/EC of 29 March 1994 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (IV/33.941 - HOV-SVZ/MCN) (OJ 1994 L 104, p. 34, points 10 to 12)).

186 Whilst the rail segment of the market for combined transport of goods is currently to a certain extent an open market, in that railway undertakings are not the only operators on it, the same is not true of the market for rail passenger services, on which the only operators are railway undertakings and, to a certain extent, international groupings of railway undertakings.

187 The Commission cannot, therefore, validly refer to the characteristics of another,

separate market - the market for combined transport of goods - to justify categorising ENS as a transport operator.

188 Nor can that conclusion be undermined by the fact that ENS was originally to serve the Brussels-Glasgow/Plymouth route even though SNCB, from which ENS had obtained a right of access to Belgian infrastructure, was not one of its parent companies. As the applicants have submitted, that was the result of a traditional cooperation agreement between railway undertakings. Furthermore, the directive in no way affects the possibility for ENS, as an international grouping within the meaning of Directive 91/440, to sign such agreements with other railway undertakings in order to obtain a contractual right of access to their infrastructure.

189 It follows from the foregoing, without there being any need to examine whether the Commission was guilty of misuse of powers or whether the decision is vitiated by lack of competence, that the Commission's assessment of ENS's legal status as that of a transport operator is based on false premisses. Moreover, since, as noted above, the activity of transport operator plays no role on the market for rail passenger services as that market actually functions at present, the Commission's analysis regarding restrictions on competition among the parent undertakings deriving from the fact that they could each act on the relevant market as transport operators in competition with ENS and the other parent undertakings (see paragraph 147 above) is also based on the same false premisses and thus cannot be upheld (see paragraph 148 above).

The third plea: the condition imposed in Article 2 of the contested decision is disproportionate and unnecessary

Arguments of the parties

190 EPS, ENS and SNCF submit that in requiring the notifying parties to supply to other international groupings or transport operators the same necessary rail services as they supply to ENS, the Commission has misapplied the `essential facilities' doctrine, inasmuch as, with the exception of the provision of train paths, which is required by Directive 91/440 under certain conditions, none of the services supplied to ENS can meet the criteria for the application of that doctrine. NS adds that such an obligation has the effect not merely of undermining the railway undertakings' efforts in setting up international groupings but also of obliging them to share the benefits of their cooperation with third parties without those third parties having to bear any of the commercial risks involved. In NS's submission, the economic effect of obliging the railway undertakings to make necessary services available to transport operators on terms which they cannot freely decide amounts, moreover, to an expropriation.

191 Furthermore, the applicants argue, the `essential facilities' doctrine is applicable only under Article 86 of the Treaty, and only in a situation where one undertaking denies rivals access to facilities which are both essential to the rival's competitive capacity and to the existence of competition.

192 In this case, the Commission did not draw a distinction between facilities which are merely advantageous to a competitor and those which are essential for competition. The latter aspect in particular was not examined: whilst possession or control of infrastructure may be regarded as an `essential facility', access to that infrastructure is nevertheless guaranteed for international groupings by Directive 91/440; nor does the decision contain the slightest evidence that the railway undertakings have exclusive

access to the locomotives used for night services through the Channel Tunnel, crews or support staff, or that any actual or potential competitor would face any difficulty in securing them. ENS and EPS state that locomotives designed specifically for or capable of operation through the Channel Tunnel can be acquired from manufacturers or hired from other train operators on an open market. Nor has the Commission addressed the question of the availability of locomotives or train crews, or established the existence of any shortage of trained railway crews. Furthermore, the condition imposed obliges the railway undertakings to supply necessary rail services to international groupings and transport operators on their networks, that is to say outside and beyond the relevant routes.

193 The applicants further submit that the condition imposed is unnecessary. It is irrelevant to the first restriction of competition identified in the decision - of competition among the parties as a result of the formation of the joint venture. Nor is it justified as regards the restriction of competition vis-à-vis third parties, deriving from the alleged dominant position enjoyed by ENS's parent undertakings in the provision of rail services in their Member States of origin. None of the railway undertakings has entered into any exclusive relationship with ENS, and they are thus all free to deploy their locomotives, staff and any track over which they may have rights to any other undertaking. Moreover, since the business and leisure travel markets over the relevant routes also include air, coach and car travel, ENS does not occupy a dominant position and any refusal to supply a third party with the services referred to in the decision would thus have no impact on competition on those downstream markets. It is therefore unnecessary for a future provider of passenger services to obtain the rail services in issue in order to be present on the market as defined in the decision. In any event, the Commission has not adduced any evidence from third parties, in particular from actual or potential operators of competing services, to substantiate its assertion that the joint venture might place other operators at a disadvantage. The Commission's concern is thus entirely hypothetical.

194 The Commission points out, first of all, that a similar condition was imposed in the ACI decision - ACI being a joint venture set up between BR, SNCF and Intercontainer for the transport of goods between the United Kingdom and the Continent - against which, it stresses, no action has been brought by the parent undertakings.

195 The Commission further points out that the condition imposed does not require ENS's parent undertakings to supply to third parties all the services which they provide to their joint subsidiary (such as cleaning and marketing services), and in particular that no requirement is imposed on them in respect of rolling stock, the cost of which is regarded by the parent undertakings themselves as the main barrier to entry into the market.

196 It states, moreover, that access to rail infrastructure is at present for the most part controlled by the railway undertakings in their capacity as infrastructure managers and that the need to obtain access to infrastructure constitutes an important barrier to entry to the rail segment of the relevant market. To the extent that infrastructure managers and railway undertakings are distinct undertakings, the obligation imposed on the latter by the condition is not relevant.

197 Although in theory undertakings other than ENS's parent undertakings may have

special locomotives and crews and although such locomotives may in theory be purchased or rented by any transport operator, the Commission notes, in reality only ENS's parent undertakings actually have them. It is thus a real and practical impossibility for transport operators to find an alternative. Consequently, it is undeniable that the railway undertakings concerned occupy a dominant position on the essential services market, which, according to the case-law (see the judgments in Commercial Solvents, CBEM, RTE and BBC, all cited above) justifies the condition imposed.

198 With regard to the claim that the condition imposed is disproportionate, the Commission states that the fact that the right of access to infrastructure is reserved by the directive for railway undertakings and international groupings of railway undertakings does not mean that other transport operators cannot operate services identical to those offered by ENS. Given that only railway undertakings have access to infrastructure and that new entrants have no independent right under the directive to request train paths from the relevant infrastructure managers, the railway undertakings must supply train paths to such operators in order to allow them access to the market. The condition imposed relates, moreover, only to the rail services necessary for entry to the rail segment of the relevant markets; it is thus not disproportionate and makes it possible to ensure the presence of a number of rail transport operators in order to enhance competition with other modes of transport.

199 The Commission denies, moreover, the assertion that the condition imposed on the railway undertakings concerned obliges them to supply necessary rail services on the whole of their networks, outside the relevant routes. The obligation concerns only access to the markets identified in the contested decision.

200 Finally, the Commission submits that the non-exclusive nature of the agreement between the railway undertakings and ENS is of no significance. Since, under the agreement, the railway undertakings share the risks and fortunes of ENS, it is unlikely that the same railway undertakings would wish to provide services to potential competitors.

201 The United Kingdom, in intervention, submits that the condition imposed could not be regarded as necessary since the Commission had already found at point 65 of the decision that the restrictions on competition were necessary in this case. The justification put forward, concerning the need to ensure the presence on the market of rail transport operators competing with ENS is, moreover, inappropriate since there are no such competing operators. The Commission has thus distorted competition by artificially encouraging operators to enter the market, a step which therefore does not lie within its powers under Article 13 of Regulation No 1017/68.

202 The decision is also vitiated by a failure to state properly and sufficiently the reasons for which the Commission applied the `essential facilities' doctrine. In any event, the conditions required for that doctrine to be applied are not met. First, since the railway undertakings do not enjoy a dominant position on the markets identified by the Commission in its decision, the rail services in issue cannot be regarded as essential for competitors to enter those markets. The justification of the condition imposed based on a segmentation of the relevant markets demonstrates the Commission's defective reasoning, which is inconsistent in that regard with the market analysis set out in the decision. Second, by stating in the decision that the parties to the ENS agreements

must provide the `necessary rail services' to new entrants if those entrants are not able themselves to supply them, the Commission implies that the railway undertakings may not have sole control of facilities the access to which is regarded as essential, and the condition imposed is thus unjustified on the facts.

203 In reply to the United Kingdom, the Commission states that a finding that an agreement setting up a joint venture entails restrictions on competition which are regarded as necessary does not mean that all the restrictions are indispensable. The condition imposed was specifically intended to ensure that the restrictions on competition remain within what is indispensable. Furthermore, the condition imposed reflects a concern distinct from the `essential facilities' doctrine, seeking in this case to ensure that the conditions for exemption required by Article 85(3) of the Treaty and by Article 5 of Regulation No 1017/68 are satisfied.

204 Finally, the Commission submits that, in a composite market such as that defined in the decision, a barrier to access need not necessarily be erected in respect of all its segments. If such an approach were followed in the case of the predominance of one mode of transport within a multimodal market, only barriers to third-party entry to that mode of transport would be caught by Article 85 of the Treaty, leaving the other modes outside the ambit of competition law.

Findings of the Court

205 According to point 79 of the contested decision, the aim of the condition imposed in Article 2 of that decision is that of `preventing the restrictions of competition from going beyond what is indispensable'.

206 However, as the Court has concluded from its examination of the first and second pleas in law, the Commission must be regarded as not having made a correct and adequate assessment in the contested decision of the economic and legal context in which the ENS agreements were concluded. It has thus not been demonstrated that those agreements restrict competition within the meaning of Article 85(1) of the Treaty and that they therefore need to be exempted under Article 85(3). Consequently, since the contested decision did not contain the relevant analytical data concerning the structure and operation of the market on which ENS operates, the degree of competition prevailing on that market or, therefore, the nature and extent of the alleged restrictions on competition, the Commission was not in a position to assess whether the condition imposed by Article 2 of the contested decision was or was not indispensable for the purpose of granting a possible exemption under Article 85(3) of the Treaty.

207 However, even if the Commission had made an adequate and correct assessment of the restrictions of competition in question, it would be necessary to consider whether it was a proper application of Article 85(3) to impose on the notifying parties the condition that train paths, locomotives and crews must be supplied to third parties on the same terms as to ENS, on the ground that they are necessary or that they constitute essential facilities, as discussed by the parties in their pleadings and at the hearing.

208 In that regard, it follows from the case-law on the application of Article 86 of the Treaty that a product or service cannot be considered necessary or essential unless there is no real or potential substitute (Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission [1995] ECR I-743, paragraphs 53 and 54, and Case T-504/93 Tiercé Ladbroke v Commission [1997] ECR II-923, paragraph 131).

209 Consequently, with regard to an agreement such as that in the present case, setting up a joint venture, which falls within Article 85(1) of the Treaty, the Court considers that neither the parent undertakings nor the joint venture thus set up may be regarded as being in possession of infrastructure, products or services which are `necessary' or `essential' for entry to the relevant market unless such infrastructure, products or services are not `interchangeable' and unless, by reason of their special characteristics - in particular the prohibitive cost of and/or time reasonably required for reproducing them - there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market.
210 The question whether the Commission could validly regard the supply of (a) train paths, (b) locomotives and (c) crews to ENS by its parent undertakings as necessary or essential services which had to be made available to third parties on the same terms as to ENS and whether, in so doing, it provided a valid statement of reasons for its decision must be examined in the light of the above considerations and by analogy with the case-law cited in paragraph 208 above. Finally, that examination will also serve as the basis for determining whether the Commission made a correct analysis of the alleged restrictions of competition with regard to third parties arising out of the special relationship between the parent undertakings and ENS (see paragraph 151 above).
211 With regard, first, to train paths, whilst it is true that Article 2 of the contested decision requires the notifying undertakings to `supply [train paths] to any international grouping of railway undertakings', it has none the less been held that the operative part of a decision must be read in the light of the terms of its preamble, which provide its basis - in the present case, point 81 of the contested decision. Point 81 states that the notifying undertakings `should not ... be required to provide a path if the applicant is a grouping of railway undertakings within the meaning of Article 10 of Directive 91/440/EEC, so that it would be able to request a path itself from the infrastructure managers'. That obligation is thus imposed by the contested decision only in cases where the third party is not an international grouping but, as the Commission contends, a transport operator such as ENS. However, as has been held above, ENS is not a transport operator but an international grouping within the meaning of Directive 91/440. Moreover, transport operators as a category play no role on the market for rail passenger services as that market actually functions at present. Consequently, there are no grounds for the condition imposed in so far as it seeks to oblige those parent undertakings already in possession of train paths to supply paths to third parties operating on the market as transport operators, since it is based on false premisses.
212 With regard, second, to the supply of locomotives, as pointed out above, locomotives cannot be regarded as necessary or essential facilities unless they are essential for ENS's competitors, in the sense that without them they would be unable either to penetrate the relevant market or to continue operating on it. However, since the decision defined the relevant market as the market for the transport of business travellers and the market for the transport of leisure travellers, both of which are intermodal, and since ENS's market share does not exceed 7% to 8% according to the Commission, or 5% according to the notification of the parties, on either of those intermodal markets, it cannot be accepted that a possible refusal by the notifying undertakings to supply ENS's competitors with special locomotives for the Channel Tunnel could have

the effect of excluding such competitors from the relevant market as thus defined. It has not been demonstrated that an undertaking having such a small market share can be in a position to exert any influence whatever on the functioning or structure of the market in question.

213 Only if the market under consideration were the completely different, intramodal, market for business and leisure travel by rail, on which the railway undertakings currently hold a dominant position, could a refusal to supply locomotives possibly have an effect on competition. However, it was not that intramodal market which was finally considered relevant by the Commission, but the intermodal market (see points 17 to 27 of the contested decision). The first time that the Commission referred to the intramodal market for rail services as a segment of the intermodal market for business and leisure travel, in justification of the obligation imposed on the notifying undertakings to supply locomotives to ENS's competitors, was during the written procedure before the Court. Whilst it cannot be denied that the effects of an agreement may be analysed both with regard to a principal market and with regard to a segment thereof, both the distinction between the principal market and its segment or segments and the reasons for drawing such a distinction must nevertheless be stated clearly and unambiguously in any decision applying Article 85(1) of the Treaty, which is not the case here.

214 Even if it may be assumed that the Commission's explanations given in that regard in its pleadings do not in fact involve a redefinition of the relevant market as defined in points 17 to 27 of the contested decision but seek, rather, to provide further clarification of that definition, its assessment is still vitiated by a failure to state the reasons on which it is based.

215 As the applicants have argued, the contested decision does not contain any analysis demonstrating that the locomotives in question are necessary or essential. More specifically, it is not possible to conclude from reading the contested decision that third parties cannot obtain them either directly from manufacturers or indirectly by renting them from other undertakings. Nor has any correspondence between the Commission and third parties, demonstrating that the locomotives in question cannot be obtained on the market, been produced before the Court. As the applicants have stated, any undertaking wishing to operate the same rail services as ENS through the Channel Tunnel may freely purchase or rent the locomotives in question on the market. It is clear, moreover, from the papers before the Court that the contracts for the supply of locomotives entered into between the notifying undertakings and ENS do not involve any exclusivity in favour of ENS, and that each of the notifying undertakings is thus free to supply the same locomotives to third parties and not only to ENS.

216 It must further be pointed out in that regard that the Commission has not denied that third parties may freely purchase or rent the locomotives in question on the market; it has merely asserted that the possibility is in fact purely theoretical and that only the notifying undertakings actually possess such locomotives. That argument cannot, however, be accepted. The fact that the notifying undertakings have been the first to acquire the locomotives in question on the market does not mean that they are alone in being able to do so.

217 Consequently, the Commission's assessment of the necessary or essential nature

of the special locomotives designed for the Channel Tunnel and, thus, the obligation imposed on the parent undertakings to supply such locomotives to third parties are vitiated by an absence or, at the very least, an insufficiency of reasoning.
218 For the same reasons, the obligation imposed on the parent undertakings also to supply train crews for special locomotives for the Channel Tunnel to third parties is similarly vitiated by an absence or an insufficiency of reasoning.
219 Consequently, the contested decision is vitiated by an absence or, at the very least, an insufficiency of reasoning in so far as it requires the applicants to supply to third parties in competition with ENS the same `necessary services' as it supplies to ENS.
220 It further follows from the foregoing that the Commission's analysis of the restrictions of competition vis-à-vis third parties as a result of the special relationship between ENS and its parent companies is also unfounded (see paragraphs 150 and 151 above). Since, as demonstrated above, ENS is not a transport operator, the market for rail services can in fact be split into only two service markets: an integrated market for passenger services on which only railway undertakings and international groupings of railway undertakings operate, and a market for access to and management of railway infrastructure, controlled by infrastructure managers within the meaning of Directive 91/440 (see paragraphs 1 to 6, under `Legal background', above). It must be added that the argument raised by the Commission at the hearing that, according to paragraph 55 of the judgment of the Court of First Instance of 21 October 1997 in Case T-229/94 Deutsche Bahn v Commission [1997] ECR II-1689, the rail services market constitutes a sub-market distinct from the rail transport market in general is unfounded, since the Court's finding in that case related solely to the rail transport market in relation to combined transport of goods. Restrictions of competition with regard to third parties should therefore have been analysed on the two markets mentioned above.
221 As regards, first, access to infrastructure (train paths), it is true that access for third parties may in principle be hindered when it is controlled by competitors; nevertheless, the obligation of railway undertakings which are also infrastructure managers to grant such access on fair and non-discriminatory terms to international groupings competing with ENS is explicitly provided for and guaranteed by Directive 91/440. The ENS agreements therefore cannot, by definition, impede access to infrastructure by third parties. As regards the supply to ENS of special locomotives and crew for the Channel Tunnel, the mere fact of its benefiting from such a service could impede access by third parties to the downstream market only if such locomotives and crew were to be regarded as essential facilities. Since, for the reasons set out above (see paragraphs 210 to 215), they cannot be categorised as such, the fact that they are to be supplied to ENS under the operating agreements for night rail services cannot be regarded as restricting competition vis-à-vis third parties. That aspect of the Commission's analysis of restrictions of competition vis-à-vis third parties is therefore also unfounded (see paragraphs 150 and 151 above).
The fourth plea: insufficient duration of the exemption granted
(omissis)
234 Consequently, the Commission's decision to limit the duration of the exemption granted for the ENS agreements is in any event vitiated by an absence of reasoning.

235 In the light of the foregoing, the applicants' fourth plea in law must be held to be well founded.
236 It follows from all the foregoing, without there being any need to examine the plea in law alleging infringement of Article 3 of Regulation No 1017/68, put forward by SNCF in Case T-384/94, that the contested decision must be annulled.
Decision on costs
Costs
237 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. Since the Commission has been unsuccessful and the applicants have applied for costs, the Commission must be ordered to pay the costs, including those incurred by SNCF as intervener in cases T-374/94 and T-384/94.
238 Under Article 87(4) of the Rules of Procedure of the Court of First Instance, the United Kingdom must bear its own costs.

15.

European Court of First Instance 21 October 1997, Case T-229/94.
Deutsche Bahn AG v Commission of the European Communities.
(omissis)
Facts
1. On 1 April 1988 the undertakings Deutsche Bundesbahn ('DB', which was succeeded in 1994 by Deutsche Bahn, hereinafter 'the applicant'), the Société Nationale des Chemins de Fer Belges ('SNCB'), Nederlandse Spoorwegen ('NS'), Intercontainer and Transfracht concluded an agreement relating to the setting up of a cooperative network known as the 'Maritime Container Network (MCN)'('the MCN Agreement').
2. The term 'maritime container' describes a container which is carried essentially by sea, but also requires on-carriage and off-carriage by land. The MCN Agreement relates to carriage by rail of maritime containers to or from Germany which pass through a German, Belgian, or Netherlands port. Among the German ports, referred to in the MCN Agreement as the 'northern ports', were Hamburg,Bremen and Bremerhaven. The Belgian and Netherlands ports, known as the 'western ports', included Antwerp and Rotterdam.
3. DB, now the applicant in the present case, SNCB and NS are the national railway undertakings operating in Germany, Belgium and the Netherlands respectively. Intercontainer and Transfracht are undertakings which are active in the maritime container transport sector and which purchase, to that end, from railway undertakings, essential railway services such as railway traction services and access to railway infrastructure. Intercontainer is a company incorporated under Belgianlaw and is a joint subsidiary of 24 European railway undertakings. Transfracht is a company incorporated under German law, 80% of which is owned by DB, and now by the applicant in the present case.
4. Before the MCN Agreement was concluded, the organization of the transport services covered by the agreement was in fact already shared between the five abovementioned undertakings. Under that distribution, which remained unchanged by the MCN Agreement, Transfracht effected the carriage of maritime containers to or from

Germany passing through German ports. Intercontainer, for its part, effected the international carriage of maritime containers to or from Germanythrough Belgian or Netherlands ports. In order to provide a complete service to their clients, Transfracht and Intercontainer were obliged to purchase certain railway services from DB (Transfracht) and from SNCB and NS (Intercontainer), given the statutory monopoly which those companies held, within their own countries, for the provision of railway services, such as the provision of locomotives, drivers and access to railway infrastructure.
5. The MCN Agreement established two coordination structures without legal personality, namely a steering committee and a 'bureau commun'. The members and staff of those two bodies were appointed by Transfracht and by Intercontainer. Among the six members of the Steering Committee there were required to be three representatives of DB and/or Transfracht, a representative of SNCB and a representative of NS. The Committee was intended to be the MCN's decision-making and supervisory body, while the Bureau Commun functioned as the administrative body. Specifically, the Steering Committee was empowered to take decisions concerning the services and prices to be offered for the transport of maritime containers and the Bureau Commun was responsible for developing and marketing, buying, selling and fixing rates and tariffs on behalf of Transfracht and Intercontainer. Certain other activities, such as invoicing clients, were carried out separately by Transfracht and Intercontainer.
6. Under paragraph 9 of the MCN Agreement, decisions taken by the Steering Committee were to be unanimous.
7. By a complaint of 16 May 1991 Havenondernemersvereniging SVZ ('HOV-SVZ'), an association of undertakings operating in the port of Rotterdam, pointed out to the Commission that the tariffs applied by DB to the carriage of maritime containers to and from Germany via Belgian and Netherlands ports were much higher than those applied to the carriage of maritime containers via the German ports. According to HOV-SVZ, DB's intention was to promote carriage for which it provided all the railway services. It claimed that the practice constituted an abuse of a dominant position prohibited by Article 86 of the EC Treaty. HOV-SVZ also considered that the MCN Agreement infringed Article 85 of the Treaty.
8. On 31 July 1992 the Commission sent a statement of objections to the undertakings bound by the MCN Agreement which, upon receiving it, terminated that agreement. After receiving the statement of objections, DB also acknowledged that it imposed tariffs for carriage via the northern ports which were different from those it applied in respect of transport via the western ports, but it denied that those differences were discriminatory. It pointed out that the tariffs were objectively set and took into account the distance covered, the production costs and the competitive situation of the market.
9. On 25 August 1992 DB's counsel was given the opportunity of consulting DB's fileat the Commission and took copies of most of the documents on the file.
10. A hearing took place at the Commission on 15 December 1992. Present at that hearing were representatives of the Commission, DB and Transfracht, SNCB, NS,Intercontainer and seven Member States.
11. On 29 March 1994 the Commission adopted Decision 94/210/EC relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (IV/33.941 — HOV-

SVZ/MCN) (OJ 1994 L 104, p. 34, hereinafter 'the Decision'). The decision is based on the EC Treaty and on Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302, 'Regulation No 1017/68').

12. So far as concerns the MCN Agreement's compatibility with the Community rules on competition, the Decision considers that the MCN Agreement had, in breach of Article 85(1) of the Treaty, the object and effect of restricting competition on the market for the inland transport of sea-borne containers between German territory and the ports situated between Antwerp and Hamburg, since it eliminated competition between Intercontainer and Transfracht for the sale of combined transport services to shippers and shipping companies, competition between the railway undertakings for the sale of combined transport services direct to shippers or shipping companies and competition between the railway undertakings on the one hand and Transfracht and Intercontainer on the other, for the sale of transport services to shippers and shipping companies, and since it made access more difficult for new competitors to Transfracht and Intercontainer (paragraphs 76 to 89 of theDecision). In this respect, the Decision adds that the agreement is not covered by the exception provided for in Article 3 of Regulation No 1017/68, since it is not intended either to apply directly technical improvements or to achieve directly technical cooperation (paragraphs 91 to 98 of the Decision), and that, furthermore, an exemption under Article 5 of Regulation 1017/68 could not be contemplated since the agreement was not found to have improved the quality of the railway transport service or promoted the productivity of the undertakings or technical and economic progress (paragraphs 99 to 103 of the Decision).

13. So far as concerns the compatibility of tariffs applied by DB with the Communityrules on competition, the Decision states, first, that, in view of its statutory monopoly, DB held a dominant position on the market for the supply of rail transport services in Germany, and, further, that DB abused that dominant position by acting in such a way that tariffs for carriage between a Belgian or Netherlandsport and Germany are appreciably higher than for carriage between points within Germany and the German ports. In that regard, the Decision states that DB controlled not only the level of tariffs charged for carriage of containers to and from northern ports, but also the level of tariffs for carriage to and from the western ports. In the first place, DB, as the compulsory supplier of rail services for the part of the journey performed in Germany, had the power to control the level of the selling tariffs charged by Intercontainer. Secondly, in view of the composition of the Steering Committee and of the fact that the Bureau Communhas its offices on Transfracht's premises, it had the power to block any decision in the context of the MCN Agreement. Thirdly, it had unilaterally introduced outside the framework of the MCN Agreement and shortly after the conclusion thereof a new tariff structure known as 'Kombinierter Ladungsverkehr-Neu' (hereinafter'the KLV-Neu Structure') which provided for price reductions for journeys to and from northern ports, but not for journeys to and from the western ports (paragraphs 139 to 187 of the Decision).

14. The Decision further holds that the differences noted in the tariffs could not be justified either by the fact that railway transport is subject to fiercer competition

from road haulage and inland waterway on journeys via the western ports than on the journeys via the northern ports, or by the fact that the production costs are greater for the journeys via the western ports than for the journeys via the northern ports. In this regard, the Decision explains that the fiercer competition on the journeys via the western ports could only justify a tariff difference in favour of those routes and that DB has not proved that there is a logical connection between the differences in costs and the differences in tariffs (paragraphs 199 to 234 of the Decision).

15. Finally, the Decision considers it proven that DB infringed Article 86 of the Treaty at least in the period from 1 October 1989 to 31 July 1992 and that a fine should be imposed on DB, taking into account the fact that it did not give any undertaking that it would adjust its tariff practices, that the infringement was committed deliberately and that it is particularly serious, among other reasons because it impeded the development of rail transport, which is an important objective of the Community's transport policy (paragraphs 255 to 263 of the Decision).

16. Article 1 of the Decision finds that DB, SNCB, NS, Intercontainer and Transfracht have infringed the provisions of Article 85 of the Treaty by concluding the MCN Agreement providing for the marketing, by a 'bureau commun', on the basis oftariffs agreed within the Bureau, of all carriage by rail of sea-borne containers toor from Germany via a German, Belgian or Netherlands port. In Article 2 itfurther finds that DB has infringed the provisions of Article 86 of the Treaty by using its dominant position on the rail transport market in Germany to impose discriminatory tariffs on the market for the inland carriage of sea-borne containers to or from Germany via a German, Belgian or Netherlands port. Finally, in Article 4, it imposes, pursuant to Article 22 of Regulation (EEC) No 1017/68, a fine of ECU 11 million on DB in respect of its infringement of Article 86 of theTreaty (see also paragraphs 255 and 256 of the Decision).

17. The Decision was notified to the applicant on 8 April 1994.

18. By letter of 27 April 1994 counsel for the applicant asked the Commission to be allowed to consult the file on which the Decision was based in order better to protect his client's interests. By letter dated 5 May 1994 the Commission refused that request on the ground that DB had already been permitted to consult the file during the pre-litigation procedure.

Procedure and forms of order sought by the parties

19. It is in those circumstances that the applicant, by application lodged at the Court-Registry on 14 June 1994, brought the present action.

20. By letter of 31 August 1994 the applicant sent to the Court of First Instance an expert's report entitled 'Kosten- und Marktanalyse für Containerverkehre in dieWest- und Nordhäfen ex BRD für den Zietraum 1989-1992 im Auftrag derDeutschen Bahn AG (Analysis of the costs and of the market in respect of container traffic from the FRG in the western and northern ports for the period 1989-1992, requested by Deutsche Bahn AG)'. The Court agreed to include that report in the case-file and, on 15 September 1994, a copy of the report was sent to the defendant.

21. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. In the context of measures of organization of procedure, however, the parties were requested to reply in writing to a

number of questions prior to the hearing.
22. At the hearing in open court on 28 January 1997 the parties presented oral argument and replied to the Court's oral questions.
23. The applicant claims that the Court should:
— annul the Decision;
— in the alternative, annul the Decision in so far as it imposes a fine;
— in the further alternative, reduce the amount of the fine;
— order the defendant to pay the costs.
24. The defendant contends that the Court should:
— dismiss the application;
— order the applicant to pay the costs.

The claim for annulment of the contested decision

25. In its application the applicant relies essentially on four pleas in law in support ofits claim for annulment. The first plea alleges infringement of Article 85 of the Treaty and of the acts adopted by the Council with a view to specifying the scopeof Article 85 of the Treaty in the field of the carriage of goods. The second plea alleges infringement of Article 86 of the Treaty. The third and fourth pleas allege infringement of the rights of the defence and breach of the principles of legal certainty and sound administration respectively.

First plea, alleging infringement of Article 85 of the Treaty and acts adopted by theCouncil with a view to specifying the scope of Article 85 of the Treaty in the field oftransport

Arguments of the parties

26. The applicant maintains that the MCN Agreement is a technical agreement within the meaning of Article 3(1)(c) of Regulation No 1017/68 and that therefore it does not fall under the prohibition of restrictive practices laid down in Article 2 of Regulation No 1017/68 and Article 85 of the Treaty. It points out, in this connection, that the purpose of the agreement was to establish cooperation in technical matters such as the setting of timetables, the changing of locomotives and of crews at frontiers and the choice of terminals.
27. In so far as the agreement was intended for the joint fixing of tariffs, the applicant points out that Article 3 of Regulation No 1017/68 as well as Article 4 of CouncilDecision 82/529/EEC of 19 July 1982 on the fixing of rates for the international carriage of goods by rail (OJ 1982 L 234, p. 5, 'Decision 82/529') and Articles 1and 4 of Council Recommendation 84/646/EEC of 19 December 1984 on strengthening the cooperation of the national railway companies of the Member States in international passenger and goods transport (OJ 1984 L 333, p. 63, 'Recommendation 84/646') expressly allow the fixing of tariffs jointly between several railway undertakings for the combined transport of goods.
28. In the alternative, the applicant submits that the MCN Agreement should have been exempt from the prohibition of restrictive practices by virtue of Article 5 of-Regulation No 1017/68 and that the Decision does not explain the reasons forwhich no use was made of that provision.
29. In the further alternative, the applicant submits that the Commission's conclusion that the MCN Agreement eliminates competition is flawed since Intercontainer and Transfracht operate on different routes and are therefore not competitors and

since the national railway undertakings are likewise not in competition.
30. According to the defendant, Article 3 of Regulation No 1017/68 permits only the conclusion of agreements the exclusive object and effect of which is to apply technical improvements or to achieve technical cooperation. The MCN Agreement exceeded that technical parameter, since it was intended to establish a joint tariff system.
31. In this respect, the defendant states that the authorization, granted by Article 3 of Regulation No 1017/68, for 'the fixing and application of inclusive rates andconditions ... including special competitive rates' does not amount to authorization to collude on prices with the aim of eliminating competition and sharing markets. The same applies to Article 4 of Decision 82/529. That article does not permit railway undertakings to organize jointly the whole of cross-border railway transport of containers, but authorizes only those forms of cooperation which are intended to prevent monopolies in rail haulage and access to the rail infrastructure from impeding the proper functioning of cross-border transport. The defendant observes that the MCN Agreement is not covered by Recommendation 84/646, since the agreement concerned not only three railway undertakings but also two transport operators, whereas the recommendation is addressed only to railway undertakings and, in any event, it is only intended to encourage the forms of cross-border cooperation made necessary by the existence of monopolies.
32. As regards the applicant's argument that the MCN Agreement should have been exempt under Article 5 of Regulation No 1017/68, the defendant states that the conditions for application defined by that provision were not fulfilled because of the major restrictions on competition brought about by the MCN Agreement.
33. Finally, the defendant states that there was genuine competition between DB, SNCB and NS and between Intercontainer and Transfracht, in particular in that DB and Transfracht had an interest in effecting as many transport operations as possible on journeys to the northern ports, while SNCB, NS and Intercontainer had a commercial interest in concentrating traffic towards the west. The defendant refers in that context to 'competition between routes'.
Findings of the Court
34. It should be pointed out, *in limine*, that one of the purposes of the MCN Agreement was to set up a common administration for the fixing of prices and tariffs for the carriage by rail of maritime containers to or from Germany through a Belgian, Netherlands or German port. It is clear from the wording of the agreement itself that it allocated to the Steering Committee the task of 'definition or amendment of the short, medium and long-term business policy concerning the traffic covered by the agreement, and in particular the definition or amendment of the policy on sales and prices' and to the Bureau Commun that of 'buying/price-setting/selling'.
35. The Court considers that that common initiative consisted in 'directly or indirectly fixing prices' within the meaning of Article 85(1)(a) of the Treaty and of Article 2(a) of Regulation No 1017/68. It follows from the case-law that an agreement establishing a common system for fixing prices falls within the scope of those provisions (as regards Article 85(1)(a) of the Treaty, see Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977, paragraphs 18 and 19, and CaseT-6/89 *Enichem Anic* v *Commission* [1991]

ECR II-1623, paragraph 198; as regards Article 2(a) of Regulation No 1017/68, see Case T-14/93 *Union Internationale desChemins de Fer* v *Commission* [1995] ECR II-1503, paragraph 50), irrespective of the extent to which the provisions of the agreement had in fact been observed (see Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 15, and *Cementhandelaren* v *Commission*, paragraph 16).
36.The reason for this is that the joint fixing of prices restricts competition, in particular by enabling every participant to predict with a reasonable degree of certainty what the pricing policy pursued by its competitors will be (*Cementhandelaren* v *Commission*, paragraph 21). The MCN Agreement cannot avoid being characterized in those terms. Since each of the undertakings concerned has an obvious commercial interest in as many transport operations as possible being effected on the routes on which it is most active, there is a competitive relationship between DB and NS and between DB and SNCB. Likewise, NS is in competition with SNCB and Transfracht with Intercontainer. Therefore, by establishing a common pricing system, those undertakings have appreciably restricted or even eliminated all competition on prices as referred to in the case-law cited above.
37. The Court considers, furthermore, that, contrary to the applicant's assertions, the MCN Agreement is not covered by the legal exception provided for inArticle 3(1)(c) of Regulation No 1017/68 which authorizes 'agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical co-operation by means of ... the organisation and execution of ... transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates'. The introduction of a legal exception for agreements of a purely technical nature cannot amount to an authorization, on the part of the Community legislature, allowing agreements to be concluded whose purpose is the joint fixing of prices. If it were otherwise, any agreement establishing a joint price-fixing system in the railway, road or inland waterway transport sector would have to be regarded as a technical agreement within the meaning of Article 3 of Regulation No 1017/68, and Article 2(a) of that regulation would be rendered nugatory.
38. Furthermore, the independent determination by each economic operator of his commercial policy and in particular of his pricing policy corresponds to the concept inherent in the competition provisions of the Treaty (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 21; Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 121). It follows that the exception provided for in Article 3 of Regulation No 1017/68, and in particular the words 'inclusive rates' and 'competitive rates', must be construed with caution. The Court has already pointed out that, having regard to the general principle prohibiting agreements restrictive of competition which is laid down in Article 85(1)of the Treaty, provisions of an exempting regulation which derogate from that principle must be strictly construed (Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996]ECR II-1201, paragraph 48, and Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 37).
39. In view of the foregoing considerations, the Court finds that the term 'inclusive rate' must be understood to mean the 'whole-journey' price, including the various

national parts of a transnational journey, and the term 'competitive price', which is linked by the expression 'including' to the abovementioned term 'inclusive rates', must be understood as allowing the various undertakings operating on a single transnational route to fix inclusive rates not only by adding together the tariffs for each of them, but also by incorporating common adjustments to ensure the competitiveness of the transport in question in relation to other modes of transport, without however altogether eliminating the independence of each undertaking with regard to the fixing of its own tariffs in accordance with its competitive interests. However, the MCN Agreement did result in such elimination and exceeded the scope of action permitted by the abovementioned terms, since it entrusted, without restriction, pricing policy and price formation to a joint body and since, furthermore, the inclusive rates for each journey covered by the MCN Agreement were jointly fixed by an undertaking which did not even operate on that journey.

40. It is clear from the foregoing paragraphs that the Commission was right in determining that the MCN Agreement exceeded the framework set down in Article 3(1)(c) of Regulation No 1017/68.

41. That interpretation of Article 3(1)(c) of Regulation No 1017/68 does not conflict with Article 4 of Decision 82/529; on the contrary, it is in conformity with that article. Article 4 of Decision 82/529 authorizes the establishment by railway undertakings of 'tariffs with common scales offering rates for whole journeys', and adds that 'the rates set out in those tariffs may be independent of those obtained by adding the rates of the national tariffs', the purpose of that independence being to protect the competitive position of railway transport *vis-à-vis* other modes of transport, as stated in the fourth recital in the preamble to Decision 82/529. Nonetheless, Article 4 likewise assumes that the railway undertakings take account of 'their own interest'. As is clear from its second recital, Decision 82/529 accords a definite value to a 'sufficient commercial independence' of the railway undertakings.

42. Recommendation 84/646, which is also relied upon by the applicant, cannot cast doubt on that conclusion. Article 4 of the recommendation again confirms that itis possible to establish inclusive tariffs that are not equal to the sum of the national tariffs and encourages the establishment of joint sales offices with forwarding agents, but does not allow, as the MCN Agreement did, unlimited power in matters of commercial management and price formation to be conferred to such bodies.

43. Finally, the Court considers that, in relation to the MCN Agreement, the Commission was in no way obliged to apply Article 5 of Regulation No 1017/68, which provides that '[T]he prohibition in Article 2 may be declared inapplicable... to any agreement or category of agreement between undertakings ... which contributes towards ... improving the quality of transport services, or promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation, or increasing the productivity of undertakings, or furthering technical or economic progress ... (without making) ... it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned'. In that regard, it should be stated at the outset that, contrary to the applicant's assertions, the Commission provided reasons for its refusal to exempt the MCN Agreement, by pointing out

in paragraphs 99 to 103 of the Decision that it had not been established that the agreement provided technical or economic progress, an improvement in the quality of the railway services or an increase in productivity, whereas it imposed significant restrictions on competition, so that the conditions required by Article 5 of Regulation No 1017/68 were in any event not fulfilled. Furthermore, it must be held that, as is evident from the findings already made bythe Court (paragraphs 34 to 40), by declaring Article 2 of Regulation No 1017/68to be inapplicable to the MCN Agreement, the Commission made it possible for the undertakings concerned to eliminate competition between themselves.

44. It follows from all the foregoing that the Commission was right to consider that the MCN Agreement was incompatible with the common market. Accordingly, the first plea must be rejected.

The second plea, alleging infringement of Article 86 of the Treaty

45. There are two parts to this plea. The applicant claims, first of all, that DB did not occupy a dominant position within the common market or in a substantial part of it. It maintains, secondly, that the conduct complained of in the Decision did not constitute an abuse.

The first part of the plea, concerning the absence of a dominant position

— Arguments of the parties

46. The applicant considers that the Decision wrongly defines the relevant market and comes to the mistaken conclusion that DB held a dominant position.

47. According to the applicant, the relevant market covers carriage of maritime containers not only by rail, but also by road and inland waterway. In this connection, it relies on the case-law according to which the material definition of the market must include all the services and goods which are interchangeable witheach other. Applying that case-law to the present case, the applicant considers that the definition of the market in which the Commission found that DB held a dominant position contains two errors.

48. First, by limiting the market solely to railway services, the Commission disregardedthe fact that Transfracht was a subsidiary of DB and that, since parent and subsidiary companies constitute a single economic entity, the economic activities of DB included, throughout Germany, not only rail transport services such as accessto the railway network and the provision of locomotives and drivers but also the other components of carriage by rail of maritime containers.

49. Furthermore, by excluding from the market carriage by road and inland waterway, the Commission disregarded the fact that, for nearly all container-forwarding agents, those modes of transport are interchangeable with carriage by road. Such interchangeability is illustrated in particular by the fact that there is significant competition on prices between rail transport operators, road hauliers and inland waterway transport operators.

50. Considering therefore that the relevant market must cover all the components of carriage by rail of maritime containers and also carriage by road and inland waterway, the applicant claims that the fact that DB held a statutory monopoly within Germany for the provision of rail services was not sufficient to prove thatit held a dominant position. It points out that the holding of a statutory monopoly amounts

to a dominant position within the meaning of Article 86 of the Treaty only where that monopoly encompasses the whole of the relevant market and where the services concerned are not subject, in that relevant market, to real competition. As a result of competition between road hauliers and inland waterway transport operators, DB held only a 6% share of the container transport market despite its statutory monopoly.

51. The defendant observes that the Court of Justice has repeatedly held that an undertaking which has a statutory monopoly in a Member State is, by virtue of that fact, in a dominant position and that the territory of a Member State over which the monopoly extends must be considered to be a substantial part of the common market within the meaning of Article 86 of the Treaty.

52. The applicant's argument that DB only held a 6% share of the container transport market is based on an altogether different delimitation of the market which is not in conformity with the case-law. The defendant states, in this connection, that the case-law requires that the interchangeability of the provision of services be assessed from the consumer's point of view and according to the characteristics of the services in question and to the structure of supply and demand. From all those points of view, the rail services provided by DB are not shown to be interchangeable with the other services provided in the context of the carriage of maritime containers.

— Findings of the Court

53. In order to establish whether at the material time DB held a dominant position, it is necessary to examine first of all the definition of the market in the services inissue. To that end, it should be borne in mind that the Commission defined the market on which it found the existence of a dominant position as being, materially, that of rail services, which are sold by the railway undertakings to the transport undertakings and which consist essentially in making locomotives available, providing traction therewith and access to the railway infrastructure and, as regards geography, as covering the whole of Germany. Notwithstanding the use in Article 2of the decision of a wider definition of the actual market ('rail transport'), the delimitation referred to above corresponds to that used in the recitals in the preamble to the Decision and to that understood by the applicant. The Commission moreover confirmed that definition in reply to a question put by the Court before the hearing.

54. So far as concerns the material definition of the market, the Court observes that, in order to be considered the subject of a sufficiently distinct market, it must be possible to distinguish the service or the good in question by virtue of particular characteristics that so differentiate it from other services or other goods that it is only to a small degree interchangeable with those alternatives and affected by competition from them (see the judgments of the Court of Justice in Case 66/86*Ahmed Saeed Flugreisen and Silver Line Reisebüro* v *Zentrale zur Bekämpfungunlauteren Wettbewerbs* [1989] ECR 803, paragraphs 39 and 40, and Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 11 and 12, and of theCourt of First Instance in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 64). In that context, the degree of interchangeability between products must be assessed in terms of their objective characteristics, as well as the structure of supply and demand on the market, and compet-

itive conditions (see the judgment of the Court of Justice in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37, and the judgment of the Court of First Instance in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 63).
55. The Court finds that the rail services market constitutes a sub-market distinct from the rail transport market in general. It offers a specific range of services, in particular the provision of locomotives, traction and access to the railway infrastructure which, while admittedly provided according to the demands of the railway transport operators, is in no way interchangeable or in competition with their services. The distinct character of railway services also derives from the demand and supply factors that are specific to those services. On the one hand, it is not possible for transport operators to provide their services if they do not have railway services available to them. On the other hand, the railway undertakings held, at the material time, a statutory monopoly as regards the provision of railway services within their respective countries. Thus, it is not in dispute between the parties that, until 31 December 1992, DB had a statutory monopoly as regards the provision of railway services within Germany.
56. As may be seen from the case-law, a sub-market which has specific characteristics from the point of view of demand and supply and which offers products which occupy an essential and non-interchangeable place in the more general market of which it forms part must be considered to be a distinct product market (see CaseT-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraphs 61 and 62). In the light of that case-law and having regard to the foregoing considerations, the Commission was justified in not taking into consideration, in its material definition of the market, the services provided by the rail transport operators and, even more so, those provided by road hauliers and inland waterway transport operators.
57. Next, it is clear from the case-law that where, as in the present case, the services covered by the sub-market are the subject of a statutory monopoly, placing those seeking the services in a position of economic dependence on the supplier, the existence of a dominant position on a distinct market cannot be denied, even if the services provided under a monopoly are linked to a product which is itself in competition with other products (Case 26/75 *General Motors* v *Commission* [1975] ECR 1367, paragraphs 5 to 10, and Case 226/84 *British Leyland* v *Commission*[1986] ECR 3263, paragraphs 3 to 10).
58. So far as concerns the geographic delimitation of the market, it is sufficient to point out that a Member State may constitute, in itself, a substantial part of the common market on which an undertaking may hold a dominant position, in particular where it enjoys a statutory monopoly over that territory (Case 127/73 *BRT* v *Sabam and Fonior* [1974] ECR 313, paragraph 5).
59. It follows from all the foregoing considerations that the first part of the plea must be rejected.
The second part of the plea, that there was no abuse of a dominant position
— Arguments of the parties
60. The applicant claims that even assuming that the Court finds that there was adominant position, it should still be held that DB did not abuse that position. Inso far as the contested decision is based on the level of the tariff for carriage by

rail to and from western ports and states that it is higher than that for carriage by rail to and from the northern ports, it is essentially criticizing Intercontainer's tariff practices and not those of DB. In that context, the applicant pointed out at the hearing that the tariffs charged by DB for the provision of its rail services to Intercontainer have always been lower than the tariffs charged by DB toTransfracht and than the tariffs charged by NS to Intercontainer, whereas, in its application, it had stated that it did not deny that the level of its tariffs for traffic via the western ports was higher than that of those charged for traffic via the northern ports (page 25 of the application). The applicant concludes that DB could not be held responsible for the average tariff applied to carriage to and from the western ports being higher compared to the tariffs applied to carriage to and from the northern ports. It observes, moreover, that, for a large number of journeys via the western ports, a major part of the component of the tariff relating to the rail services had nothing to do with DB but concerned the services supplied by NS or SNCB (pages 31 and 32 of the reply).

61. In the same context, the applicant denies that DB blocked, in the context of the MCN Agreement, any reduction of Intercontainer's tariffs and that it had in fact required those tariffs to be maintained. On that point, the applicant points out that, under the MCN Agreement, every price change required unanimity in the Steering Committee, including, therefore, the consent of the other railway companies and Intercontainer, and that it had not been proved that it was DB which had prevented a reduction of the difference between the rail transport tariffs applied on western journeys and those on northern journeys.

62. The applicant adds that, in any event, each of the parties to the MCN Agreementwas entitled, under the terms of the agreement, to terminate it. It claims that theparties to the MCN Agreement were therefore in a position to avoid beinginfluenced by DB if they so wished (page 31 of the reply).

63. The applicant then maintains that the difference between the tariffs applied on the western journeys and those applied on the northern journeys were, in any event, objectively justified by a difference in the competitive situation and in costs.

64. In order to illustrate that difference with regard to the competitive situation, the applicant states that, on northern journeys, competition from inland waterways is weak and that competition from road hauliers is limited to German lorries, whereas, on western journeys, inland waterways is the cheapest mode of transport and competition from road hauliers is also very strong. In particular, the tariffs applied by road hauliers and inland waterway transport operators on western journeys were 20 to 40% lower than the tariffs applied by DB/Transfracht on northern journeys. The applicant states that it is not possible for it, as a small competitor on the transport market on western journeys, to cope with such rates and to cover its own costs at the same time. It had been making a loss for years on the western journeys and that loss had become more serious after DB took the step in 1989 and 1991 of bringing the tariffs applied to the western journeys a little closer to those applied to northern journeys. A temporary joint initiative undertaken by DB and NS at the end of 1993 for the purpose of applying the same rates as those of the road hauliers on one of the western journeys also failed completely in that it did not win new customers for car-

riage by rail.
65. The applicant considers, moreover, that the consequence of the difference between the competitive situation on the western journeys and that on the northern journeysis that the Commission's definition of the market on which DB allegedly abused its dominant position is fundamentally flawed. It states, in this regard, that the Commission defined a market covering the inland transport of sea-borne containers both on western journeys and northern journeys, whereas it is settled case-law that only geographical areas in which the objective competitive conditions are similar may be considered to constitute a uniform market. The applicant considers that such a flaw in the definition of the market is in itself sufficient to justify annulling the contested decision.
66. So far as concerns transport costs and in particular the costs of rail services, the applicant states that they are not determined exclusively by length of journey but also depend on other factors such as the number and duration of the shunting operations, customs formalities, the time worked by the crews and the length oftime during which locomotives and wagons are used. It follows that transport costs can be very different for journeys whose length is identical. In the present case, thedifferences in the costs arise from the fact that rail traffic is denser on the northern journeys and from the fact that, on western journeys, the crossings by trains of the Belgian and Netherlands borders give rise to costs.
67. In particular, the large volume of transport on the northern journeys enables blocktrains to be used to transport containers bound for the same destination, such trains not needing therefore to be shunted. Moreover, on northern journeys it is not necessary to change locomotives since DB is responsible for traction over the whole length of the journey. Costs are therefore lower for the northern journeys, which makes it possible to apply lower tariffs to those journeys.
68. Finally, the fact that, with the introduction of the KLV-Neu structure, the DB further reduced costs and, therefore, the rates for rail services on northern journeys makes no difference because, in the Decision, the Commission based its conclusions on a comparison of Intercontainer's tariffs with those of Transfracht and, moreover,the Commission did not prove that the reduction of prices in Germany under the KLV-Neu structure was not economically justified.
69. The defendant points out, *in limine*, that the Court has consistently held that an abuse within the meaning of subparagraph (c) of the second paragraph ofArticle 86 of the Treaty is committed where an undertaking uses its dominant position in order to apply dissimilar conditions to equivalent transactions with the purpose of placing its own services at an advantage.
70. The defendant states, first of all, that it considered the carriage by Intercontainer of containers from and to the western ports, on the one hand, and the carriage by Transfracht of containers from and to the northern ports, on the other, to be'equivalent transactions'.
71. The defendant goes on to state that it considered the differences between rates perkilometre charged for Intercontainer's and Transfracht's services to be 'dissimilar conditions'. Those differences ranged from 2 to 77% in respect of the carriage ofempty containers and from 4 to 42% in respect of full containers, according to

figures supplied by the undertakings concerned on the basis of Intercontainer's tariffs for the carriage of containers to the port of Rotterdam and on the basis of Transfracht's tariffs in respect of carriage to the port of Hamburg, figures which appear in Annexes 3 to 9 to the Decision and which are analysed in paragraphs 162to 171 thereof. The defendant established those differences on the basis of comparisons whose only variable was the length of journey. It justified this methodof comparison by reference to information provided by Transfracht at the hearing, according to which the length of journeys is the decisive criterion.
72. According to the defendant, there is no objective justification for the difference in rates which was found to exist.
73. So far as concerns the competitive situation, the defendant observes that the existence of inter-modal competition which is stronger on the western journeys could account for the tariffs applied by Intercontainer being lower than those applied by Transfracht, but cannot account for a difference in the opposite sense. Furthermore, DB was not in competition with road hauliers and inland waterway transport operators, since its services are by nature rail services and are not therefore, from the point of view of Intercontainer and Transfracht, interchangeable with the services offered by road hauliers and inland waterway transport operators.
74. So far as concerns production costs, the defendant considers that the applicant has not demonstrated that traffic via the western ports entails higher costs than the traffic via northern ports. In particular, it has not been proved that bordercrossings significantly increase transport costs, and the data available on the volume of traffic and the type of consignments disclose no logical relation with the transport costs and tariffs. Furthermore, the average price per kilometre charged by DB to Intercontainer is lower than the average price charged by DB to Transfracht and this suggests that the costs of the rail services provided for carriage to and from the western ports are lower than the costs of the rail services provided for carriage to and from the northern ports (pages 38 and 39 of the defence).
75. As to whether the abovementioned differences in tariffs can be attributed to DB, the defendant repeats the analysis which it had already set out in paragraphs 143to 156 of the Decision, according to which DB had the power to block decisions within the bodies set up by the MCN Agreement and used that agreement in orderto prevent a decrease in Intercontainer's tariffs, while applying to the northernjourneys a new tariff system unilaterally created by itself. The defendant further states that the dissatisfaction of Intercontainer, NS and SNCB with the attitude adopted by DB within the framework of the MCN Agreement emerges clearly from the minutes of the meetings held by Intercontainer and of the meetings held under the MCN Agreement.
76. The defendant concludes that DB imposed tariff differences and that those differences constitute discrimination. It states that the economic effects of such discrimination are not to be found in the dealings between the rail transport operators and the other transport operators but in the dealings between DB andNS and SNCB and in those between Transfracht and Intercontainer. According to the defendant, it is clear that, in those dealings, DB and Transfracht gained from the abovementioned discriminatory tariffs.

— Findings of the Court

77. It should be pointed out *in limine* that the first paragraph and subparagraph (c) ofthe second paragraph of Article 8 of Regulation No 1017/68 reproduce the wording of the first paragraph and subparagraph (c) of the second paragraph of Article 86of the Treaty and prohibit, in so far as trade between Member States may be affected thereby, any abuse of a dominant position within a substantial part of the common market through the application of 'dissimilar conditions to equivalenttransactions with other trading parties, thereby placing them at a competitive disadvantage'. Moreover, none of the recitals in or the provisions of RegulationNo 1017/68 confers upon Article 8 of the regulation a purpose which is substantially different from that of Article 86 of the Treaty. Accordingly, by finding that Article 86 of the Treaty and not Article 8 of Regulation No 1017/68 had been infringed, the Commission did not commit an error without which the content of the decision might have been different. The choice of Article 86 of the Treaty as the article of reference in the Decision was not, moreover, criticized by the applicant.

78. It should next be pointed out that the concept of abuse of a dominant position amounts to prohibiting a dominant undertaking from strengthening its position byusing methods other than those which come within the scope of competition on the basis of quality (see, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 70). Thus, an undertaking may not apply artificial price differences such as to place its customers at a disadvantage and to distort competition (*Tetra Pak* v *Commission*, cited above, paragraph 160).

79. Furthermore, the existence of an abuse of a dominant position cannot be ruled outby the fact that the undertaking which holds the dominant position has formally entered into an agreement the object of which is the joint fixing of tariffs and which thus falls within the scope of the prohibition of restrictive agreements. Theexistence of such an agreement does not preclude the possibility that one of the undertakings bound by the agreement might unilaterally impose discriminatory tariffs (see, by analogy, *Ahmed Saeed Flugreisen and Silver Line Reisebüro*, cited above, paragraphs 34 and 37).

80. In the present case the Court finds that several factors enabled the Commission to conclude that, in spite of the MCN Agreement and its primary objective, which was, as the applicant confirmed at the hearing, to lower Intercontainer's tariffs and thus restore the competitive position of rail transport on the western journeys, DBacted unilaterally in a manner which thwarted that objective.

81. First, the Commission had in its possession a set of documents, to which it refers in paragraphs 152 to 154 of the Decision, the existence of which was not disputedby the applicant and the content of which tended to confirm that DB was, in fact, responsible for fixing tariffs within the framework of the MCN Agreement and, accordingly, for maintaining the differences in tariffs. Thus, the minutes of aplenary meeting of Intercontainer's Management Board mention a statement made by a representative of SNCB according to which the Steering Committee 'had beenshort-circuited by DB'. Likewise, an internal memorandum of Intercontainer states that 'northern port traffic is being handled directly and exclusively by Transfrachtand DB without any participation by [the Steering Committee]. In

practice, it has in addition emerged that the power of decision-making as regards tariffs does not emanate from [the Steering Committee]'. Finally, certain proposals formulated by DB and recorded in the minutes of a meeting between the representatives of the western ports and DB, SNCB and NS unequivocally imply that DB had the power enabling it to control the level of tariffs both on the western and on the northern journeys. DB in particular proposed during that meeting '[to re-examine] the level of prices ... in the light of the German political context' with a view to obtaining thereby a '50% reduction in the difference on 1 January 1990' and a 'furtherreduction on 1 July 1990'.

82. There was therefore some evidence to support the Commission's finding to the effect that DB and Transfracht took advantage of their ability to block decisions, acquired by them through the requirement for unanimity in the Steering Committee's decision-making procedure (see paragraph 6 above), in order toprevent a decrease in Intercontainer's tariffs. Contrary to what the applicant maintains, SNCB, NS and Intercontainer were not able to avoid such blocking tactics by terminating the MCN Agreement. In the first place, termination of the MCN Agreement would not have altered the fact that, for each journey between the port of Antwerp or Rotterdam and a German town, the railway and transport undertakings operating in Belgium and the Netherlands depended on DB's cooperation in order to continue the journey within Germany. Secondly, termination of the agreement would not have altered the fact that DB set, incomplete independence, the level of the tariffs for carriage on the northern journeys and that it thus influenced the difference between the tariffs in respect of western journeys and those in respect of northern journeys.

83. In the second place, it is not disputed that DB unilaterally introduced on 1 June1988, that is to say barely three months after the entry into force of the MCNAgreement, a new tariff structure, namely the KLV-Neu structure. That was confirmed by the applicant in reply to a question put by the Court before the hearing. In that reply, the applicant also confirmed that the KLV-Neu structure led to a decrease in rates which worked only to the benefit of forwarding agents for the carriage by rail of maritime containers passing through German ports, given that that tariff system was based on rationalization measures which, in practice, were applied only to container traffic passing through the northern ports.

84. It follows from the Court's findings in the foregoing paragraphs that the conduct of DB during the period under investigation directly contributed to the maintenance of a difference between the rates per kilometre applicable to carriage via the western ports and those applicable to carriage via the northern ports.

85. At this stage in the Court's reasoning the abovementioned difference in rates per kilometre should be examined in order to ascertain whether it was discriminatory and thus affected the competitive position of certain operators.

86. For the purpose of that examination, the figures appearing in Annexes 3 to 9 to the Decision should be analysed. Those figures show that, apart from Saarbrücken, for each destination which was substantially nearer to Rotterdam than to Hamburg and in respect of which carriage via Rotterdam was therefore objectively more advantageous, that commercial advantage by comparison with carriage via Hamburg was in each

case counterbalanced either by higher total prices for carriage to Rotterdam or by the application of equal total prices. The dissimilar total prices include, for example, those applied to carriage of empty containers between 1 October 1990 and 31 December 1991 (Annex 3) to Duisburg, Bochum, Wuppertal, Mannheim and Karlsruhe. Those total prices result in differences in prices per kilometre of 77.6% (Duisburg), 56.5% (Bochum), 42% (Wuppertal), 16.5% (Mannheim) and 22.6% (Karlsruhe). The equal total prices include, for example, those applied from 1 January 1992 (Annex 7) in respect of the carriage of full containers to Frankfurt, Karlsruhe, Duisburg, Düsseldorf, Wuppertal andBochum. Those prices result in differences in price per kilometre of 4.6%(Frankfurt), 11.35% (Karlsruhe), 58% (Düsseldorf), 28% (Wuppertal) and 20.9%(Bochum). Furthermore, it appears that, with the sole exception of Saarbrücken, the total prices applied to carriage between Rotterdam and any town in Germany, whether it was nearer to Rotterdam or Hamburg, was not lower than the total prices applied to carriage from or to Hamburg. That was the case, for example, with respect to the KLV prices applied to the carriage of containers as from 1 July1991 (Annex 9) to Frankfurt (a total price of DM 857 to Rotterdam, as against DM833 to Hamburg), Düsseldorf (DM 653 as against DM 618) and Mainz (DM 867as against DM 843), on the one hand (towns closer to Rotterdam than to Hamburg), and to Augsburg (DM 1 456 as against DM 1 415), Munich (DM 1 520as against DM 1 410) and Regensburg (DM 1 386 as against DM 1 334), on the other hand (towns closer to Hamburg). The Court finds that that practice artificially consolidated a protective system of tariffs for carriage by rail passing through the northern ports and must be regarded as an imposition of dissimilar tariff conditions to the detriment of the competitive position of undertakings operating on the western rail journeys by comparison with those operating on the northern rail journeys.

87. The applicant stated that the differences in price per kilometre were due to thefact that the costs of providing the services were higher on the western journeys than on the northern journeys and to the fact that carriage by rail was subject to stronger inter-modal competition on the western journeys than on the northern journeys.

88. The Court finds, in the first place, that the difference in costs relied on by the applicant was partially created by DB itself. In particular, DB adopted several rationalization measures within the framework of the KLV-Neu tariff structure such as increasing the use of direct and block trains and concentrating on night traffic and on carriage to certain terminals operated on rationalized lines. Those measures enabled costs to be reduced, but only for traffic to and from German ports (see paragraph 83).

89. It should be pointed out, in this respect, that the applicant has not put forward any argument to show that the provision of rail services for the carriage of goods to Belgian and Netherlands ports had necessarily to be excluded from the rationalization measures adopted under the KLV-Neu system and, consequently, from the complete range of the cost-reduction measures taken by DB. In this regard, the argument that the rationalization measures introduced by the KLV-Neusystem could not be applied to traffic via the western ports because its volume was small and that it was therefore impossible to assemble direct and block trains is not persuasive. The applicant moreover stated on two occasions, in reply to questions put by the Court at the hearing, that block trains were assembled on the western journeys.

90. In so far as the applicant alleges that certain costs are specific to the western journeys, namely those entailed by locomotive changeover and reassembling of wagons at the border, the Court finds that such costs can represent only a small part of the costs incurred in the provision of the services in question as a whole (every aspect of the provision of locomotives and traction) and cannot therefore justify the price differences noted. It is clear, moreover, from the figures which appear in Annex 15 to the Decision and which are not disputed by the parties that the total tariffs charged by DB and NS to Intercontainer for providing rail services on the journeys linking the German towns to the port of Rotterdam were, onaverage, lower than the tariff charged by DB to Transfracht for providing rail services on the northern journeys. Accordingly, the costs directly relating to the services provided by the rail undertakings should logically be lower on the western journeys than those incurred on the northern journeys.
91. Secondly, the Court finds that the greater intensity of competition between rail transport operators, on the one hand, and road hauliers and inland waterway transport operators, on the other, on the western journeys cannot account for the level of tariffs applied by Intercontainer on those journeys being higher than that of the tariffs applied by Transfracht on the northern journeys. Assuming that the more intense nature of inter-modal competition on the western journeys could justify a difference in price, it must be stated that, from a commercial point of view, this could give rise logically only to a difference in favour of the tariffs applied on the western journeys.
92. Inasmuch as the applicant submits that the Commission's definition of the geographical market is undermined by the difference in the competitive situation, it is sufficient to state that the definition of the geographical market does not require the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'similar' or 'sufficiently homogeneous' and, accordingly, only areas in which the objective conditions of competition are 'heterogenous' may not be considered to constitute a uniform market (*United Brands* v *Commission*, cited above, paragraphs 11 and 53, and *Tetra Pak* v*Commission*, cited above, paragraphs 91 and 92). In the present case the greater intensity of inter-modal competition on the western journeys cannot mean that the objective conditions of competition which exist on those journeys are 'heterogenous' by comparison to those existing on the northern journeys.
93. It is clear from the foregoing considerations that the Commission has adduced sufficient evidence to substantiate its conclusions concerning DB's conduct and that it has proved to the requisite legal standard that, by its conduct, DB imposed dissimilar conditions for equivalent services, thus placing the other parties operating on the western journeys at a disadvantage in competition with itself and its subsidiary Transfracht. Accordingly, the second part of the plea must also be rejected.
94. It follows that the second plea in law must be rejected in its entirety.
95. That conclusion cannot be invalidated by the additional complaint, raised by the applicant in its reply and at the hearing, that the Commission gave inadequate reasons for its conclusions relating to the finding that DB had abused its dominant position and that it thus infringed Article 190 of the Treaty. In this respect, it should be borne in mind that, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of

fact which come to light in the course of the procedure. The Court finds that the complaint that Article 190 of the Treaty was infringed constitutes a new plea in law which is not based on matters of law or of fact which have come to light in the course of the procedure, with the result that it could not be raised for the first time in the course of the proceedings.

96. In any event, by analysing in turn 'the key role of DB in the setting of tariffs for the carriage of sea-borne containers from or to Germany' (paragraphs 143 to 156of the Decision), the 'tariffs of Transfracht and Intercontainer' (paragraphs 162to 177 of the Decision), the 'position of the undertakings regarding the discriminatory nature of the tariff differences' and in particular the 'position of theDB/Transfracht group' (paragraphs 185 to 190 of the Decision), and the competitive situations and production costs (paragraphs 199 to 248 of the Decision)and by establishing a link between those analyses, the Commission explained in detail in its Decision why it considered DB to have abused its dominant position,thus enabling the Court to exercise its power of review. Similarly, both in its application and during the course of the proceedings, the applicant replied to arguments put forward by the Commission in the Decision with regard to the finding of abuse of a dominant position, which shows that the Decision provided it with the information necessary to enable it to defend its rights. Accordingly, it cannot be held that the statement of reasons was defective (Case C-350/88 *Delacreand Others* v *Commission* [1990] ECR I-395, paragraph 15, and Case T-150/89*Martinelli* v *Commission* [1995] ECR II-1165, paragraph 65).

Third plea, alleging infringement of the rights of the defence

Arguments of the parties

97. The applicant states that it asked the Commission, after notification of theDecision, for permission to consult the file and that the Commission refused its request. It points out that such consultation was essential in order to enable its counsel to prepare its case properly for the pre-litigation procedure. The fact that consultation was authorized during that procedure is not relevant in this respect, since at that time both the undertaking concerned and its counsel were different. In any event, the applicant maintains that it does not have in its possession the copies made by DB's counsel after examining the file.

98. The applicant states furthermore that the German Law of 27 December 1993 forthe reorganization of the railways created a new body, the 'Bundeseisenbahnvermögen', as the official successor to DB. It concludes from this that neither its identity or its rights may be assimilated to those of DB. Accordingly, the Commission's refusal to grant access to the file deprived the applicant, which only came into existence in January 1994, of all rights in that respect. That amounts to a breach of the rights of the defence, causing the Decision to be vitiated by a breach of an essential procedural requirement.

99. The Commission's refusal to take account of the change of identity of the undertaking resulted, moreover, in a breach of the obligation to state reasons. Onthe basis in particular of the case-law of the Court of First Instance, the applicant submits that, where a decision taken in application of Article 85 or 86 of the Treaty imposes a fine on an undertaking which is considered liable for the infringement committed

by another undertaking, it must contain a detailed account of the grounds for holding the undertaking on which the fine is imposed liable for the infringement (Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraphs 26 and 27). However, the contested decision contains no such statement of reasons.
100. The defendant states that the right of access to the file is extinguished once the administrative procedure is closed. As soon as a decision is adopted and notified, the rights of defence of the person to whom it is addressed are protected by the possibility of challenging the decision before the Court.
101. The defendant maintains moreover that, in any event, a change of lawyer cannot have any repercussion on the right of access to the file, since access to the file is a right conferred on the undertaking concerned and not on the individual lawyers engaged by it. The fact that, in this case, the identity of the undertaking itself changed is not relevant either, since the applicant is the successor both in economic and legal terms to DB and, accordingly, its rights and obligations are not distinguishable from the rights and obligations of DB, including the right to consult the file, which DB exercised during the pre-litigation procedure.
Findings of the Court
102. The Court finds that the applicant's request for access to the file was made to the Commission after adoption and notification of the Decision and thus post-dates the Decision; consequently, the legality of the Decision cannot in any circumstances be affected by the Commission's refusal to grant the requested access (see T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraph 30, and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, cited above, paragraph 40).
103. The third plea in law must therefore be rejected.
104. That conclusion cannot be invalidated by the fact that the applicant raised another complaint of a procedural nature alleging that inadequate reasons were given for holding it responsible for the infringement found. That complaint was submitted for the first time in the applicant's reply. Although it was submitted in the contextof the arguments on the matter of access to the file, the Court finds that it is substantively different from the matter of access to the file and from the other matters raised in the application and that it must therefore be held to constitute a separate and new plea in law. Since it is not based on matters of law or of fact which have come to light during the procedure, the Court holds that the applicant was not entitled to raise it in the course of the proceedings (see, on a similar point, paragraph 95).
105. In any event, the complaint, formulated by the applicant in its reply, that the statement of reasons was inadequate cannot be upheld. The Commission stated, in paragraph 13 of the Decision, that on 1 January 1994 the applicant became DB'ssuccessor. The Court finds that that statement sufficiently explains the reason forwhich the Commission considered that it was entitled to enjoin the applicant to putan end to the infringement of Article 86 of the Treaty committed by DB and toorder it to pay a fine on account of that infringement (Articles 3 and 4 of theDecision). That assessment by the Commission is, moreover, entirely correct in the context of the present case, since it is clear from the German law concerning the reorganization of the railways and creating the Bundeseisenbahnvermögen that the applicant acquired, through

the Bundeseisenbahnvermögen, DB's assets to the extent necessary for the provision of railway services and for the operation of the railway infrastructure.
106. The facts of the present case are different, moreover, from those in *AWS Benelux*v *Commission*, cited above, in which the Court held that a detailed account of the grounds for holding the fined undertaking to be responsible for the infringement was necessary because the alleged conduct concerned more than one undertaking. In that case, several undertakings were involved in the administrative procedure, and this gave rise to complex questions as to responsibility for the infringement when it was finally established. However, in the present case, the infringement forwhich the Commission imposed a sanction was committed by a single undertaking, DB. The reason for holding the applicant responsible for that infringement could thus be reduced to the mere finding that it was the successor to DB.
Fourth plea, alleging breach of the principles of legal certainty and properadministration (omissis)
The alternative claims for annulment or reduction of the fine
Arguments of the parties
118. The applicant considers that the fine imposed upon it offends against the principle of proportionality. That is so, first, because the Commission did not find, for 20 years, that any infringement had been committed in the field of rail transport, even though it was fully aware of the practices of the railway undertakings. Accordingto the applicant, a fine must be annulled, or at least reduced, if the Commission has hesitated in taking action against alleged distortions of competition (JoinedCases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 51 and 52).
119. The amount of the fine is also out of proportion to the gravity of the alleged infringement. The consequences of infringement which are regarded by the Commission as proven did not, in fact, occur. The tariff practices examined did not entail any loss whatsoever for the undertakings comprised in the complainant association and they did not result, in the market for transport via the western ports in general, in Belgian and Netherlands forwarding agents migrating to other modes of transport. Furthermore, such a move was, even theoretically, hardly possible, since transport by road and inland waterway were already the most heavily used modes of transport in that market.
120. Finally, the applicant criticizes the Commission for having, contrary to its administrative practices in the calculation of fines, calculated the limits set byArticle 22(2) of Regulation No 1017/68 on the basis of DB's total turnover (ECU12.9 thousand million for 1993), and not on the turnover for container traffic (DM461 million for 1993).
121. The defendant confirms that the contested fine is the first that has been imposed on the basis of Regulation No 1017/68, but it considers that this could not influencethe amount fixed. The amount of the fine is fully justified since DB was well aware of the discrimination which it practised and did not show itself willing to bring it to an end.
122. Moreover, DB's conduct had serious consequences. The defendant observes, in that regard, that during the period from 1989 to 1991 the traffic via the northern

ports increased by 20% and the traffic via the western ports decreased by 10%. The defendant admits that the expert's report suggests that the flow of traffic remained more or less constant during the period under investigation, but adds that, even supposing that those calculations are accurate, DB's conduct should still be considered to have prevented carriage of containers by rail from increasing on the western journeys, which constitutes, in itself, a serious infringement of the rules of competition.
123. The defendant further states that, according to the case-law of the Court of FirstInstance, the Commission is not required to announce that it intends to impose a fine. It also emphasizes that it opened the inquiry as soon as it received a complaint. Finally, it points out that the amount of the fine imposed is within the limits laid down by Article 22 of Regulation No 1017/68.
Findings of the Court
124. It should be pointed out *in limine* that Article 22 of Regulation No 1017/68 enablesthe Commission to impose a fine for infringement of Article 8 of that regulation. The Court considers that the fact that the Commission found that Article 86 of theTreaty had been infringed rather than Article 8 of Regulation No 1017/68 did not preclude it from imposing a fine under Article 22 of Regulation No 1017/68, since the relevant provisions of Article 8 of Regulation No 1017/68 have the same wording and the same scope as those of Article 86 of the Treaty (see paragraph77). The choice of Article 22 of Regulation No 1017/68 as the legal basis for imposing the fine was, moreover, not challenged by the applicant.
125. Also *in limine*, it should be pointed out that, pursuant to Article 24 of RegulationNo 1017/68, the Court has unlimited jurisdiction within the meaning of Article 172of the Treaty in proceedings brought against decisions in which the Commission has fixed the amount of a fine or periodic penalty payment.
126. So far as concerns calculation of the fine, the Court finds that the Commission observed the upper limit of 10% indicated in Article 22(2) of Regulation No1017/68. Under that article the Commission may impose fines of up to 10% of the'turnover in the preceding business year of each of the undertakings participatingin the infringement. According to settled case-law, it is permissible, in that context, to have regard both to the total turnover of the undertaking and to the turnover accounted for by the services in respect of which the infringement was committed (*Compagnie Maritime Belge Transport and Others* v *Commission*, cited above, paragraph 233). In the light of the information provided by the parties, the fine of ECU 11 million corresponds to less than 0.1% of DB's turnover for 1993 and to less than 5% of DB's turnover in 1993 in respect of container traffic. It follows that the Commission remained in every respect below the limit prescribedby Article 22 of Regulation No 1017/68.
127. As regards the setting of the amount of the fine within the quantitative limits provided for in Article 22 of Regulation No 1017/68, it should be pointed out that fines constitute an instrument of the Commission's competition policy and that that institution must therefore be allowed a margin of discretion when fixing their amount, in order that it may direct the conduct of undertakings towards compliance with the competition rules (*Martinelli*, cited above, paragraph 59, and Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53). Nevertheless, the Court

must verify whether the amount of the fine imposed is in proportion tothe duration of the infringements and to the other factors capable of affecting the assessment of the gravity of the infringements, such as the influence which the undertaking was able to exert on the market, the profit which it was able to derive from those practices, the volume and the value of the services concerned and the threat that the infringement poses to the objectives of the Community (see Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v*Commission* [1983] ECR 1825, paragraphs 120 and 129).

128. In the present case, the Court finds that DB could not have been unaware that, by its extent, its duration and its systematic nature, its conduct considerably promoted carriage via the German ports and thus resulted in serious restriction of competition. It follows that the Commission lawfully considered that the infringement had been committed deliberately (see, to this effect, Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157). The Commission moreover rightly took account of the relatively long duration (at leasttwo years and ten months) of the infringement, of the fact that DB in no way undertook to change its practices following the forwarding of the statement of objections and of the commercial advantage which DB was able to derive from its infringement.

129. It follows from the foregoing considerations that the Commission had in its possession information which showed that the abuse established was of a very grave nature and that therefore the amount of the fine imposed, and in particular the percentage of the turnover which it represents, is not disproportionate.

130. Contrary to the applicant's assertion, the Commission was not required to fix a more moderate amount because no fines had previously been imposed in the sector concerned. In that regard, it should be pointed out that the unprecedented nature of a decision cannot be pleaded as a ground for a reduction of the fine, provided that the gravity of the abuse of a dominant position and of the resulting restrictions of competition are undisputed (*Tetra Pak* v *Commission*, cited above, paragraph 239; Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraphs 46to 49). Nor is it open to the applicant to criticize the Commission for having hesitated to take action and for having thus itself contributed to the duration of the infringement. In this respect, it is sufficient to note that the Commission opened an inquiry as soon as it received a complaint regarding the applicant's tariff practices.

131. The Court therefore finds that there are no grounds for annulling or reducing the fine imposed on the applicant.

132. It follows from all the foregoing that the application must be dismissed.

16.

European Court of First Instance 22 October 1996, Joined cases T-79/95 and T-80/95.
Société nationale des chemins de fer français and British Railways Board v Commission of the European Communities.
(omissis)
Grounds
Facts
1 By a treaty signed on 12 February 1986, the French Republic and the United Kingdom agreed to authorize the construction and operation by private concessionaires of a rail link beneath the English Channel (hereinafter `the fixed link' or `the tunnel') between Fréthun in the Pas-de-Calais and Cheriton in Kent.
2 By an agreement signed on 14 March 1986 with the UK Secretary of State for Transport and the French Minister for Town Planning, Housing and Transport, the two companies Channel Tunnel Group and France Manche obtained the concession to build and operate the tunnel. For that purpose, they established a joint-venture company under the name of `Eurotunnel'. The concession was originally for 55 years but was extended to 65 years in 1994.
3 Annex I to the concession agreement lays down the operating conditions for a shuttle service between Fréthun and Cheriton. Channel Tunnel Group and France Manche (hereinafter `Eurotunnel'), as the concessionaires, are required to guarantee the minimum shuttle frequency laid down by the agreement (Clause A.I.32 of the agreement). In addition, the provisions in Annex I indicate that the tunnel will also be used to allow the passage of international trains belonging to railway undertakings other than Eurotunnel between places in the United Kingdom and places on the Continent (hereinafter `international trains').
4 On 29 July 1987 Eurotunnel and the applicants entered into an agreement concerning the use of the fixed link (hereinafter `the usage contract'), which was entered into in the context and for the duration of the concession obtained by Eurotunnel.
5 Clause 6.2 thereof states that the applicants are `at all times during the term of [the usage contract] ... entitled to fifty per cent (50%) of the capacity, per hour in each direction, of the fixed link ... unless ... they agree to surrender part of their entitlement, such agreement not to be unreasonably withheld'. The remaining capacity, measured in standard hourly paths, remains available to Eurotunnel, the infrastructure manager. In consideration of the use of the fixed link, the applicants are to pay to Eurotunnel charges comprising a fixed element and a variable, decreasing, element calculated by reference to actual traffic. During the first twelve years the charges may not be lower than a certain threshold. Pursuant to Clause 10 of the contract the applicants are also to reimburse Eurotunnel a portion of the costs of operating the fixed link, as set out in Schedule V. They undertake in addition to make substantial investment in order to organize their respective railway infrastructures according as required by usage of the tunnel and to have available special rolling stock suitable for such use.
6 On 2 November 1987 Eurotunnel, in agreement with the applicants, notified the usage contract to the Commission with a view to obtaining a declaration of the non-ap-

plicability of the prohibition laid down in Article 2 of Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterways (OJ, English Special Edition 1968 (I), p. 302). The Commission published a summary of the notification in the Official Journal of the European Communities on 16 November 1988 (OJ 1988 C 292, p. 2), in accordance with Article 12(2) of Regulation No 1017/68. It decided to allow the 90-day period provided for in Article 12(3) of the regulation to expire without raising any serious doubts, thereby granting an exemption for three years from the date of publication of the summary of the notification.

7 By letter of 25 January 1989 Eurotunnel requested the Commission to adopt a formal decision granting exemption for a period equal to the duration of the usage contract. The Commission published a summary of that request in the Official Journal of 17 July 1990 (OJ 1990 C 176, p. 2), in accordance with Article 26(3) of Regulation No 1017/68.

8 On 20 September 1991 Eurotunnel sent the Commission a memorandum explaining that the terms of the usage contract were compatible with Article 2 of Regulation No 1017/68.

9 By letter of 28 February 1994 the Commission requested the Société Nationale des Chemins de Fer Français (`SNCF') to communicate to it `forecasts for passenger and freight traffic between the United Kingdom and the Continent during the first twelve years of the tunnel's operation' and `the number of hourly paths, by times of day, which [the applicants] expect to use in catering for that traffic'. By letter of 29 March 1994 SNCF replied that `looking twelve years ahead, and subject to the natural limitations of forecasts of this kind, the capacity necessary to carry the whole of that traffic represents on average approximately 75% of the capacity reserved for [the applicants] by the usage contract with Eurotunnel. That figure takes account of the varying speeds of the various types of train in the tunnel. The average figure of 75% may moreover be subject to variation either way, depending on the time of day, without it being possible to be more explicit at present, given the uncertainties as to demand.'

10 By letter of 2 May 1994 the Commission sent the applicants a draft of a new notice it was preparing to publish in the Official Journal concerning the possible exemption of the usage contract. SNCF made observations on that draft notice by letters of 19 May and 13 June 1994. British Railways Board (`BR') did so by letter of 14 June 1994.

11 In the Official Journal of 30 July 1994 (OJ 1994 C 210, p. 15), the Commission published a notice pursuant to Article 19(3) of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and Article 26(3) of Regulation No 1017/68. In that notice (paragraph 19), the Commission explained that operating conditions in the rail transport sector had been significantly altered by the adoption of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25). The notice went on to point out (paragraph 21) that the usage contract comprised two different aspects: a sharing of infrastructure capacity, covered by Regulation No 17, and a sharing of the transport market, covered by Regulation No 1017/68. It referred (paragraph 24) to a 20% reduction in the hourly paths attributed to the applicants to enable the usage contract to qualify for exemption under Article

85(3) of the EC Treaty.
12 The directive referred to in the Commission's notice made two innovations with a view to improving the efficiency and competitiveness of the Community rail network. First, it provided for accounting separation between the operation of transport services and the management of infrastructure (Article 6). Secondly, it opened the railway sector to a certain extent to the freedom to provide services. In particular, Article 10 established, with effect from 1 January 1993, and subject to certain conditions, a right of access to railway infrastructure in the Community. Subsequently, the Council went on to adopt Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees (OJ 1995 L 143, p. 75).
13 By letters of 11 and 14 October 1994 the Commission informed SNCF and BR that it was proposing to reduce the capacity allocated to the applicants by 25% rather than 20%, following comments it had received from ten interested third parties. The applicants commented on that proposal by letters dated 19 October 1994.
The contested decision
14 The Commission adopted the contested decision on 13 December 1994. It is based (paragraph 49) on Regulation No 1017/68 in so far as the contract deals with transport services, and on Regulation No 17 in so far as it deals with the provision of infrastructure.
15 The decision identifies the relevant markets (paragraphs 51 to 67) as:
- on the one hand, the market in providing hourly paths for rail transport in the tunnel, as an essential facility for railway undertakings wishing to provide transport services between the United Kingdom and the Continent, the market being geographically confined to the tunnel and its access areas;
- on the other hand, a number of markets in the international transport of passengers and freight between the United Kingdom and the Continent.
16 It goes on to refer (paragraphs 69 to 84) to two restrictions on competition arising from the contract.
17 On the transport markets, the contract provides for a division of the markets between Eurotunnel, which concentrates on the operation of shuttles, and the applicants, which operate international trains carrying passengers and freight. Since each party could legally operate services reserved for the other, that division of the market restricts competition between Eurotunnel and the applicants.
18 On the market in the provision of hourly paths for rail transport in the Channel Tunnel, the contract provides that the applicants are at all times entitled to 50% of the capacity of the tunnel. Since under the terms of the contract half the tunnel capacity is reserved for shuttle services and the other half for international passenger and freight trains, the applicants are in fact entitled to 100% of the hourly paths available for that latter category of transport. Accordingly, other railway undertakings cannot obtain from the infrastructure managers the hourly paths necessary to operate international passenger or freight trains in competition with the applicants.
19 The decision declares that Article 85(1) of the Treaty, Article 2 of Regulation No 1017/68 and Article 53(1) of the EEA Agreement do not apply to the contract for a period of 30 years beginning on 16 November 1991. Since the Commission considers that the reservation for the applicants of all the hourly paths available for internation-

al trains is not essential to them for the provision of their transport services and to contribute to the success of the project (paragraph 102), it has made the exemptions subject to conditions and obligations.
20 The conditions (hereinafter `the disputed conditions') are set out in Article 2(A) of the contested decision:
`(a) In accordance with Clause 6.2 of the usage contract, BR and SNCF must not withhold their agreement to the sale by the managers of the infrastructure to other railway undertakings of the hourly paths necessary to operate international passenger and freight services.
(b) However, BR and SNCF must have available the hourly paths necessary to provide an appropriate level of services during the period up to 31 December 2006, that is up to 75% of the hourly capacity of the tunnel in each direction which is reserved for international passenger and freight trains, in order to operate their own services and those of their subsidiaries.
(c) Over the same period the other railway undertakings and groupings of undertakings shall have available at least 25% of the hourly capacity of the tunnel in each direction in order to run international passenger and freight trains.
(d) The conditions set out in (b) and (c) shall not prevent BR and SNCF, during that period, from using more than 75% of the hourly capacity if the other railway undertakings do not use the 25% of capacity remaining.
(e) The conditions set out in (b) and (c) shall similarly not prevent railway undertakings other than BR and SNCF from using, during that period, more than 25% of the hourly capacity if BR and SNCF do not use the 75% of capacity which is reserved to them.
(f) Such adjustments shall in no way restrict the right of BR and SNCF to use up to 75% of the hourly paths reserved for international trains during that period if the need arises, nor the rights of the other railway undertakings to use up to 25% of that capacity.
(g) The proportion of paths reserved to BR and SNCF will be re-examined by the Commission before 31 December 2006.'
Procedure and forms of order sought
21 SNCF and BR brought these actions by applications lodged at the Registry of the Court of First Instance on 7 and 8 March 1995 respectively.
22 They each made an application for suspension of the operation of Article 2(A) of the contested decision pursuant to Articles 185 and 186 of the Treaty. By order of the President of the Court of First Instance of 12 May 1995 (Joined Cases T-79/95 R and T-80/95 R SNCF and British Railways v Commission [1995] ECR II-1433), those applications were dismissed and costs were reserved.
23 By applications lodged at the Registry on 31 July 1995 and 18 August 1995 the United Kingdom and Eurotunnel respectively applied to intervene in both cases in support of the applicants. European Passenger Services Ltd (hereinafter `EPS') applied on 18 August 1995 for leave to intervene in support of the applicant in Case T-80/95. The applicants requested confidential treatment vis-à-vis Eurotunnel for a number of documents in the application. The applications to intervene and the requests for confidential treatment were granted by orders of the Court of First Instance (Third

Chamber, Extended Composition) of 18 December 1995.
24 The applicants, the United Kingdom and EPS claim that the Court should:
- annul the Commission's decision;
- in the alternative, annul the decision in so far as it is accompanied by conditions (Article 2(A));
- order the Commission to pay the costs.
25 Eurotunnel claims that the Court should annul the Commission's decision of 13 December 1994 concerning Eurotunnel (IV/32.490).
26 The Commission contends that the Court should:
- dismiss the applications;
- order the applicants to pay the costs.
27 Upon hearing the report of the Judge-Rapporteur the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory enquiry. However, it requested the parties to provide replies to certain written questions in advance of the hearing, which they did within the time allowed.
28 The parties submitted oral argument and their replies to the oral questions put by the Court of First Instance at the hearing on 25 June 1996.
29 After hearing the views of the parties on the subject at the hearing, the Court of First Instance (Third Chamber, Extended Composition) decided to join the cases for the purposes of the judgment.

Substance

Preliminary observations

30 The applicants rely on six identical pleas in support of the application for the annulment of the decision or, in the alternative, of the disputed conditions. These are, first, misinterpretation of the scope of Regulation No 1017/68; second, breach of Article 85(1) of the Treaty, Article 2 of Regulation No 1017/68 and Article 53(1) of the EEA Agreement; third, breach of Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement; fourth, misuse of powers; fifth, infringement of the rights of the defence; and sixth, breach of Article 190 of the Treaty. SNCF also alleges breach of Article 8(3) of Regulation No 17 and Article 13(3) of Regulation No 1017/68 as regards the withdrawal of an exemption. Finally, Eurotunnel questions in its intervention the Commission's power to adopt the contested decision.
31 The Court notes that in the second and third pleas the applicants first allege that the Commission's legal reasoning was based on an error of fact, vitiating not only the assessment of the way in which the contract would restrict competition, but also the examination of that contract in the light of Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement.
32 It is therefore necessary to consider first of all whether the second and third pleas are well founded in so far as they allege error of fact.

The alleged error of fact

Summary of the arguments of the parties
33 The applicants argue that the Commission's conclusion, in paragraph 84 of the contested decision, that the contract `has as its object and effect the restriction of competition on the market in the provision of hourly paths for rail transport in the tunnel

and on the transport markets' is based on the consideration that `half of the capacity of the tunnel is reserved for shuttle services and the other half for international passenger and freight trains' (paragraph 81) and that therefore the applicants have 100% of the hourly paths available for the latter category of transport (paragraph 82). Supported by all the interveners, they insist that there is nothing in the contract which reserves half of the tunnel's capacity to Eurotunnel for shuttles and the remainder to the applicants for the operation of international passenger and freight trains.

34 The Commission relied almost exclusively on a single statement appearing in the notification (point III.1.c(ii)) in order to conclude that it would be impossible for other railway undertakings to obtain tunnel paths for international trains. Moreover, the Commission made no mention of the statements made subsequently by Eurotunnel in its memorandum of 20 September 1991 (see paragraph 8, above) contradicting the Commission's interpretation of the contract. Thus paragraph 3.1.3 of the memorandum states that `Eurotunnel has no interest in favouring one means of transport above the other since they cater for different needs. In fact, the repartition of capacity will, in the future, be decided by the demand of the users'.

35 Eurotunnel could make the tunnel available to other railway undertakings by turning over to them part of its own capacity. As manager of the infrastructure Eurotunnel is responsible for allowing access to the tunnel by other railways on request. As there is no obligation for Eurotunnel to assign its 50% of capacity to shuttle services, it would be entirely consistent with the general scheme of the contract to allow other undertakings to apply for access to the tunnel.

36 In its statements in intervention (paragraph 4 and paragraphs 80 to 86), and at the hearing, Eurotunnel also stated that there was nothing in the contract which provided that the 50% of capacity not allocated to the applicants must be reserved for shuttle services. Therefore, the contract did not prevent Eurotunnel from making part of its own capacity available to third parties for the operation of international trains. On the whole, the tunnel offered sufficient physical capacity to satisfy any demand from third parties. Legally, third parties were entitled under Directives 91/440 and 95/19 in any event to gain access to infrastructures in the Member States.

37 The applicants consider that the Commission's conclusion that they were entitled to 100% of the hourly paths available for international trains, thereby excluding third parties from obtaining the hourly paths necessary for that transport category, was an error of fact which led the Commission to accompany the decision to exempt with conditions described by them as superfluous and disproportionate.

38 The Commission does not accept the arguments put forward by the applicants and the interveners and relies on a number of documents, some of which, it claims, indicate that the applicants and Eurotunnel split the market - a point which is not discussed in the context of this plea - whilst others indicate that tunnel capacity was shared equally between the shuttle services and international trains. As regards the alleged sharing of tunnel capacity the Commission makes particular reference to point III.1.c(ii) of the notification.

39 It also refers to points 3.1.1 and 3.1.2 of the memorandum of 20 September 1991 (see paragraph 8, above), which read as follows:

`3.1.1 Since the capacity of the tunnel is necessarily limited, the capacity had to be

divided between the two means of transport. According to the present repartition, neither the trains nor the shuttles may use more than 50%.
3.1.2 The 50/50 repartition was not established once and for all. If the experience shows that there is a great demand for one of the means of transport, its share of the capacity can be increased; see Article 6.2(1) of the contract.'
40 In the light of those sources the Commission considers that under the contract the half of the tunnel capacity not allocated to the applicants must be used for shuttles. Since the other half must be used for international trains and all the capacity for international trains is reserved for the applicants, other undertakings wishing to run international trains through the tunnel will be unable to obtain the necessary hourly paths.
41 It adds that even if the agreement did not so split the transport markets, so that other railway undertakings may still use Eurotunnel paths for international trains, the clause reserving 50% of tunnel capacity for the applicants for 65 years restricts competition in any event.
Findings of the Court
42 In the contested decision (paragraphs 73 to 79) the Commission first stated that there was a division of the transport market between Eurotunnel and the applicants, which undertook to concentrate on the market in shuttles and the market in international trains respectively. It found (paragraphs 86 to 103) that those restrictions on competition on the transport market met the four conditions necessary for obtaining exemption under Article 85(3) of the Treaty.
43 Next (in paragraphs 80 to 84 and 101 to 103) it found that in the so-called market in the provision of hourly paths for rail transport in the tunnel there were restrictions on competition which were not themselves eligible for exemption under Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement.
44 The way in which it evaluated the restriction of competition on that market resulting from the reservation to the applicants of 50% of the capacity is to be found in paragraphs 81 to 83 of the contested decision:
`(81) [...] the terms of the contract show that half of the capacity of the tunnel is reserved for shuttle services and the other half for international passenger and freight trains.
(82) Furthermore, BR and SNCF are at all times entitled to 50% of the capacity of the tunnel to operate international trains or actually 100% of the hourly paths available for that category of transport unless they surrender part of their entitlement. Under the terms of the contract, BR and SNCF do not undertake to buy 50% of the capacity of the tunnel but the managers of the infrastructure undertake to sell that capacity if the need arises.
(83) Accordingly, other railway undertakings cannot obtain from the managers of the infrastructure the hourly paths necessary to operate international trains carrying passengers or freight in competition with BR and SNCF.'
45 It is common ground that under Clause 6.2(i) of the contract the applicants are entitled to 50% of the tunnel capacity for the duration of the contract.
46 However, the applicants and Eurotunnel challenge the factual premisses set out in paragraphs 81 and 82 of the decision on which the Commission based its assessment

of the availability of tunnel capacity to other railway undertakings.
47 Thus all the parties to the contract have argued before the Court that, contrary to the statement in paragraph 81 of the decision, the contract nowhere provides for half of the tunnel capacity to be reserved for shuttles. As for the conclusion in paragraph 82, to the effect that the applicants are entitled to 100% of the hourly paths for international trains, that, too, is incorrect: Eurotunnel has expressly explained in both its statements in intervention and at the hearing that there is nothing in the contract to prevent capacity being made available to other railway undertakings wishing to operate international trains, by taking the paths necessary from its own capacity.
48 The first point to be made is that all the parties to the contract agree that the Commission misinterpreted the contract. It is possible, however, that the interpretation favoured by the applicants and Eurotunnel amounts in fact to an amendment of the contract subsequent upon the adoption of the contested decision, a modification which might lead the Commission to revoke its decision, but which could not lead to the annulment of the decision by the Court. Since the lawfulness or otherwise of a decision must be determined at the time of its adoption (see inter alia Case 40/72 Schroeder v Germany [1973] ECR 125, paragraph 14, and Joined Cases C-133/93, C-300/93 and C-362/93 Crispoltoni and Others v Fattoria Autonoma Tabacchi and Donatab [1994] ECR I-4863, paragraph 43), it is necessary to ascertain whether when the decision was adopted the Commission made an error of fact in finding that there had been a 50/50 division of tunnel capacity between shuttles and international trains, the capacity allocated to Eurotunnel being exclusively for shuttles and that to the applicants exclusively for international trains.
49 It is plain that no provision in the contract reserves, either expressly or impliedly, half of tunnel capacity for shuttle services and the other half for international passenger and freight trains, notwithstanding the statement in paragraph 81 of the decision that `the terms of the contract show' that such a division exists.
50 The Commission maintains that its interpretation of the contract is based on the wording of the notification and on a number of passages in Eurotunnel's memorandum of 20 September 1991 (see paragraph 8, above). It argues that the notification enables the parties to an agreement to communicate to it their interpretation of the nature and content of the contract. Accordingly, it considers that if the applicants were of the opinion that Eurotunnel's notification gave an inaccurate interpretation of the contract, they would not have approved the terms of the notification.
51 Point III.1.c(ii) of the notification to which the Commission refers (Case T-79/95, defence, paragraph 107; Case T-80/95, rejoinder, paragraph 36) reads as follows:
`The contract aims to achieve an equitable and practicable apportionment of the new infrastructure between, on the one hand, the markets for passenger and freight transport by train and, on the other hand, the market for the transport of accompanied motor vehicles by specially designed railed shuttle.'
52 Although that passage refers to `an equitable and practicable apportionment' of the tunnel it does not support the Commission's hypothesis that the contract provides for capacity to be shared equally between shuttle services and international train services.
53 As for the memorandum of 20 September 1991, its terms are not unequivocal, as is demonstrated by the fact that both the Commission and the applicants seek to rely

on passages in it to support their respective interpretations. Whilst the extract cited by the Commission (see paragraph 39, above) appears to bear out its interpretation it also makes it clear that `the 50/50 repartition was not established once and for all' and that it may vary according to demand.
54 During the administrative procedure conducted before the Commission, moreover, the applicants expressly drew the latter's attention to the fact that the contract did not reserve half of tunnel capacity for shuttles and the other for international trains, so that other railway undertakings would be able to use Eurotunnel paths to operate international trains.
55 In a letter from BR to the Commission dated 19 October 1994 (application in Case T-80/95, Annex 16), for example, there appears the following statement: `It is a fundamental misconception to consider for the purposes of Directive 91/440 and competition policy that the capacity of the tunnel available for the passage of through trains is limited to the capacity reserved by the contract that BR and SNCF made with Eurotunnel. It is the case ... that the contract puts us under obligations to pass the trains of other railway operators. But the contract in no way prevents Eurotunnel from making other capacity available to other railways operators and the contract does not give to BR and SNCF any right to oppose that course of action. For Eurotunnel to refuse to do so would no doubt be abusive.'
56 Similarly, in a letter from BR to the Commission of 25 October 1994 (application in Case T-80/95, Annex 16) the applicant in Case T-80/95 says: `There is a profound misunderstanding about the nature of the usage contract ... The usage contract does not in any way prevent third parties from entering the same market [as BR and SNCF]. It provides for BR and SNCF to pass the trains of other railways through the tunnel, as we are keen to do. But as well as that, there is nothing in the contract to stop Eurotunnel from giving access to third parties. The contract that Eurotunnel made with BR and SNCF secures us entitlement to only half the capacity'.
57 The letter sent by SNCF to the Commission on 19 October 1994 likewise contradicts the argument that the applicants were entitled to all the hourly paths for international trains (application in Case T-79/95, Annex 8):
`Eurotunnel ... disposant des autres 50% de la capacité du tunnel peut les utiliser soit pour son activité d'exploitation des services de navettes, soit pour satisfaire à sa tâche de gestionnaire d'infrastructure du tunnel, ... à savoir de satisfaire des demandes d'accès provenant d'entreprises ferroviaires tierces. En effet, Eurotunnel n'est soumise par les gouvernements français et britannique à aucune obligation d'utiliser un pourcentage déterminé de la capacité d'infrastructure en cause pour l'exploitation des services de navettes. Or, la flotte de navettes dont dispose potentiellement Eurotunnel ne requiert nullement l'intégralité des 50% qui sont la part d'Eurotunnel en vertu de la convention d'utilisation'.
(`Since Eurotunnel ... is entitled to the other 50% of tunnel capacity, it may use that either for running shuttles or to meet its obligations as manager of the infrastructure ... that is to say to meet requests for access from other railway undertakings. The French and British Governments have not placed Eurotunnel under any obligation to use a particular percentage of infrastructure capacity for shuttle services. The shuttle fleet which Eurotunnel will have available to it will certainly not require the full 50% which

is Eurotunnel's share under the usage contract'.)
58 Those extracts show that the statements made by all the parties to the contract in the course of the procedure before the Court to the effect that the points contained in paragraphs 81 and 82 are inaccurate as regards the facts (see paragraph 47, above) rely on an interpretation of the contract compatible with its own terms and with the notification of 2 November 1987 and, furthermore, are in accordance with the information provided by the applicants at the last stage of the administrative procedure before the Commission. The interpretation given by the applicants and Eurotunnel of their contract cannot therefore be regarded as a modification made after the adoption of the contested decision.
59 The Commission's statements in paragraphs 81 and 82 of the decision to the effect that half of the tunnel capacity is reserved for shuttle services and the other for international trains and that the applicants are entitled to all the capacity reserved for international trains are therefore vitiated by an error of fact.
60 The assessment in the contested decision (paragraphs 83 and 84) of the restrictive effects of the contract on competition is founded on that error. Thus, in its evaluation of those effects as regards other railway undertakings, the Commission failed to have regard to the possibility that Eurotunnel might still cede some of its own capacity to other undertakings wishing to run international trains through the tunnel.
61 The possibility for other railway undertakings to obtain hourly paths from Eurotunnel's capacity is a real one: the minimum shuttle service which Eurotunnel is obliged to operate under the concession contract (see paragraph 3, above) represents only 40% of its own capacity (paragraph 113 of Eurotunnel's statement in intervention in Case T-79/95 and paragraph 112 of its statement in intervention in Case T-80/95). Moreover, it was expressly stated at the hearing that Eurotunnel uses only 66% of its capacity at present.
62 As regards the Commission's argument that reserving 50% of capacity to the networks for 65 years is in any event a breach of Article 85(1) of the Treaty, it must be stated that even if that were to constitute a restriction of competition the fact remains that the Commission's assessment of the restrictive effects of the contract on competition as regards other railway undertakings in the contested decision was wrong.
63 The Commission's error of fact also influenced its assessment of the contract in the light of Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement. The decision states that `the reservation for BR and SNCF of all of the hourly paths available for international trains is not essential to them for the provision of their transport services and to contribute to the success of the project' (paragraph 102) and that it may, moreover, eliminate all competition (paragraph 103). In order to make the contract eligible for exemption the Commission deemed it necessary to impose conditions (paragraphs 102 and 103) in order to ensure that other railway undertakings could obtain hourly paths for the operation of international trans. Under the conditions set out in Article 2(A) of the decision the applicants may be obliged to cede up to 25% of the capacity reserved to them by Clause 6.2(i) of the contract.
64 If the Commission had correctly assessed the opportunities available to other railway undertakings to obtain the hourly paths necessary to run international trains

through the tunnel it might not have deemed it necessary to impose conditions on the applicants. Alternatively, it could have imposed conditions on both the applicants and Eurotunnel, which might have had the effect of enabling less onerous conditions to be imposed on the applicants than the current ones. However, since it is not for the Court to substitute its own assessment for that of the Commission in proceedings for annulment (see inter alia Case T-3/93 Air France v Commission [1994] ECR II-121, paragraph 113, and Case T-548/93 Ladbroke Racing v Commission [1995] ECR II-2565, paragraph 54), Article 2(A) of the decision, which imposes the disputed conditions on the applicants, must be annulled.

65 Those conditions constitute an essential part of the decision, inseparable from the remaining provisions. In accordance therefore with the applicants' main claims, the decision must be annulled in its entirety and it is not necessary to rule on the other pleas for annulment which were advanced.

(omissis)

On those grounds,

THE COURT OF FIRST INSTANCE

(Third Chamber, Extended Composition)

hereby declares:

1. Cases T-79/95 and T-80/95 are joined for the purposes of the judgment.

2. Commission Decision 94/894/EC of 13 December 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/32.490 - Eurotunnel) is annulled.

3. The Commission shall bear its own costs together with those of the applicants, including the costs relating to the applications for interim measures. It shall also bear the costs of the intervener European Passenger Services Ltd.

4. The United Kingdom of Great Britain and Northern Ireland, together with Channel Tunnel Group Ltd and France Manche SA (Eurotunnel), shall bear their own costs.

17.

European Commission Decision of 27 August 2003 relating to a proceeding pursuant to Article 82 of the EC Treaty of (COMP/37.685 GVG/FS)

(omissis)

A. INTRODUCTION

(1) This case was initiated by a complaint from the German railway undertaking Georg Verkehrsorganisation GmbH (hereinafter "GVG") against Ferrovie dello Stato SpA (hereinafter "FS"), the Italian national railway carrier. GVG complained that since 1995 FS had been refusing to provide access to the Italian infrastructure, to enter into negotiations for the formation of an international grouping and to provide traction. This prevented GVG from providing an international rail passenger service from various points in Germany via Basle to Milan.

(2) The Commission has come to the conclusion that by denying GVG access to the services in question, which are necessary for carrying out its business, FS has abused its dominant position within the meaning of Article 82 of the EC Treaty and Article 8 of Regulation (EEC) No 1017/68. Following the initiation of the Commission's

investigation, FS has given undertakings to the Commission that the abuse will be terminated and will not be repeated.

B. THE PARTIES

(3) GVG is a German railway undertaking which has been operating international rail passenger services on the basis of a national authorisation since March 1992. On 31 March 1995 it obtained from the Transport Ministry of the Land of Hessen a licence compatible with Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings(6) to operate passenger rail transport services. In 2000 GVG formed an international grouping with the Swedish State railways providing services between Malmö and Prague and Malmö and Berlin. In 2001 it operated more than 200 trains per year in the international passenger long-distance market from Germany to other European countries (Austria, France, Sweden, and eastern Europe).

(4) FS is the major Italian railway operator and a State-owned enterprise. During the 1990s, FS went through a restructuring process. On 22 December 1992, the company was established as the public limited company "Ferrovie dello Stato - Società di Trasporti e Servizi per Azioni" (FS SpA) under the supervision of the Ministry of the Treasury. On 4 March 1996, FS established separate business units for the network, rolling stock and traction, passengers and other activities. On 27 July 1998, these business units were transformed into free-standing divisions: the infrastructure division (FS Infrastruttura), the division for passenger transport (FS Passeggeri) and the division for freight transport (FS Cargo).

(5) On 13 July 2001, FS accomplished a restructuring process creating FS Holding SpA FS Holding controls two companies:

(6) Rete Ferroviaria Italiana SpA (RFI), which operates the network infrastructure on the basis of a 60-year management contract granted by the Transport Minister on 31 October 2000 (Decree No 138T); and

(7) Trenitalia SpA (Trenitalia), which carries on transport business on the basis of a licence to provide rail services granted by the Transport Minister on 23 May 2000 in accordance with Presidential Decrees No 277 of 8 July 1998 and No 146 of 16 March 1999.

C. THE SERVICE CONCERNED BY THE DECISION

1. AN INTERNATIONAL RAIL PASSENGER TRANSPORT SERVICE BETWEEN GERMANY AND MILAN

(8) GVG wants to provide an international passenger service from Germany to Milan and back. Its intention is to feed passengers originating in different cities in Germany, *i.e.* Karlsruhe, Koblenz and Mannheim, into Basle. It then proposes a non-stop ("Sprinter") rail link that would operate twice a day from Basle to Milan via Domodossola. Some of these passengers would continue their journey from Milan. Similarly, the train from Milan to Basle would take local passengers as well as beyond passengers (fed into Milan by existing FS trains). GVG wishes to cater in particular for business customers by offering a Basle-Milan connection which is up to one hour faster than existing links. Unlike GVG's non-stop service, the former operate with up to 14 stops between Basle and Milan. GVG also envisages providing additional services on the train.

(9) The attractiveness of such a service depends considerably on the time schedule.

Arrival and departure times in Basle have to be well connected with Deutsche Bahn AG (hereinafter "DB") Intercity trains which would provide feeder services for beyond traffic. Similar interconnection has to be ensured for beyond traffic in Milan. Moreover, the trains should depart with a sufficient time difference. The train paths envisaged by GVG would allow its trains to depart with a time difference of about two hours. In addition, in order to ensure the shortest possible travelling time, there has to be a good connection at Domodossola. The train paths requested by GVG in 1998 can be taken by way of illustration(7). They would allow for the services as set out in the table below and a seven/eight-minute stop in Basle Bad to catch the Intercity to/from Germany(8):

>TABLE>

>TABLE>

(10) FS and the Swiss railway undertaking Schweizer Bundesbahn (hereinafter "SBB") provide a cooperative rail passenger transport service from Basle to Milan. They operate seven trains daily via Chiasso(9) and three trains a day via Domodossola(10). Apart from that, the Italian-Swiss undertaking Cisalpino, in which FS holds 50 % (the other half being shared between SBB and the Swiss BLS Lötschbergbahn (hereinafter "BLS")) operates one daily service via Domodossola(11). These services are not provided on the basis of a public service obligation or under a public service contract(12).

2. REQUIREMENTS FOR THE SERVICE

2.1. LICENCE

(11) In order to provide a cross-border rail transport service, a railway undertaking first needs a licence. The conditions for granting licences to railway undertakings in the European Union have been harmonised by Directive 95/18/EC, which was transposed in Italy by Decree No 146/1999 with a two-year delay on 23 July 1999.

2.2. INTERNATIONAL GROUPING

(12) At the present stage in EU rail liberalisation, the only way a railway undertaking from one Member State can obtain access to the rail passenger transport market of another Member State for the provision of international passenger transport services is by entering into an "international grouping". An international grouping is defined by Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways(13) as an association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States. According to Article 10(1) of Directive 91/440/EEC, international groupings must be granted access and transit rights in the Member States of their constituent railway undertakings as well as transit rights in other Member States. As shown in recital 128, it is the Commission's view that Article 10(1) of Directive 91/440/EEC has direct effect.

(13) Directive 91/440/EEC was implemented in Italy only after a five-year delay by Decree No 277/1998, which entered into force on 8 July 1998. However, even before the transposition of Directive 91/440/EEC, there was no legal obstacle under Italian law for FS to enter into an international grouping with a railway undertaking of another EU Member State for the purpose of providing international rail services(14).

2.3. ACCESS TO INFRASTRUCTURE

(14) The railway undertaking also needs to be provided with infrastructure capacity,

i.e. a certain time slot on the tracks of the railway networks on which it wishes to provide the cross-border service. Access to the infrastructure includes a number of different services and actions that take place at different points in time. In particular the following elements are important: information regarding the availability of train paths and related prices; the handling of requests for capacity; the permission to use track capacity; train control, including signalling, regulation and the provision of information on train movement; access to refuelling facilities; access to passenger stations; access to marshalling yards; access to storage sidings; and access to maintenance and other technical facilities(15).

(15) Some of these services need to be made available to a railway undertaking before it takes a formal decision to start a service. This holds in particular for the provision of all relevant technical information concerning the allocation of train paths, the reservation of a particular train path and information concerning infrastructure tariffs. Only on the basis of such information and the reservation of the necessary train path can the potential entrant establish a business plan. Based on the latter, the potential entrant takes its entry decision, which, if it is positive, then leads to a start of negotiations with potential partners.

(16) By contrast, some other infrastructure services, for instance access to refuelling facilities or passenger stations, may only become necessary after negotiations with partners are finalised and the operation of the planned service begins.

(17) Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees(16) defines the principles and procedures to be applied in that regard. It was transposed in Italy by Decree No 146/1999 with a two-year delay on 23 July 1999. According to Article 3 of the Directive, Member States must designate an allocation body which has to ensure that railway infrastructure capacity is allocated on a fair and non-discriminatory basis. It also has to ensure that the allocation procedure allows effective use of the infrastructure.

(18) Article 3 of Decree No 146/1999 provides that the use of the railway infrastructure, already regulated by Presidential Decree No 277/1998, is to be granted on condition that each railway undertaking proves that it possesses a licence and a safety certificate and that it has concluded the necessary administrative, technical and financial agreements with regard to the allocation of capacity. The infrastructure manager is to issue the safety certificate.

(19) Pursuant to Decree No 277/1998, FS (RFI) has been assigned the task of the infrastructure manager and the role of the allocation body. According to Article 4 of Decree No 277/1998, the infrastructure manager is responsible for monitoring the circulation of rolling stock and for the maintenance of the railway infrastructure.

(20) Before the entry into force of Decree No 277/98, FS had an exclusive concession to operate the Italian railway infrastructure and to provide rail transport services on the basis of Article 1 read in conjunction with Article 2 of Decree No 225-T of 26 November 1993(17). On that basis, in cooperation with the Ministry of Transport, FS was itself responsible for defining the conditions of access to the railway infrastructure(18).

(21) Already before Directives 95/18/EC and 95/19/EC were transposed in Italian law, as the infrastructure manager, FS was entitled on the basis of Article 8 of Decree No 277/98 to grant access to the network, either directly or through an international

grouping, and to issue safety certificates to other railway companies.

2.4. ACCESS TO INTERNATIONAL TRAIN PATHS

(22) The provision of international rail transport services requires the coordination of train paths on the national railway networks. Such coordination is carried out by European railway companies in the working groups of Forum Train Europe (hereinafter "FTE"). During such meetings, railway companies discuss the time schedules of services to ensure that rolling stock and infrastructure capacity are available. Three meetings a year are organised on a regular basis(19). Railway companies wishing to provide international services make requests for train paths to the respective allocation bodies. Train paths are reserved on a temporary basis. If they are not taken up within a certain period of time the reservation is cancelled and a new request has to be made during the following FTE meeting. Before the train path can actually be used for a particular service, the allocation body has to verify whether the necessary technical and safety requirements for the rolling stock are fulfilled.

(23) Until 1998, only national railway undertakings were permitted to participate in the FTE meetings. As a result, as a private railway undertaking GVG was prevented from participating directly in the slot allocation process for international train paths. It could only become a member of FTE on 1 April 1998. Until then it had to make its requests for train paths in other EU Member States through the German national railway undertaking, DB.

2.5. SAFETY CERTIFICATE

(24) Pursuant to Article 11 of Directive 95/19/EC, the railway undertakings in the international grouping must have a safety certificate to ensure safe service on the routes concerned. In order to obtain the safety certificate, the undertaking must comply with relevant regulations under national law. In Italy, according to Article 5 of Decree No 277/98(20), the Ministry of Transport determines the relevant standards and regulations on the basis of a proposal made by the infrastructure manager. As the infrastructure manager, FS (RFI) grants the safety certificate to railway undertakings and international groupings.

2.6. TRACTION

(25) In order to be able to provide a rail transport service, a railway undertaking needs to have traction - *i.e.* a locomotive and a driver - to move the train on the network(21).

(26) At this stage in the process of liberalising the rail transport sector in the EU, there are a number of technical, legal and economic barriers to the provision of traction for international rail transport services. For a century and a half, European railways have developed within national boundaries. Each national railway has adopted its own technical and administrative standards according to national requirements. As a result, there are 15 different national signalling systems and five different systems for electricity supply (voltage). National systems differ in their operating procedures, length of passing tracks, safety systems, driver training and route knowledge. The fact that different technical standards continue to exist has prevented interoperability in the European market for rail services. Therefore, unless they are equipped with multiple technology, locomotives have to be changed at borders. Similar barriers also exist for drivers, who need route knowledge, a national licence and language skills. To provide traction for international services by itself, a railway undertaking would have to set up

separate locomotive and driver pools in every Member State where it wishes to operate.

D. BACKGROUND

(27) Nothing in Italian legislation before or since the transposition of the relevant Community legislation prevented FS from granting access to the railway infrastructure or from setting up an international grouping with or providing traction services to a railway undertaking established in another Member State. On the contrary, several provisions of Italian law imply that FS should be proactive in the provision of access to the infrastructure. For instance, according to Article 5 of Decree No 277/98, as the infrastructure manager, FS (RFI) has to offer rail transport undertakings access to the network with a view to using its capacity to the maximum.

(28) On 17 January 1992, GVG wrote to FS to request information on the costs of access to the Italian rail network for the purpose of providing a passenger transport service, infrastructure access costs and traction costs. The Commission has no confirmation of any reply from FS to this letter. Since 1995, GVG submitted bids to FS for a train path(22) between Domodossola and Milan and related information as well as for the formation of an international grouping via DB in the FTE(23). Similarly, GVG requested SBB to offer train paths between Basle and Domodossola.

(29) As of June 1996, SBB offered GVG the requested train paths on Swiss territory. By way of comparison, on 28 January 1997, DB informed GVG in writing that "in spite of concerted attempts made by SBB" no response could be obtained from FS(24). DB Geschaeftsbereich Netz (DB Netz) has confirmed that between 1995 and 1997 its staff had discussions with FS and SBB during three FTE sessions concerning GVG's project(25). DB furthermore confirms that during the discussions it had with FS between 1995 and 1997, it had informed FS that GVG intended to carry out this train service on the basis of Directive 91/440/EEC and to set up an international grouping on the basis of that Directive.

(30) After GVG joined FTE on 1 April 1998, it was able to make its own requests. Since that date, GVG had contacts with FS concerning its requests during all FTE meetings. At least since December 1998, GVG also requested FS to provide traction for its planned rail passenger service(26).

(31) On 27 November 1998, FS replied for the first time in writing, pointing out that it would provide information (on timetables, infrastructure charges, etc.) only after GVG had presented documents showing that it had entered into an international grouping, that it possessed a safety certificate in Italy and that it had a licence in conformity with Directive 95/18/EC(27).

(32) According to the minutes of an FTE meeting on 20 August 1999, GVG, FS, SBB and BLS met to discuss GVG's project. It is noted that GVG made a bid for a train path(28) and asked for the formation of an international grouping between FS and GVG on the basis of Directive 91/440/EEC. This request was then repeated by GVG during all subsequent FTE meetings.

(33) On 25 October 1999(29), GVG lodged its complaint with the Commission, arguing that FS had abused its dominant position by not providing the requested information regarding access to the network and by not entering into an international grouping. Thereafter, GVG continued to make requests to FS regarding traction and the formation of an international grouping. It also continued requesting a train path

and related information during various meetings of the FTE.
(34) On 2 and 3 December 1999, GVG wrote to FS complaining that at all FTE meetings in the past five years it had asked FS to enter into an international grouping in order to operate its train from Basle to Milan without having received any reply from FS. GVG also reiterated its request for information regarding the train path from FS (Infrastruttura).
(35) On 27 October 2000, FS published the network information manual that sets out the criteria, procedures, conditions and fees for access to the Italian railway network. On 13 December 2000, FS offered train paths to GVG without, however, specifying the price to be paid for them. GVG refused the paths because they would not have allowed it to provide the service as envisaged and they did not permit connection with train paths already offered by SBB(30).
(36) During the FTE A meeting (see footnote 19) in January 2002, FS provided GVG with information for the first time, including the price for a train path between Domodossola and Milan. However, given the fact that at that point FS did not offer a particular train path, the price was an estimate and therefore no more than indicative.
(37) In its defence, FS has argued that it was not obliged to respond to GVG's requests since they were unclear, and since they related only to train paths and occasionally to traction but not to the establishment of an international grouping.
(38) It should, however, be noted that GVG had written to FS already in 1992 informing the latter about its interest in operating an international passenger transport service and requesting related information. FS's assertions conflict with DB's confirmation to the Commission that between 1995 and 1997 its staff had discussions with FS and SBB during three FTE sessions concerning GVG's project, that it had informed FS that GVG wanted to carry out this train service on the basis of Directive 91/440/EEC and that GVG requested to enter into an international grouping. Moreover, a DB report on the FTE meeting in La Rochelle in 1996 remarks that GVG requested train paths from SBB, BLS, FS and SNCF. SBB, BLS and SNCF replied to the requests(31). The report notes that, with regard to GVG's project for a train on the Basle-Milan route, SBB was responsible for coordinating with FS. In spite of repeated requests made by SBB, no reply was forthcoming from FS. Thus, among the various railway companies to which GVG made requests, only FS did not react. In addition, FS's view was not shared by SBB, which on the basis of GVG's bid entered into negotiations with GVG and provided a train path as well as related information from 1996 onwards.
(39) It is also noted that even during the period between August 1999 and August 2002, during which FS has acknowledged that it was aware of GVG's requests, it did not enter into negotiations for the conclusion of a traction or an international grouping contract.
(40) It is therefore concluded that since September 1995 FS knew of GVG's firm intention to provide an international passenger service from Basle to Milan on the basis of Directive 91/440/EEC and that at least since August 1999 it was informed of GVG's request to enter into an international grouping with FS. GVG repeated this request in writing to FS, in its complaint to the Commission and at all FTE meetings. Furthermore, FS has been aware at least since December 1998 that GVG wanted it to provide traction for this service.

(41) During the FTE B meeting on 16 May 2002, FS (RFI) undertook to provide GVG with a reply to its request for train paths. On 24 July 2002 FS (RFI) offered specific train paths to GVG between Domodossola and Milan. However, by that time SBB had withdrawn its offer for the corresponding train paths between Basle and Domodossola as they had been taken up for another rail transport service. During the FTE A meeting on 23 January 2003, FS (RFI), GVG, SBB and DB further discussed GVG's project(32). GVG entered a new request for train paths on this route. However, so far FS (RFI) and SBB have not been able to make a suitable offer.
(42) On 2 August 2002 FS (Trenitalia) expressed its willingness to enter into an international grouping with GVG and to provide traction to the latter. On 27 June 2003, FS (Trenitalia) and GVG signed an international grouping agreement and agreed on the terms of the traction contract.
E. COMPLAINT AND SUBSEQUENT PROCEDURE
(43) On 25 October 1999, GVG lodged its complaint against FS arguing that the latter had abused its dominant position by refusing to grant GVG access to the Italian railway market.
(44) On 22 June 2001, the Commission sent a statement of objections to FS. At this preliminary stage, the Commission had come to the conclusion that FS had abused its dominant position on the upstream markets. It had prevented GVG from gaining access to the infrastructure by refusing to provide information to GVG and it had refused to provide traction. Finally, FS had abused its dominant position by refusing to enter into an international grouping with GVG. By doing so, FS had eliminated all competition on the downstream market of passenger transport by rail.
(45) Following FS's written reply to the statement of objections, on 30 October 2001 a hearing took place. While recognising that in principle it could have provided technical information to GVG, FS argued that due to its internal reorganisation it was not yet ready to do so. As Directive 91/440/EEC had started a process of gradual liberalisation, the application of competition rules to the sector should have been temporarily suspended until the process of restructuring national railway companies was completed. FS furthermore argued that GVG did not depend on FS for the provision of traction and that no obligation existed for FS to enter into an international grouping.
(46) Following the hearing, the Commission undertook further fact-finding in order to verify the assertions made by both parties during the hearing.
(47) On 6 December 2002, FS offered the commitments attached to this Decision. FS (Trenitalia) offers to enter into international grouping agreements with other EU railway companies under the condition that the latter have a licence in accordance with Directive 95/18/EC and that they present a reasonable project for the operation of rail transport services in Italy(33). As discussed in more detail in recitals 160 and 161, it has also offered to provide traction services on the Italian network to railway companies providing international passenger services.
F. RELEVANT MARKETS
1. THE RELEVANT UPSTREAM MARKETS
(48) Two upstream markets can be identified: the market for access to the infrastructure and the traction market.
1.1. MARKET FOR ACCESS TO THE INFRASTRUCTURE

The product market
(49) The Court of First Instance has considered that there is "a market for access to and management of railway infrastructure"(34). In addition, EU directives, as transposed into Italian law, have established to whom and under what conditions infrastructure capacity can be sold. Directive 91/440/EEC establishes a right of access to the infrastructure for international groupings. In Italy, FS (RFI) sells network capacity to transport service providers such as FS (Trenitalia), Cisalpino, Rail Traction Company (hereinafter "RTC") and Ferrovie Nord Milano SpA (hereinafter "FNME"). It follows that providing access to the railway infrastructure is a discrete market capable of separate delineation.
The geographic market
(50) In order to provide its rail passenger service from German cities, as mentioned above, to Milan via Basle, GVG needs access to the Italian network between Domodossola and Milan. Thus, from the demand side, the relevant geographic market is an intercity railway path in Italy which is connected to the Swiss railway network and which allows GVG to run its train from Basle to Milan, *i.e.* the Domodossola-Milan segment. Trains originating in Basle may also pass via Chiasso and via France. However, these other routes do not offer an alternative for GVG, as they would mean a longer travelling time. In any case, as FS (RFI) operates the only long-distance rail network in Italy any other possible connection between Basle and Milan would also imply that GVG has to rent network capacity from FS (RFI).
1.2. TRACTION MARKET
The product market
(51) Traction is defined as the provision of a locomotive and driver. This includes the ancillary service of a locomotive and driver back-up. In principle, traction can either be provided in-house, *i.e.* by GVG or its partner in the international grouping using their own personnel and locomotives, or traction can be rented from other railway companies.
(52) The provision of traction is linked to a specific rail transport service on the downstream market. In this case it is a passenger rail transport service from Basle to Milan via Domodossola. As the traction is provided with a view to carrying out this particular transport service, certain requirements have to be fulfilled by the traction supplier. In particular, the traction supplier has to provide a locomotive at a certain location (here: Milan/Domodossola), at a certain point in time (before the departure of the train) and for a certain time period (until the specific transport service is terminated). In the case of a scheduled train service, such as GVG's planned service between Basle and Milan, traction has to be provided on a regular basis (daily). The locomotive has to meet certain quality requirements (such as minimum speed) and it has to be fully operational. In this particular case, GVG requires an electric locomotive capable of speeds of at least 160 km/hour.
(53) A contract for traction must, if it is to be meaningful, include whatever back-up is necessary to ensure reasonable certainty in terms of punctuality, reliability and continuity of the service. Such back-up would need to include the maintenance and repair of the locomotive as well as the provision of a replacement locomotive, if necessary. With regard to the driver, the traction supplier has to ensure that the driver has the

necessary licence and the route knowledge for the specific service. As in the case of the locomotive, the driver has to be provided at a certain location, a certain point in time and for a specified duration. A back-up requirement exists also for the driver.
(54) The market for traction is different from the market for the renting or purchasing of locomotives. Traction services can only be provided by railway companies, as they have a licence to do so. Locomotives can be rented or purchased from railway companies or from manufacturers. The renting or purchasing of a locomotive is not a substitute for traction as it concerns only the provision of rolling stock. Traction instead includes also the provision of a driver, maintenance and repair services and the back-up. These additional elements are necessary to ensure the continuity of a scheduled passenger transport service.
(55) In recent years, a readily identifiable traction market has developed in various Member States. In the UK, for instance, British freight train operators EWS, Freightliner, GB Railfreight and DRS provide Network Rail with traction for infrastructure trains. In Germany, DB and other private railway operators provide traction on a commercial basis to each other and to "private wagon owners" for passenger transport, and DB has provided traction to the GVG/SJ international grouping. On the basis of bilateral agreements and International Union of Railways (UIC) rules(35), national railway companies provide each other with traction for cross-border and "penetration" services(36). SNCF provides traction services on the French railway network for international passenger charter services of foreign railway companies and private wagon owners, and to DB for its "Autoreisezug"(37) on routes from Germany to Avignon, Fréjus, Narbonne and Bordeaux. Société Nationale des Chemins de Fer Belges (SNCB) provides traction on the Belgian railway network for the passenger night train operated between Paris and Amsterdam by SNCF and Nederlandse Spoorwegen (NS).
(56) Similarly, based on UIC rules, FS (Trenitalia) regularly provides traction services to foreign railway companies. It provides traction, for instance, to SNCF for passenger transport from Milan and Turin to Lyon(38). On 13 different routes between Germany and Italy, DB regularly operates train services with its "Autoreisezug". FS (Trenitalia) provides traction and ancillary services to DB on the Italian network for a price of [...](39) and wagon. According to the contract between the parties, such services comprise a volume of at least [...] per year. In 2000 and 2001, FS (Trenitalia) provided traction for the Overnight Express which operated six nights a week between Amsterdam and Milan. The Overnight Express was a combined passenger/freight train which consisted of approximately five passenger wagons and seven freight wagons(40). FS (Trenitalia) also provides traction services to private wagon owners in Italy and to Intercontainer and European Rail Shuttle for international container transport services to Milan. In May 2001, FS (Trenitalia) provided traction to GVG for a passenger transport service from Chiasso to Monte Carlo.
The geographic market
(57) In all EU Member States, the locomotive has to comply with national technical standards and the crew (driver) needs special qualifications/training to be permitted to drive on the national railway network. For this particular service, neither the locomotive nor the crew of railway undertakings of another Member State can be used to provide traction in Italy. As a result, GVG can only rent traction from an undertaking

that operates in Italy, *i.e.* which has locomotives and drivers that fulfil Italian technical criteria.
(58) Further, in order to provide back-up, the traction provider needs to be able to call upon a pool of locomotives at reasonably short notice in the event of technical failure. This means that the pool has to be sufficiently close to the Domodossola-Milan route, otherwise the time and cost incurred in providing the replacement locomotive will be disproportionate. The relevant geographic market is therefore confined to the region of Milan.
3. INTERNATIONAL RAIL PASSENGER TRANSPORT MARKET
The product market
(59) In air transport decisions, supported by case-law, the Commission has developed the point-of-origin/point-of-destination (O & D) pairs approach(41) for passenger transport services. This principle applies irrespective of the transport mode chosen by the individual passenger. GVG proposes to provide a rail passenger service from several German cities like Karlsruhe, Koblenz and Mannheim to Milan via Basle. Each of these routes can therefore be considered to be a relevant market on its own.
(60) In transport, under certain conditions passengers may consider air travel, high-speed rail travel, coach and car travel to be interchangeable modes of transport. This depends on the concrete characteristics of the service, for instance the travelling time. In this particular case, other transport modes such as car, coach or air transport, do not offer an alternative from the customer's point of view for the planned rail transport service for the reasons set out in recitals 61 to 67(42).
(61) GVG's proposed "Sprinter" service from German cities to Milan via Basle is directed toward business customers from Germany. The main advantage for the latter would arise from the shorter travelling time, since GVG's point-to-point service aims to be at least one hour faster than existing trains. GVG also plans to provide additional services for business customers on the train. For such customers, car and coach transport do not offer a valid alternative. For traffic between Karlsruhe, Koblenz and Mannheim to Milan, there is no scheduled coach service.
(62) In its written reply to the statement of objections, FS argued that the overall journey time of GVG's planned service would be more or less identical to the service operated by Cisalpino and not much shorter than that of traditional services, inter alia because the particular line does not allow a speed of 160 km/h to be exceeded. GVG's planned train would therefore not offer a new service for the customer. This assertion is not correct, as GVG's service is addressed mainly to passengers who are fed into Basle from Germany. For a comparison of travelling time for this group of passengers between GVG's train and existing connections it is important to consider two elements. The first element is the travelling time between Basle and Milan and the second element the interconnection with feeder trains from and to places in Germany.
(63) GVG's schedule, as set out in recital 9, does not require the train to operate at a higher speed than 160 km/h. The shorter travelling time of GVG's service in comparison with traditional services results in particular from the fact that GVG's planned train is a non-stop service. Existing trains operate with 14 stops between Basle and Milan. GVG's planned schedule furthermore saves time in comparison with existing connections due to a shorter stop in Domodossola for the exchange of locomotives.

(64) In comparison with the Cisalpino, for passengers from and to places in Germany, the main advantage of the planned GVG train is the interconnection in Basle. The Cisalpino operates in Basle from the "Basle SBB" railway station. Trains from Germany arrive in the Basle Bad railway station. Cisalpino passengers therefore have to transfer from one railway station to the other, which takes about 30 minutes. By way of contrast, GVG's train would operate directly into Basle Bad where, as set out in recital 9, passengers would have a connecting Intercity train to Germany within seven to eight minutes. More importantly, Cisalpino's departure time in Basle of 6.17 is too early for passengers who start the journey in cities like Koblenz, Karlsruhe or Mannheim. Such passengers would have to come to Basle the day before to catch the Cisalpino in the morning. Similarly, the Cisalpino from Milan arrives in Basle only at 21.44. The only possible connection is then a regional train from Basle Bad at 23.33 (which is slower than the Intercity train). As a result, for passengers taking the Cisalpino the overall travelling time to Germany would be almost three hours longer than with the planned GVG train.
(65) GVG's train offers a transport service that, if at all, is comparable only to a car transport service provided by a chauffeur. Car travel cannot be considered to be a transport service if the passenger drives the car himself. Moreover, the quality of transport differs considerably between the two transport modes(43). Trains enable congestion problems on the road to be avoided. It is possible to work on the train while it is difficult to do so in a car even if one has a driver. In addition, the estimated travelling cost would be significantly higher for the use of the car(44). On the other hand, the car offers more flexibility than the train, as regards the departure time and mobility after arrival. Thus, with regard to the present route, car and rail transport offer substantially different quality elements and therefore cannot be considered to be close substitutes on this market.
(66) Similarly, there are considerable quality differences between travelling by train and by aircraft. GVG aims to feed passengers into Basle from cities in Germany which either do not have an airport nearby or where no direct flights to Milan are available. If they wish to fly, passengers from such a place of origin would first have to travel to the airport. Thereafter they have to take the aircraft while changing to a bus or train to travel from Malpensa airport to the city centre of Milan(45). The frequent changes between the bus and the plane and the need to check in and to pass through controls at the airport cause numerous disruptions which prevent the traveller from working while travelling.
(67) In the case of point-to-point traffic between Basle and Milan, a price comparison demonstrates that transport by air and rail belong to different markets. A return ticket on the Cisalpino in the first and second class cost EUR 310 and EUR 194 respectively. On the same day, the corresponding price for a business class and economy class ticket on a direct flight offered by Swiss amounted to EUR 811,87 and EUR 749,14 respectively(46). Thus, air transport is at least about 2,6 times more expensive than existing train connections. On the other hand, in most cases the estimated travelling time of air transport is significantly shorter than the travelling time by train. In this particular case, between Basle and Milan the Cisalpino takes about four hours, 30 minutes. By way of comparison, if one takes into account the time needed to travel to and from

the airport as well as check-in, air travel between the two cities may take about three hours(47). Thus, from the standpoint of the passenger, in this case train and air transport services cannot be regarded as substitutable due to their different characteristics, prices and intended use.

The geographic market

(68) It follows that for the relevant bundle of routes from Germany to Italy, *i.e.* Karlsruhe, Koblenz and Mannheim to Milan, transport by rail is not interchangeable from the customer's point of view and, as a result, the relevant downstream market in this case is rail passenger transport between the abovementioned German cities and Milan.

Access to the market

(69) As set out in recital 12, a particularity of the European rail passenger market is the legal requirement to form an international grouping for the provision of international passenger rail services. Article 10(1) of Directive 91/440/EEC establishes access and transit rights for international groupings to provide international rail transport services. Article 10(3) requires that such international groupings conclude the necessary administrative, technical and financial agreements with the infrastructure managers with a view to regulating traffic control and safety issues.

(70) Only after having concluded an international grouping with a railway undertaking established in Italy can GVG provide its service from Germany to Milan. Like access to the infrastructure, conclusion of the international grouping agreement is therefore a precondition for entering the market. However, while access to the infrastructure is to be provided by infrastructure managers, the international grouping agreement is to be concluded with railway undertakings which provide transport services. As argued by FS in its written reply to the statement of objections(48), it is therefore considered that the formation of an international grouping relates to the passenger rail transport market.

(71) It follows from the judgment of the Court of First Instance in the ENS case(49) that there is no specific mandatory form for an international grouping(50). In particular, an international grouping does not have to take the form of a traditional joint operation agreement in the railway sector. It also follows from that judgment that it is not unusual for railway undertakings to enter into agreements solely aimed at conferring a contractual right of access to the railway infrastructure in the other railway undertaking's Member State, without necessarily also entering into other commercial agreements concerning the joint operation of services(51). Such agreements also fall under the definition of "international grouping" as they constitute an "association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States". The concept of an international grouping is therefore anything between a fully fledged commercial agreement under which the parties share risk more or less equally and an agreement under which parties only confer access rights to each other pursuant to Directive 91/440/EEC(52) without bearing any commercial risk.

G. DOMINANCE

1. FS AS AN UNDERTAKING

(72) Until July 2001, FS was a single undertaking responsible for the operation of the railway infrastructure and the provision of transport services.

(73) On 13 July 2001 FS accomplished a restructuring process to become a holding company. Within this holding company, as legally independent subsidiaries, FS (Trenitalia) is responsible for transport services, rolling stock and traction, and FS (RFI) is responsible for the operation of the infrastructure.
(74) There has been a clear continuity of behaviour on the part of FS and its subsidiaries before and after separate entities were established in July 2001. As set out in recitals 30 to 40, at least since December 1998 and since August 1999 FS and its subsidiaries have been aware of GVG's request to enter into negotiations as regards traction and an international grouping contract respectively. Until August 2002, neither before nor after the restructuring did FS or its subsidiary Trenitalia enter into such negotiations. Similarly, for the period between September 1995 and July 2002, neither FS nor its subsidiary RFI offered specific train paths to GVG. Moreover, the FS holding company and the FS subsidiaries have taken an identical position on this case. While the statement of objections issued on 22 June 2001 was addressed to FS, a joint written response was provided by FS and its subsidiaries Trenitalia and RFI on 16 October 2001.
(75) Thereafter, in relation to this case, FS (Trenitalia) has dealt with all issues related to traction and the international grouping while FS (RFI) has been responsible for issues related to the access to infrastructure. FS has not argued that it is not responsible for actions taken by its subsidiaries with regard to this case.
(76) Also after the restructuring, FS can be considered to be one undertaking within the meaning of the EC Treaty. The FS holding company holds 100 % of the shares of its subsidiaries Trenitalia and RFI. Moreover, a joint economic interest exists between the holding company and its subsidiaries. All three undertakings operate in the same industrial sector and action taken by one subsidiary can have an important effect on the performance of the other subsidiary, thereby affecting the profitability of the FS holding company as a whole. On the one hand, FS (Trenitalia) is by far the most important customer of FS (RFI). On the other hand, as the infrastructure manager, FS (RFI) plays an important role in deciding whether and to what extent potential competitors of FS (Trenitalia) gain access to the infrastructure and therefore whether they can enter the market. As the holding company and its subsidiaries are all owned by one and the same shareholder, the latter has an interest in ensuring that behaviour within the FS holding company is sufficiently coordinated.
(77) Such coordination is ensured mainly vertically, as the FS holding company owns the entire share capital of RFI and Trenitalia. It is in a position to exert a decisive influence on RFI's and Trenitalia's policy. According to FS's annual report 2001, the FS holding company is responsible for setting strategic policy and management direction for its subsidiaries such as RFI and Trenitalia. It is ultimately responsible to the shareholder for the group's success(53). There is a consolidated annual balance sheet which aggregates the profits/losses of its various subsidiaries.
(78) As the holding company is responsible for the definition and implementation of the undertaking's overall policy, it can be held liable for the behaviour of its subsidiaries RFI and Trenitalia. As stated by the Court of Justice in Stora(54): "On several occasions the Court of Justice has held that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its

own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company"(55).
(79) The fact that RFI and Trenitalia both belong to the same holding structure gives them common interests as a consequence of which they cannot be seen as "legally, administratively and structurally" unrelated to each other(56).
(80) FS is an undertaking within the meaning of Article 82. It provides rail transport services on a commercial basis. In addition, FS has been assigned certain regulatory functions in its role as the infrastructure manager and allocation body. Due to this role, FS (RFI) acts as the supplier of infrastructure capacity on the market for access to the infrastructure. This is a commercial activity. Moreover, as the infrastructure manager and allocation body, FS determines the procedures and conditions under which suppliers of rail transport services carry out their activities. Thus, the provision of rail infrastructure facilities by FS contributes to the performance of a range of services of an economic nature and so forms part of its economic activity(57). Consequently, FS is an undertaking within the meaning of Article 82 of the EC Treaty also when exercising its infrastructure management and allocation functions.
(81) It is therefore concluded that FS is liable for the behaviour of its subsidiaries FS (RFI) and FS (Trenitalia) also after the restructuring.
2. DOMINANCE ON THE RELEVANT UPSTREAM MARKETS
2.1. DOMINANCE ON THE MARKET FOR ACCESS TO INFRASTRUCTURE
(82) FS has a statutory monopoly to operate the Italian railway infrastructure. In addition, in its role as the infrastructure manager and the allocation body, FS (RFI, formerly Infrastruttura, see recital 4 of this Decision) is responsible for establishing and maintaining the Italian railway infrastructure and assigning train paths to railway operators in Italy in return for a fee. Therefore, in view of its position, only FS can sell train paths on the Italian railway network to GVG in order to enable the latter to operate on the Domodossola-Milan route.
(83) The Court of Justice has held(58) that Article 82 applies to an undertaking holding a dominant position on a particular market even where that position is due not to the activity of that undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.
(84) There is no alternative infrastructure which GVG could use to provide the planned rail passenger transport service. Apart from FS, there are regional railways that operate local networks assigned to them via a concession. These regional railway companies can grant access to such local and regional networks. However, regional railways only operate on specific connections, occasionally using sections of the FS network as connecting track. Regional networks do not have intercity links. It would therefore not be possible for GVG to provide its service by using local and regional railway networks in Italy.
(85) FS is dominant on the entire Italian intercity railway infrastructure. This includes the Domodossola-Milan segment.
2.2. DOMINANCE ON THE TRACTION MARKET
(86) In this particular case, traction requires an electric locomotive that can operate at a speed of at least 160 km/hour and which has type approval to operate on the Ital-

ian network. A further prerequisite for safety certification is that the drivers need the necessary language skills and the route knowledge for the Domodossola-Milan sector.
(87) In principle, to operate on the Domodossola-Milan route, GVG could either obtain traction from an Italian railway undertaking or it could provide traction by itself. In the latter case it would have to set up its own locomotive and driver pool in Italy or shop around for the different elements, *i.e.* the locomotive, the driver and the back-up, from various sources.
2.2.1. Traction provided by other railway operators
(88) Apart from FS, other railway companies offering long-distance services in Italy are restricted to freight transport. The small new entrants into the Italian railway market, like RTC and FNME (see recital 49), are the only Italian railway companies which, on the basis of their own locomotive pools, could in principle provide traction to GVG. However, according to the Commission's investigation, they are not equipped to provide traction services for GVG's planned service. To the extent that they have suitable locomotives at all, they lack the necessary spare capacity to provide such a service(59).
(89) No non-Italian railway undertaking is in a position to provide traction to GVG. SNCF owns 60 BB 36000 locomotives which have the necessary type approval to operate in Italy. However, these locomotives do not fulfil the technical requirements for GVG's services as they are only authorised for freight transport services and for a maximum speed of 120 km/h. SNCF also does not have drivers who could operate on the Italian railway network and have the necessary route knowledge.
(90) By way of contrast, as stated in recital 56, FS has already provided traction services to SNCF, DB and GVG. It has sufficient spare capacity to provide traction for GVG's planned service(60).
(91) In the light of the foregoing, it can be concluded that for the time being only FS could provide the right sort of traction to GVG on the Domodossola-Milan route. It is therefore clearly dominant on the traction market.
2.2.2. Traction being provided by GVG itself
(92) The Commission has investigated whether GVG could provide traction by itself on the basis of renting locomotives, drivers and back-up or by purchasing locomotives.
2.2.2.1. Renting of locomotives, drivers and back-up
(93) On the basis of the market investigation, it can be concluded that neither FNME and RTC nor manufacturers like Alstom, Bombardier, Finmeccanica, Siemens and Skoda are equipped to provide suitable locomotives or drivers for rent. Thus, the renting of a locomotive is not a feasible alternative for GVG.
(94) If GVG wished to rent locomotives from a supplier, it would in addition have to rent drivers from Italian railway companies. For the time being, drivers with the necessary Italian licence and route knowledge could only be rented from FS.
(95) Hiring and training its own staff does not seem feasible for the planned international rail service. Due to language problems and different training requirements, GVG would find it difficult to employ German drivers in Italy. Italian drivers on the other hand could hardly be employed outside Italy. Thus, GVG would have to set up its own pool of Italian drivers. It would also have to set up a driver back-up service. In Italy, the domestic long-distance passenger transport market and cabotage is not liberalised. GVG would therefore not be able to use these drivers for a number of different

services, in particular for train services in open competition within Italy. It would therefore be highly uneconomic to set up an Italian driver pool only for the purpose of providing an international rail service from Basle to Milan. This impediment applies to any railway undertaking which wishes to provide international passenger transport services into Italy, irrespective of its size.
(96) Finally, it is not possible to rent a back-up service for the locomotives needed by GVG on the Domodossola-Milan route.
(97) It is therefore concluded that providing traction by itself on the Domodossola-Milan route by renting locomotives, drivers and back-up is not an alternative for GVG to obtaining traction from FS.
2.2.2.2. Purchase of locomotives
(98) In order to provide traction by itself on the basis of its own locomotives and drivers on the Italian segment of the Basle-Milan route, GVG would have to make an investment in a dedicated locomotive and driver pool in Italy. As set out above, the lack of interoperability and different type approval procedures prevent GVG from using locomotives approved in other Member States on the Italian network.
(99) For its planned service to operate twice a day between Basle and Milan, GVG would need two Italian locomotives to operate on the Domodossola-Milan segment. With a distance of 250 km, operation on this route would bind 1/6 of the capacity of a locomotive. Finally, GVG would need a third locomotive for the back-up. Operating on the basis of three locomotives is not economic since one third of locomotive capacity is bound by the back-up. This generates high fixed costs. Bearing in mind the sometimes considerable variation in reliability of locomotives, it is not unreasonable to envisage that a locomotive pool should comprise at least 10 units. In that case one locomotive would provide the back-up for nine locomotives in operation, which means that about 1/10 of the locomotive capacity would be bound by the back-up(61). Thus, in order to operate at the minimum efficient scale, GVG should be able to make use of a locomotive pool of at least eight to 10 locomotives, which cannot be envisaged.
(100) Moreover, at this stage in the liberalisation of the European rail sector, as an undertaking substantially owned and controlled by nationals of another Member State, GVG is not permitted to operate cabotage or purely domestic services in free competition within Italy under current Italian legislation. Thus, GVG could not use the 5/6 spare capacity of the two locomotives to operate domestic rail services within Italy. In such a situation, if it acquired three locomotives for its planned service, GVG could use only one ninth of its overall Italian locomotive capacity. This would make an investment in Italian locomotives completely uneconomic. This reasoning applies to any potential entrant, irrespective of its size.
(101) In order to provide domestic rail services in Italy, GVG would therefore first have to set up its own Italian subsidiary. Apart from the driver and the locomotive pool, in order to obtain a licence and a safety certificate, GVG's Italian subsidiary would in addition also have to acquire rolling stock (wagons) suitable for passenger transport. As a result, GVG main business would become the provision of domestic rail services in Italy. An investment on such a scale would not be proportionate for any entrant wanting to operate only on one international route into Italy. Moreover, at the present stage in the liberalisation of the Italian railway market, even if it had carried

out such an investment, such an entrant would not be able to make any efficient use of it. As the domestic long-distance passenger market has not yet been liberalised in Italy, GVG's Italian subsidiary would not be in a position to enter this market(62).

(102) Moreover, if it wished to provide traction on the basis of its own locomotives and drivers, any railway undertaking which specialises in providing international rail passenger services in the EU would have to set up multiple subsidiaries in the various Member States. On the basis of the current state of the European rail transport market this would be a disproportionate requirement for railway undertakings making use of the free movement of services and therefore not an economically viable option.

(103) Finally, even if one considered that such an investment was economically viable, the market investigation has shown that it is at least doubtful whether GVG could acquire suitable locomotives.

(104) For the time being, there is no market for second-hand locomotives in Italy. There may be the possibility of acquiring second-hand locomotives in eastern Europe(63). However, by FS's own admission, including the conversion costs such a locomotive would cost about EUR 1,4 million, to which must be added type approval costs of, according to Bombardier, between several hundred thousand euro and up to EUR 1,5 million. Such an investment seems not to be justified given that there would be significant difficulties in obtaining spare parts and repair services at reasonably short notice for such a locomotive.

(105) In principle, it is possible to purchase new locomotives that are suitable for operating GVG's service on the Italian market(64). However, the Commission's market investigation has shown that a number of economic, legal and technical barriers rule out this option. As pointed out by the Union of European Railway Industries (UNIFE), Italian technical specifications are very specific to the requirements of the national network. Locomotives would have to be custom-made and the price would vary greatly depending on the size of the order, delivery time, etc. As GVG would only purchase a small number of locomotives, it would face a considerably higher price than the national flag railway undertaking, which makes large orders. Some uncertainty exists whether manufacturers would produce such a small quantity of tailor-made locomotives at all. For locomotives that could be used for GVG's service, estimates of the delivery time are between 18 and 36 months.

(106) With one exception, manufacturers are not in a position to provide back-up services. Bombardier would be prepared to do so within 24 hours; however, the price would be close to the price of renting a second locomotive. This, however, is not economically viable as the back-up should not bind more than 1/10 of the locomotive pool's capacity.

(107) In terms of yield, GVG would need about 190 passengers per train(65) (*i.e.* 752 passengers per day) to cover the entry cost if it decided to acquire new locomotives to operate the train. Buying second-hand locomotives would require about 80 passengers per train to achieve cost coverage for traction only. This does not seem to be feasible on the basis of existing passenger numbers. Cisalpino's existing Basle-Milan service yields no more than 35 point-to-point passengers per train.

(108) Finally, even if it were economically viable for GVG to acquire locomotives for operation and back-up for the Italian market, GVG would still depend on FS as

regards the provision of drivers and maintenance and repair services.
(109) It is therefore concluded that, in particular due to the lack of interoperability of locomotives, the absence of liberalisation of the Italian long-distance passenger rail market and the prohibition of cabotage, an investment by GVG, or any other railway undertaking, in locomotives solely for the purpose of operating on the Domodossola-Milan route would be prohibitively expensive and would not make any commercial sense. Due to these impediments, certain markets, such as the leasing or rental of locomotives and the hiring of drivers, are still in their infancy, which means that GVG depends on FS providing traction for the planned transport service from Basle to Milan.
2.2.3. Conclusion
(110) Until April 2001, FS had a de jure monopoly for the provision of traction on the Italian rail infrastructure(66). Since then, FS has a de facto monopoly for the provision of traction for passenger services on the Domodossola-Milan route. Moreover, at the present stage in the liberalisation of the EU railway sector, GVG cannot provide traction by itself on this route, and FS is the only source for traction on the Domodossola-Milan route for the provision of an international passenger rail transport service between Basle and Milan.
(111) It can therefore be concluded that FS is dominant on the relevant traction market and that in order to operate its planned service, it is indispensable for GVG to obtain traction from FS.
3. DOMINANCE ON THE MARKET FOR RAIL PASSENGER TRANSPORT
(112) On the routes that belong to the relevant market, as defined above, only FS is present on the Italian segment (via its cooperation with SBB and Cisalpino). FS is therefore dominant on the market for rail passenger transport between Domodossola and Milan.
(113) There are considerable entry barriers in this market. Apart from the need to obtain access to the infrastructure and ancillary services, the railway undertaking needs rolling stock and personnel complying with different national technical and administrative standards, as different systems for signalling, electricity supply and safety apply. Finally, in order to carry out such a rail passenger transport service from Germany to Milan, any rail operator has to enter into an international grouping.
(114) So far, FS is the only undertaking with a licence to provide intercity rail passenger transport in Italy. While since May 2000 the Italian Ministry of Transport and Navigation has granted several licences to other railway undertakings, these companies cannot operate long-distance passenger rail transport services as this market has not been liberalised in Italy yet. Moreover, in order to enter into an international grouping with GVG, such railway companies would need a safety certificate to operate passenger transport services on the Domodossola-Milan route(67). In order to obtain such a safety certificate, any railway undertaking would first have to obtain the suitable rolling stock (which is then certified). So far, only FS has obtained a safety certificate to operate passenger rail transport services between Domodossola and Milan(68). FS is therefore so far the only Italian railway undertaking that can enter into an international grouping with GVG for the particular service that the latter wants to provide.
4. DOMINANCE IN A SUBSTANTIAL PART OF THE COMMON MARKET
(115) Where a Member State has granted a statutory monopoly to an undertaking

on a certain part of its territory, according to the case-law of the Court of Justice(69), this territory constitutes a substantial part of the common market. As regards the infrastructure, according to Decree No 225-T of 26 November 1993, FS still has a statutory monopoly. Thus, the market for access to the Italian infrastructure can be considered to be a substantial part of the common market.

(116) The relevant traction market and the downstream market for passenger rail transport are also a substantial part of the common market. Until 8 July 1998, Decree No 225-T granted FS a statutory monopoly with regard to traction and the provision of rail passenger services. In addition, the relevant market is a substantial part of the common market since the relevant geographic market includes several Member States(70). In this case the Domodossola-Milan segment is part of the relevant downstream market for international rail passenger services from Germany into Italy. It is a vital route for rail transport, which connects northern and southern Europe. As such it is part of the trans-European rail network (TERN).

H. ABUSE OF A DOMINANT POSITION

(117) FS has committed several abuses of its dominant position in the relevant upstream and downstream markets which have had the effect of foreclosing competition in international rail passenger transport on a number of routes from German cities to Milan via Basle.

(118) It is recalled that nothing in Italian law as described in recital 13 of this Decision prevents FS from providing information, entering into an international grouping(71) with, or granting a safety certificate, granting access to infrastructure and providing traction to a licensed railway undertaking established in another Member State.

1. ABUSE ON THE RELEVANT UPSTREAM MARKETS

1.1. REFUSAL TO GRANT ACCESS TO THE ITALIAN INFRASTRUCTURE

(119) FS holds a monopoly as the allocation body that has been designated by the Italian State to decide upon requests for infrastructure capacity on the Italian railway network. In this capacity, FS is responsible for assigning train paths to railway operators in Italy.

(120) In line with the Court of First Instance's Aéroports de Paris ruling(72), the railway infrastructure can be considered an essential facility. It fulfils the two main conditions for an essential facility, as established by the CFI in its ENS(73) decision, *i.e.* the indispensability of the facility and, if access is not granted, the elimination of all competition from the other operator(74). For any competitor it would be unfeasible to duplicate FS's long-distance railway network because of the prohibitive cost of such an investment and the impossibility of getting the right of way.

(121) Restricting access to the railway network constitutes an abuse of a dominant position if it excludes a potential competitor from the market. In its decision in the Port of Rødby case, the Commission concluded that an undertaking that owns or manages and uses itself an essential facility, *i.e.* a facility or infrastructure without which its competitors are unable to offer their services to customers, and refuses them access to such facility, is abusing its dominant position(75).

(122) In its judgment in the Télémarketing case(76), the Court ruled that "an abuse within the meaning of Article 86 [now 82] of the EC Treaty is committed where, without objective necessity, an undertaking holding a dominant position on a particular

market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking".

(123) As pointed out in the Commission notice on the application of competition rules to access agreements in the telecommunications sector(77), a refusal to give access to facilities may be prohibited pursuant to Article 82 if the refusal is made by an undertaking which is dominant because of its control of facilities. An undue, inexplicable or unjustified delay in responding to a request for access to an essential infrastructure may also constitute an abuse.

(124) FS has made use of its power as allocation body to deny GVG, a potential competitor in the market for rail passenger transport services, train paths on the Domodossola-Milan route. It has both withheld from GVG information necessary to enable GVG to prepare an adequate business plan and it has effectively denied access to GVG without objective justification. It has thus prevented GVG from entering the market for the provision of rail passenger transport services on this route. In deciding to retain for itself the market for the provision of cross-border rail passenger transport services, FS has extended its dominant position on the market for the access to infrastructure to this neighbouring but separate market. In Decision 98/190/EC in the FAG-Flughafen Frankfurt case(78), the Commission concluded that an infringement of Article 86 (now 82) arose as soon as FAG's monopoly on the ramp-handling services market was maintained by a refusal on its part to authorise self-handling or third-party handling. The fact that FAG already held a dominant position on the ramp-handling market prior to committing the infringement could not justify FAG's decision to reserve for itself the market by denying ramp access to potential competitors.

(125) In the circumstances of the present case, an allocation body verifiably independent of any railway undertaking would certainly have actively considered all possible means, in terms of availability of time slots and other practical and technical issues, of granting GVG access to the infrastructure on fair and non-discriminatory terms. However, experience with previous cases suggests that an allocation body that is also active in the market for providing services on its own infrastructure is likely to prefer an arrangement which will minimise inconvenience to itself, especially in relation to its own operations as a user(79).

(126) Directive 91/440/EEC does not explicitly mention the right of access to technical information regarding access to infrastructure for railway companies that have not yet formed an international grouping. The Commission, however, rejects FS's argument that such information can only be provided and a train path can only be reserved after the applicant has entered into an international grouping. Directive 91/440/EEC does not prejudice the application of the competition rules of the EC Treaty. The allocation body cannot require the establishment of an international grouping before even providing information relating to prices of train paths and their availability, since that may have the effect of preventing market entry. Such information is necessary to enable the entrant to establish a business plan and to judge whether the planned service would be economically viable.

(127) FS was in a position to provide such information and give advice on related

issues of access to infrastructure. Before the entry into force of Decree No 146/1999, FS (Infrastruttura(80)) was entitled pursuant to Article 8(5) of Decree No 277/1998 to issue a (temporary) safety certificate in accordance with Directive 95/19/EC. At that stage, as the infrastructure manager, instead of refusing to provide the requested information on the grounds that GVG did not have a safety certificate(81), FS (Infrastruttura) should have taken a proactive approach. For instance, in line with its obligations as the infrastructure manager, FS should have informed GVG that it is FS (Infrastruttura) itself which grants the safety certificate and advised it of what is required to obtain such a certificate.

(128) In addition, the Commission considers that Article 10(1) of Directive 91/440/EEC has direct effect. According to the relevant case-law of the Court of Justice, a provision may have direct effect if the obligation imposed on the Member States is sufficiently clear and precise, unconditional and does not leave any margin of discretion in its implementation(82).

(129) Article 10(1) of Directive 91/440/EEC is a provision that clearly indicates that international groupings have the right to obtain access to infrastructure. Such a provision in itself does not require any further implementation from Member States and can thus be considered sufficiently clear and precise in accordance with the abovementioned case-law.

(130) Railway undertakings such as GVG could rely directly on this provision to request from FS information necessary to enter into meaningful negotiations with railway undertakings established in Italy with a view to setting up an international grouping. Article 10(1) could therefore be invoked by GVG since the entry into force of Directive 91/440/EEC on 1 January 1993. GVG had the right to form an international grouping with a view to providing an international rail passenger transport service to Milan. Hence, it was entitled to request information from FS regarding train paths and prices with a view to obtaining access to the Italian infrastructure.

(131) It is concluded that during the period at least from September 1995(83) until July 2002, FS refused to provide the necessary information for access to the Italian railway infrastructure to GVG without any objective justification and thereby prevented GVG from entering the market in international rail passenger transport in breach of Article 82 of the EC Treaty.

1.2. REFUSAL TO PROVIDE TRACTION

(132) Recital 51 states that traction consists in the provision of a locomotive, a driver and ancillary services such as the back-up. There is a market for traction services, as such services are provided on a commercial basis in most Member States. Recitals 55 and 56 provide examples showing that FS is and has been active on the traction market. For instance, FS provides regular traction services to SNCF from Milan and Turin to Lyon and to DB for its international "Autoreisezug" on 13 different routes between Germany and Italy. On one occasion it also provided traction services to GVG for a rail passenger transit service. None of these rail transport services are competing with transport services provided by FS.

(133) As set out in recitals 86 to 109, the Commission has extensively examined whether GVG (or any other railway undertaking from another Member State) would have alternatives to renting traction from FS (Trenitalia) on the Italian segment of the

planned passenger transport service between Basle and Milan. This examination has shown that there were no such commercially viable alternatives available to GVG or any other non-Italian railway undertaking. Therefore, in order to be able to provide an international rail passenger service between Germany and Milan, it is indispensable that GVG obtains traction from FS on the Italian railway network.
(134) As FS has not responded to GVG's requests for traction, since December 1998 it has effectively refused to provide traction services to GVG for this particular service. FS's refusal was not justified by any objective reason. For instance, FS does not lack spare capacity for traction services, there are no safety reasons preventing FS from providing traction to GVG, FS could obtain an adequate remuneration for the provision of such services and it does not operate under public service obligations which prevent it from providing traction services to GVG.
(135) No lack of spare capacity: Following the hearing, FS Trenitalia argued that it did not have spare locomotive capacity to provide traction services to GVG. However, after further investigation, FS Trenitalia finally declared by letter of 18 December 2002 that it had quantified its spare capacity for the supply of such traction services at one million km per year.
(136) No safety reasons: Once it has ensured traction and it has formed an international grouping, GVG would still have to obtain a safety certificate for the planned passenger transport service in Italy. This is therefore a separate and consecutive step. As the safety certificate is issued by the infrastructure manager, it is not the responsibility of FS (Trenitalia) to judge whether GVG fulfils the necessary safety requirements. A refusal to provide traction could therefore not be justified on the grounds of safety concerns.
(137) Adequate remuneration: FS has a right to adequate remuneration under normal commercial terms.
(138) No public service obligations: Finally, FS is under no explicit obligation to provide a public service the financial equilibrium of which could be jeopardised by the services that GVG intends to provide (see recitals 154 and 155).
(139) GVG's planned service between Basle and Milan competes with the Cisalpino, which is a joint venture of FS and SBB. This has been confirmed by FS's reply to the statement of objections. FS considers that GVG's planned service would have damaged its existing traffic on the Basle-Milan route(84).
(140) FS has therefore refused to provide traction to a potential competitor in a neighbouring market to the market for traction. FS is dominant not only in the latter (upstream) market but also in the downstream market for rail passenger transport. On the downstream market, there is no competition. By refusing to provide traction to GVG, FS is preventing a potential competitor from entering this market. It is thereby preserving its monopoly position on this separate downstream market by eliminating potential competition on that market(85).
(141) The Court has consistently held that the extension of a monopoly in a given market to a neighbouring market, without objective justification, is prohibited pursant to Article 82(86). In Télémarketing(87), the Court found that an abuse of Article 82 is committed where an undertaking holding a dominant position on a particular market reserves to itself, without any objective necessity, an ancillary activity which might be

carried out by another undertaking and if it thereby eliminates all competition from such an undertaking. This applies even where the dominant position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition in that market(88).

(142) The Commission found in Decision 98/190/EC in the FAG-Flughafen Frankfurt case(89) that Frankfurt Airport had abused its dominant position in breach of Article 82 of the EC Treaty by denying, without objective justification, potential competitors access to the market for the provision of ramp-handling services at Frankfurt Airport. This market was considered to be a separate market from that of the provision of airport facilities. Until the adoption of that Decision, Frankfurt Airport had a monopoly on both the market for the provision of airport facilities and that of the provision of ramp-handling services.

(143) In the present case, although Italian law has appointed FS's subsidiary RFI as the infrastructure manager, it does not confer exclusive rights on FS for the provision of international passenger services, in particular on the route at stake. FS's refusal is therefore only based on its own commercial decision as an undertaking and not on State intervention(90).

(144) Finally, according to settled case-law(91), a refusal to supply also constitutes an abuse when it leads to the risk of elimination of competition on the part of the requesting undertaking in the relevant market or hindering competitors' development and when it is not objectively justified.

(145) FS's refusal to provide traction, an activity which it routinely performs, is not justified by any objective reason and it protects its monopoly position in the downstream market for international passenger rail services between Basle and Milan. It therefore constitutes an abuse of a dominant position. FS's refusal to provide traction to GVG eliminates a potential competitor and thereby hinders the growth of competition in the downstream market. This harms consumers, who will not benefit from alternatives to existing rail passenger services.

(146) The infringement took place between December 1998 and 27 June 2003. At least since December 1998, GVG requested FS to provide traction services for its planned service on the Domodossola-Milan route. FS did not make any offer to provide traction until August 2002. On 25 November 2002, FS (Trenitalia) offered GVG a draft contract for the provision of traction, including back-up, for its planned service on the Domodossola-Milan route. On 27 June 2003, GVG and FS (Trenitalia) concluded negotiations by agreeing on the traction price.

2. ABUSE ON THE MARKET IN RAIL PASSENGER TRANSPORT

2.1. REFUSAL TO NEGOTIATE THE FORMATION OF AN INTERNATIONAL GROUPING

(147) At the present stage in the liberalisation of the European rail passenger market, railway undertakings can only provide cross-border rail passenger services if they have formed an international grouping with a licensed railway undertaking established in another Member State. However, the existence of this European regulatory framework does not preclude the application of Article 82 of the EC Treaty to situations in which there is only one railway undertaking available to form an international grouping and

which refuses to enter into negotiations with a view to the formation of such a grouping.
(148) In its judgment in ENS(92) the Court of First Instance held that a service may be regarded as "necessary" for entry to the relevant market if such a service is not "interchangeable" and if, by reason of its special characteristics - in particular the prohibitive cost of and/or time reasonably required for reproducing it - there are no viable alternatives available to potential competitors, who are therefore excluded from the market by the refusal to provide such a service.
(149) In the present case the formation of an international grouping with FS is indispensable for GVG if the undertaking is to be able to provide the international passenger transport service on the Domodossola-Milan route. It is not "interchangeable" with any other service in the sense that there are no other railway undertakings with which GVG could enter into an international grouping for the purposes of operating this route(93). As set out in recital 101, neither does the option exist at this stage for GVG to set up a subsidiary in Italy with a view to forming an international grouping with its own subsidiary.
(150) Therefore, unless the refusal by FS to enter into negotiations with GVG with a view to the formation of an international grouping is justified on the basis of objective reasons, it constitutes an abuse of a dominant position. While FS has pointed out in general that there is no obligation under EU law to form an international grouping and that it would enter into an international grouping only if it had a commercial interest in doing so, it has not provided concrete reasons why it could not enter into such negotiations. Instead, FS has argued that its refusal to enter into negotiations with GVG was justified since GVG's planned service would compete with services already provided by FS, in particular the Cisalpino, on the Basle-Milan route(94). To preserve its monopoly on this route, however, is not an acceptable justification for FS's refusal.
(151) At least since August 1999, FS was aware that GVG wanted to enter into an international grouping with it to provide an international service between Basle and Milan. FS failed to deal with GVG's request until August 2002. On 27 June 2003, the parties signed an international grouping agreement.
(152) The Commission therefore concludes that by refusing to enter into an international grouping with GVG without any objective justification, during the period from August 1999 until 27 June 2003, FS abused its dominant position on the Italian market for passenger rail transport.
3. EFFECT ON TRADE BETWEEN MEMBER STATES
(153) GVG aims to provide an international transport service between Germany and Italy. As pointed out, it feeds customers from Karlsruhe, Koblenz and Mannheim into Basle and then provides a rail passenger transport service to Milan. In view of the characteristics of these routes and the heavy traffic and given that this affects a transport service between two Member States of the EU, the abuses described above significantly affect trade between Member States.
I. ARTICLE 86(2) OF THE TREATY
(154) FS is not relying on the derogation provided for in Article 86(2) of the Treaty to justify its policy.
(155) In particular, FS has not argued that granting access to GVG on the Domodos-

sola-Milan route would jeopardise the performance by FS in conditions of economic equilibrium of a service of general interest entrusted to it. The Cisalpino service, offered by FS in cooperation with SBB, is not operated on the basis of a public service obligation or a public service contract(95). The same applies in relation to the trains operated in cooperation with SBB via Chiasso and Domodossola. More generally, FS has not argued that granting access to GVG would jeopardise any public service obligations it may have in relation to transport services it provides on the main infrastructure network in Italy. At all events, the Commission takes the view that there is no evidence that refusing access to GVG to the market in international passenger rail transport between Domodossola and Milan would be necessary to preserve the financial equilibrium of FS in relation to its basic services(96).

J. REMEDIES

1. TERMINATION OF THE INFRINGEMENT

(156) Regulation No 17 applies to the abuses relating to the markets for access to infrastructure and traction. The latter lie outside the scope of the procedural rules specific to the transport sector and fall under Regulation No 17 as far as the application of Article 82 of the EC Treaty is concerned. Regulation (EEC) No 1017/68, which lays down the competition rules applying to transport by road, rail and inland waterway, applies to the abuse relating to the refusal to enter into an international grouping on the market for the provision of passenger rail transport.

(157) Article 3(1) of Regulation No 17 provides that the Commission may, where it finds that there is an infringement of Article 81 or 82 of the Treaty, require the undertakings or associations of undertakings concerned to bring such infringement to an end. Article 11 of Regulation (EEC) No 1017/68 contains similar provisions.

(158) FS (Trenitalia) has entered into an international grouping agreement and has agreed on the terms of a traction contract with GVG. FS (RFI) has also undertaken to provide GVG with suitable train paths on the Domodossola-Milan segment, as soon as corresponding train paths are made available by SBB on the Swiss network for the Basle-Domodossola segment. The Commission takes note that, given that GVG's entry into the market has been delayed and as part of an overall settlement between the parties, for a limited period of time FS (Trenitalia) and FS (RFI) have offered GVG special conditions to facilitate its market entry. These terms must be considered to be specific to this case.

(159) The Commission considers that the undertakings given by FS (Trenitalia) and by FS (RFI), as annexed to this Decision, ensure that the infringement has been brought to an end and that the abuse will not be repeated.

(160) The Commission takes note that, apart from the above undertakings aimed at solving the particular problem of GVG, FS (Trenitalia) has in addition undertaken to enter into international grouping agreements with other railway undertakings that possess the necessary licence and propose a reasonable project for an international rail service. For a period of five years, FS has undertaken to provide traction services on a non-discriminatory basis to other railway undertakings intending to provide cross-border passenger services. The available capacity, as defined in the commitments, would allow new entrants to operate up to seven international railway services into Italy similar to the one planned by GVG. The traction price would be based on FS

(Trenitalia)'s cost, including, inter alia, an adequate return on the capital investment and the maintenance costs for the rolling stock concerned.
(161) While these general undertakings go beyond what is necessary for the termination of the infringements as regards GVG, the Commission considers that they will considerably facilitate entry into the market in international rail passenger services into Italy. The commitments eliminate the most significant market access barriers for start-up companies in this market. New entrants will be able to obtain in a timely manner all necessary information as regards train paths, they will be able to enter into an international grouping and they will obtain the necessary traction services to start their services. The undertakings given by FS will therefore allow market entry in a startup phase which should contribute to enhancing competition in the European rail sector.
2. ARTICLE 15 OF REGULATION NO 17 AND ARTICLE 22 OF REGULATION (EEC) NO 1017/68
(162) Article 15(2) of Regulation No 17 provides, inter alia, that the Commission may impose fines, within the limits set out in that Article, where the undertakings in question have intentionally or negligently infringed Article 82. Article 22(2) of Regulation (EEC) No 1017/68 confers equivalent powers on the Commission.
(163) FS must have been aware of the fact that the behaviour in this case, in particular the refusal to provide information regarding access to the network, prevented a potential entrant from entering the relevant downstream market. An infringement of the competition rules such as the present one would normally be penalised by fines varying in accordance with the gravity and duration of the infringement.
(164) However, in this case the Commission is refraining from imposing a fine in particular because of the novelty of the case, as GVG has been the first and only new entrant railway undertaking to approach FS with a view to forming an international grouping. Moreover, FS has proposed undertakings which ensure that FS will not repeat the abuses in the future and which should contribute significantly to the dismantling of entry barriers for international rail passenger services into Italy.
K. ADDRESSEE
(165) As set out in recitals 72 to 81, the FS holding company can be considered responsible as a single undertaking. The Decision is therefore addressed to the FS holding company,
HAS ADOPTED THIS DECISION:

Article 1
By refusing to enter into an international grouping with Georg Verkehrsorganisation GmbH, for the purposes of providing an international rail passenger service between Germany and Italy on the Domodossola-Milan route, Ferrovie dello Stato SpA has abused its dominant position on the Italian market for passenger rail transport, in breach of Article 82 of the EC Treaty.
This infringement lasted at least from August 1999 until 27 June 2003.

Article 2
By refusing to deal effectively with Georg Verkehrsorganisation GmbH's requests for access to the railway network between Domodossola and Milan for the said purposes,

Ferrovie dello Stato SpA has abused its dominant position on the market for access to the infrastructure, preventing GVG from entering the market in international rail passenger transport in breach of Article 82 of the EC Treaty.
This infringement lasted at least from September 1995 until 24 July 2002.

Article 3
By refusing to provide traction to Georg Verkehrsorganisation GmbH in the form of a locomotive, a qualified driver with route knowledge and back-up for the said purposes, Ferrovie dello Stato SpA has abused its dominant position on the traction market, preventing GVG from entering the market in international rail passenger transport in breach of Article 82 of the EC Treaty.
This infringement lasted at least from December 1998 until 27 June 2003.

Article 4
Ferrovie dello Stato SpA shall immediately bring to an end the infringements referred to in Articles 1, 2 and 3 of this Decision in so far it has not already done so and shall in future refrain from repeating any similar act or conduct.

Article 5
Until given notice by the Commission that it is no longer required to do so, Ferrovie dello Stato SpA shall report twice a year to the Commission on the implementation of the commitments annexed to this Decision.
(omissis)

18.

European Court of Justice 12 March 2002, Case C-168/00.
Simone Leitner v TUI Deutschland GmbH & Co. KG.
Reference for a preliminary ruling: Landesgericht Linz - Austria.
(omissis)
Grounds
1 By order of 6 April 2000, received at the Court on 8 May 2000, the Landesgericht (Regional Court) Linz (Austria) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59, the Directive).
2 That question was raised in proceedings between Simone Leitner and TUI Deutschland GmbH & Co. KG (TUI) concerning compensation for non-material damage sustained during a package holiday.
The relevant Community provisions
3 The second recital in the preamble to the Directive states that ... the national laws of Member States concerning package travel, package holidays and package tours, hereinafter referred to as "packages", show many disparities and national practices in this field are markedly different, which gives rise to obstacles to the freedom to provide services in respect of packages and distortions of competition amongst operators established in different Member States. According to the third recital, the establishment

of common rules on packages will contribute to the elimination of these obstacles and thereby to the achievement of a common market in services, thus enabling operators established in one Member State to offer their services in other Member States and Community consumers to benefit from comparable conditions when buying a package in any Member State.
4 According to the eighth and ninth recitals in the preamble to the Directive, disparities in the rules protecting consumers in different Member States are a disincentive to consumers in one Member State from buying packages in another Member State, and this disincentive is particularly effective in deterring consumers from buying packages outside their own Member State.
5 Article 1 provides that The purpose of [the] Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community.
6 Article 5 provides that:
1. Member States shall take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services without prejudice to the right of the organiser and/or retailer to pursue those other suppliers of services.
2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organiser and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services ...
...
In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.
In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.
(3) Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.
...
The dispute in the main proceedings and the question referred
7 The family of Simone Leitner (who was born on 7 July 1987) booked a package holiday (all-inclusive stay) with TUI at the Pamfiliya Robinson club in Side, Turkey (the club) for the period 4 to 18 July 1997.
8 On 4 July 1997 Simone Leitner and her parents arrived at the club. There they spent the entire holiday and there they took all their meals. About a week after the start of the holiday, Simone Leitner showed symptoms of salmonella poisoning. The poisoning was attributable to the food offered in the club. The illness, which lasted beyond the end of the holiday, manifested itself in a fever of up to 40 degrees over several days,

circulatory difficulties, diarrhoea, vomiting and anxiety. Her parents had to look after her until the end of the holiday. Many other guests in the club also fell ill with the same illness and presented the same symptoms.

9 Two to three weeks after the end of the holiday a letter of complaint concerning Simone Leitner's illness was sent to TUI. Since no reply to that letter was received, Simone Leitner, through her parents, brought an action for damages in the sum of ATS 25 000.

10 The court of first instance awarded the claimant only ATS 13 000 for the physical pain and suffering (Schmerzensgeld) caused by the food poisoning and dismissed the remainder of the application, which was for compensation for the non-material damage caused by loss of enjoyment of the holidays (entgangene Urlaubsfreude). That court considered that, if the feelings of dissatisfaction and negative impressions caused by disappointment must be categorised, under Austrian law, as non-material damage, they cannot give rise to compensation because there is no express provision in any Austrian law for compensation for non-material damage of that kind.

11 The claimant appealed to the Landesgericht Linz, which concurs with the court of first instance so far as regards Austrian law, but considers that application of Article 5 of the Directive could lead to a different outcome. In that connection, the Landesgericht cites Case C-355/96 Silhouette International Schmied [1998] ECR I-4799, paragraph 36, where the Court ruled that, while a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, a national court is required to interpret the provisions of national law in the light of the wording and the purpose of the directive so as to achieve the result it has in view.

12 The national court observes in addition that the German legislature has adopted legislation expressly concerning compensation for non-material damage where a journey is prevented or significantly interfered with and that in practice German courts do award such compensation.

13 Taking the view that the wording of Article 5 of the Directive is not precise enough for it to be possible to draw from it any definite conclusion as to non-material damage, the Landesgericht Linz decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Is Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours to be interpreted as meaning that compensation is in principle payable in respect of claims for compensation for non-material damage?

The question

14 By its question the national court seeks to ascertain whether Article 5 of the Directive must be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from failure to perform or the improper performance of the obligations inherent in the provision of package travel.

Arguments of the parties

15 According to Simone Leitner, the third recital in the preamble to the Directive makes it clear that operators must be able to offer packages in all the Member States on the same conditions. The fourth subparagraph of Article 5(2) of the Directive makes it possible to set contractual limits to liability incurred in the case of non-material

damage resulting from the non-performance or improper performance of the services constituting a package holiday. That provision means that, according to the Directive, non-material damage must in principle be the subject of compensation.
16 TUI and the Austrian, French and Finnish Governments are, essentially, at one in arguing that the harmonisation of national laws sought by the Directive consists merely of defining a minimum level of protection for consumers of package holidays. In consequence, anything not expressly covered by the Directive in that field, and in particular the kind of damage to be compensated, remains within the competence of the national legislatures. The Directive does no more than set out a body of essential common rules concerning the content, conclusion and performance of package tour contracts without exhaustively regulating the entire subject, in particular, matters relating to civil liability. Accordingly, the existence of a right to compensation for non-material damage cannot be inferred from the absence of an express reference thereto in the Directive.
17 The Belgian Government submits that the general and unrestricted use of the term damage in the first subparagraph of Article 5(2) of the Directive implies that that term is to be construed broadly, with the result that damage of every kind must in principle be covered by the legislation implementing the Directive. In those Member States which recognise liability for non-material damage under the ordinary law, the Directive provides the right to set limits to that liability in accordance with certain criteria. In those Member States in which liability for non-material damage depends on the existence of an express provision to that effect, the absence of such a provision must be deemed to exclude absolutely compensation for non-material damage, which is contrary to the Directive.
18 The Commission first points out that the term damage is used in the Directive without the least restriction, and that, specifically in the field of holiday travel, damage other than physical injury is a frequent occurrence. It then notes that liability for non-material damage is recognised in most Member States, over and above compensation for physical pain and suffering traditionally provided for in all legal systems, although the extent of that liability and the conditions under which it is incurred vary in detail. Lastly, all modern legal systems attach ever greater importance to annual leave. In those circumstances, the Commission maintains that it is not possible to interpret restrictively the general concept of damage used in the Directive and to exclude from it as a matter of principle non-material damage.
Findings of the Court
19 The first subparagraph of Article 5(2) of the Directive requires the Member States to take the necessary steps to ensure that the holiday organiser compensates the damage resulting for the consumer from the failure to perform or the improper performance of the contract.
20 In that regard, it is clear from the second and third recitals in the preamble to the Directive that it is the purpose of the Directive to eliminate the disparities between the national laws and practices of the various Member States in the area of package holidays which are liable to give rise to distortions of competition between operators established in different Member States.
21 It is not in dispute that, in the field of package holidays, the existence in some Mem-

ber States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition, given that, as the Commission has pointed out, non-material damage is a frequent occurrence in that field.
22 Furthermore, the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers.
23 It is in light of those considerations that Article 5 of the Directive is to be interpreted. Although the first subparagraph of Article 5(2) merely refers in a general manner to the concept of damage, the fact that the fourth subparagraph of Article 5(2) provides that Member States may, in the matter of damage other than personal injury, allow compensation to be limited under the contract provided that such limitation is not unreasonable, means that the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage.
24 The answer to be given to the question referred must therefore be that Article 5 of the Directive is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.
(omissis)
On those grounds,
THE COURT (Sixth Chamber),
in answer to the question referred to it by the Landesgericht Linz by order of 6 April 2000, hereby rules:
Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.

19.

European Court of Justice 8 October 1996, Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94.
Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland. - Reference for a preliminary ruling: Landgericht Bonn - Germany.
(omissis)
Grounds
1 By orders of 6 June 1994, received at the Court on 28 June 1994 in Cases C-178/94 and C-179/94 and on 1 July 1994 in Cases C-188/94, C-189/94 and C-190/94, the Landgericht Bonn referred to the Court for a preliminary ruling under Article 177 of the EC Treaty 12 questions on the interpretation of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59, hereinafter "the Directive").
2 The questions have been raised in the course of actions for compensation which Erich Dillenkofer, Christian Erdmann, Hans-Juergen Schulte, Anke Heuer, and Werner,

Torsten and Ursula Knor (hereinafter "the plaintiffs") have brought against the Federal Republic of Germany for damage they suffered because the Directive was not transposed within the prescribed period.
3 The purpose of the Directive, according to Article 1 thereof, is to approximate the laws, regulations and administrative provisions of the Member States relating to package travel, package holidays and package tours sold or offered for sale in the territory of the Community.
4 Article 2 contains a number of definitions. It provides that:
"For the purposes of this Directive:
1. 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:
(a) transport;
(b) accommodation;
(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.
...
2. 'organizer' means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;
3. 'retailer' means the person who sells or offers for sale the package put together by the organizer;
4. 'consumer' means the person who takes or agrees to take the package (' the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package (' the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package (' the transferee');
...".
5 Article 7 provides: "The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency."
6 Article 8 states that Member States may adopt or maintain more stringent provisions in the field covered by the Directive to protect the consumer.
7 Article 9 requires Member States to bring into force the measures necessary to comply with the Directive before 31 December 1992.
8 On 24 June 1994, the German legislature adopted a Law implementing the Directive (Bundesgesetzblatt I, p. 1322). That law introduced into the Buergerliches Gesetzbuch (German Civil Code, hereinafter "the BGB") a new provision, Paragraph 651k, in terms of which:
"1. The travel organizer shall ensure that the package traveller obtains a refund of:
(1) the travel price paid if the travel services are not provided as a result of the organizer' s insolvency; and
(2) necessary expenditure incurred by the traveller in respect of his repatriation following the organizer' s insolvency.
The travel organizer can fulfil the obligations set out in (1) only:
(1) by taking out insurance with a company authorized to operate within the scope of this Law; or

(2) through a promise of payment from a credit institution authorized to operate within the scope of this Law.
2. ...
3. In order to satisfy the requirement set out in (1), the organizer must provide for the traveller to have a direct remedy against the insurer or the credit institution and be responsible for furnishing evidence thereof by way of an attestation issued by the said company (security document).
4. Apart from a deposit of up to 10% of the travel price, subject, however, to a maximum of DM 500, the organizer may demand or accept payment towards the travel price before completion of the travel only if he has given the traveller a security document.
...".
9 That law entered into force on 1 July 1994. It applies to travel contracts which were concluded after that date and under whose terms the travel was to commence after 31 October 1994.
10 The plaintiffs in the main proceedings are purchasers of package travel who, following the insolvency in 1993 of the two operators from whom they had bought their packages, either never left for their destination or had to return from their holiday location at their own expense. They have not succeeded in obtaining reimbursement of the sums they paid to the operators or of the expenses they incurred in returning home.
11 The plaintiffs have brought actions for compensation against the Federal Republic of Germany on the ground that if Article 7 of the Directive had been transposed into German law within the prescribed period, that is to say by 31 December 1992, they would have been protected against the insolvency of the operators from whom they had purchased their package travel.
12 They rely in particular on the judgment of the Court of Justice of 19 November 1991 in Joined Cases C-6/90 and C-9/90 Francovich and Others v Italy [1991] ECR I-5357, paragraphs 39 and 40, according to which, where a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation, provided that the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties. According to the applicants, those conditions are satisfied in this case. They therefore claim refund of sums paid for travel never undertaken or expenses incurred in their repatriation.
13 The German Government contests the claims. It considers that the conditions laid down in Francovich are not satisfied in these cases and that in any event failure to transpose a directive within the prescribed period cannot render a Member State liable to pay damages unless there has been a serious, that is to say manifest and grave, breach of Community law, for which it can be held responsible.
14 The Landgericht Bonn found that German law did not afford any basis for upholding the claims for compensation but having doubts regarding the consequences

of the Francovich judgment it decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
"(1) Is the EC Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC) intended to grant individual package travellers, via national transposing provisions, the individual right to security for money paid and repatriation costs in the event of the insolvency of the travel organizer (see paragraph 40 of the judgment in Joined Cases C-6/90 and C-9/90 Francovich)?
(2) Is the content of that right sufficiently identified on the basis of that Directive?
(3) What are the minimum requirements for the 'necessary measures' to be taken by the Member States within the meaning of Article 9 of the Directive?
(4) In particular, did it satisfy Article 9 of the Directive if the national legislature by 31 December 1992 provided the legislative framework for imposing a legal obligation on the travel organizer and/or retailer to take measures for security within the meaning of Article 7 of the Directive? Or did the necessary change in the law, taking into account the lead times involved in consultation of the travel, insurance and credit sectors, have to come into effect sufficiently in advance of 31 December 1992 for that security actually to function in the package travel market from 1 January 1993?
(5) Is the protective purpose, if any, of the Directive satisfied if the Member State allows the travel organizer only to require a deposit towards the travel price of up to 10% of the travel price with a maximum of DM 500 before documents of value are handed over?
(6) To what extent are the Member States obliged under the Directive to act (by legislating) in order to protect package travellers against their own negligence?
(7) (a) Could the Federal Republic of Germany, in view of the 'advance payment' judgment (Vorkasse-Urteil) of the Bundesgerichtshof (BGH) of 12 March 1987 (BGHZ 100, 157; NJW 86, 1613), have omitted altogether to transpose Article 7 of the Directive by means of legislation?
(b) Is there no 'security' within the meaning of Article 7 of the Directive even where, on payment of the travel price, travellers were in possession of documents of value confirming a right to performance against those responsible for providing particular services (airline companies, hotel operators)?
(8) (a) Does the mere fact that the time-limit specified in Article 9 of the Directive has been exceeded suffice to confer a right to compensation involving State liability as defined in the Francovich judgment of the Court of Justice, or can the Member State put forward the objection that the period for transposition proved to be inadequate?
(b) If that objection fails, does the response to the previous question apply even where the Member State concerned cannot achieve the protective purpose of the Directive simply by a change in the law (as for instance with payments in lieu of wages to employees in the event of insolvency), the cooperation of private third parties (travel organizers, the insurance and credit sector) being essential?
(9) Does liability on the part of a Member State for an infringement of Community law presuppose a serious, that is to say a manifest and grave, breach of obligations?
(10) Is it a precondition of State liability that a judgment in infringement proceedings establishing a breach of Treaty obligations has been delivered before the event giving rise to damage?

(11) Does it follow from the Francovich judgment of the Court of Justice that the right to compensation on grounds of breach of Community law is not dependent on a finding of fault in general, or at any rate of wrongful non-adoption of legislative measures, on the part of the Member State?
(12) If that conclusion is not correct, could the 'advance payment' judgment of the Bundesgerichtshof have been an acceptable reason justifying or excusing the Federal Republic of Germany for transposing the Directive, as defined in the answers of the Court of Justice to Questions 4 and 7, only after expiry of the time-limit specified in Article 9?"
Conditions under which a Member State incurs liability (Questions 8, 9, 10, 11 and 12)
15 Questions 8, 9, 10, 11 and 12, concerning the conditions under which a State incurs liability towards individuals where a directive has not been transposed within the prescribed period, will be examined first.
16 The crux of these questions is whether a failure to transpose a directive within the prescribed period is sufficient per se to afford individuals who have suffered injury a right to reparation or whether other conditions must also be taken into consideration.
17 More specifically, the national court raises the question of the importance to be attached to the German Government' s contention that the period prescribed for transposition of the Directive proved inadequate (Question 8). It asks, further, whether State liability requires a serious, that is to say, a manifest and grave, breach of Community obligations (Question 9), whether the breach must have been established in infringement proceedings before the loss or damage occurred (Question 10), whether liability presupposes the existence of fault, of either commission or omission, in the adoption of legislative measures by the Member State (Question 11) and, lastly, in the event that Question 11 is answered in the affirmative, whether liability can be excluded by reason of a judgment such as the "advance payment" judgment of the Bundesgerichtshof referred to in Question 7 (Question 12).
18 The German, Netherlands and United Kingdom Governments have submitted in particular that a State can incur liability for late transposition of a directive only if there has been a serious, that is to say, a manifest and grave, breach of Community law for which it can be held responsible. According to those Governments, this depends on the circumstances which caused the period for transposition to be exceeded.
19 In order to reply to those questions, reference must first be made to the Court' s case-law on the individual' s right to reparation of damage caused by a breach of Community law for which a Member State can be held responsible.
20 The Court has held that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (Francovich, paragraph 35; Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-0000, paragraph 31; Case C-392/93 British Telecommunications [1996] ECR I-0000, paragraph 38; and Case C-5/94 Hedley Lomas [1996] ECR I-0000, paragraph 24). Furthermore, the Court has held that the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of

Community law giving rise to the loss and damage (Francovich, paragraph 38; Brasserie du Pêcheur and Factortame, paragraph 38, and Hedley Lomas, paragraph 24).
21 In Brasserie du Pêcheur and Factortame, at paragraphs 50 and 51, British Telecommunications, at paragraphs 39 and 40, and Hedley Lomas, at paragraphs 25 and 26, the Court, having regard to the circumstances of the case, held that individuals who have suffered damage have a right to reparation where three conditions are met: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.
22 Moreover, it is clear from the Francovich case which, like these cases, concerned non-transposition of a directive within the prescribed period, that the full effectiveness of the third paragraph of Article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties.
23 In substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in Francovich, was nevertheless evident from the circumstances of that case.
24 When the Court held that the conditions under which State liability gives rise to a right to reparation depended on the nature of the breach of Community law causing the damage, that meant that those conditions are to be applied according to each type of situation.
25 On the one hand, a breach of Community law is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (see Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraph 6; Brasserie du Pêcheur and Factortame, paragraph 55; and British Telecommunications, paragraph 42). On the other hand, if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see Hedley Lomas, paragraph 28).
26 So where, as in Francovich, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.
27 Consequently, such a breach gives rise to a right to reparation on the part of individuals if the result prescribed by the directive entails the grant of rights to them, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties: no other conditions need be taken into consideration.

28 In particular, reparation of that loss and damage cannot depend on a prior finding by the Court of an infringement of Community law attributable to the State (see Brasserie du Pêcheur, paragraphs 94 to 96), nor on the existence of intentional fault or negligence on the part of the organ of the State to which the infringement is attributable (see paragraphs 75 to 80 of the same judgment).
29 The reply to Questions 8, 9, 10, 11 and 12 must therefore be that failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State' s obligation and the loss and damage suffered.
Grant to individuals of rights whose content is sufficiently identifiable (Questions 1 and 2)
30 By its first two questions, the national court asks whether the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing the refund of money paid over and repatriation in the event of the insolvency of the travel organizer and/or the retailer party to the contract (hereinafter "the organizer"), and whether the content of those rights can be sufficiently identified.
31 According to the plaintiffs and the Commission, these two questions must be answered in the affirmative. Article 7, they say, clearly and unequivocally recognizes the right of the package traveller, qua consumer, to obtain a refund of money paid over and of the costs of repatriation in the event of the organizer' s insolvency.
32 The German, Netherlands and United Kingdom Governments disagree with that point of view.
33 The question whether the result prescribed by Article 7 of the Directive entails the grant of rights to individuals must be examined first.
34 According to the actual wording of Article 7, this provision prescribes, as the result of its implementation, an obligation for the organizer to have sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.
35 Since the purpose of such security is to protect consumers against the financial risks arising from the insolvency of package travel organizers, the Community legislature has placed operators under an obligation to offer sufficient evidence of such security in order to protect consumers against those risks.
36 The purpose of Article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of the insolvency of the organizer from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of the security which organizers must offer under Article 7 of the Directive is to enable consumers to obtain a refund of money paid over or to be repatriated.
37 That result is, moreover, confirmed by the penultimate recital in the preamble to the Directive, according to which both the consumer and the package travel industry would benefit if organizers were placed under an obligation to provide sufficient evidence of security in the event of insolvency.

38 In that connection, the German and United Kingdom Governments' argument that the Directive, which is based on Article 100a of the Treaty, is aimed essentially at ensuring freedom to provide services and, more generally, freedom of competition cannot be valid.
39 First, the recitals in the preamble to the Directive repeatedly refer to the purpose of protecting consumers. Secondly, the fact that the Directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers. Indeed, according to Article 100a(3) of the Treaty, the Commission, in its proposals submitted pursuant to that article, concerning inter alia consumer protection, must take as a base a high level of protection.
40 Similarly, the German and United Kingdom Governments' argument that the actual wording of Article 7 shows that this provision simply requires package travel organizers to provide sufficient evidence of security and that its lack of reference to any right of consumers to such security indicates that such a right is only an indirect and derived right must be rejected.
41 In this regard, it suffices to point out that the obligation to offer sufficient evidence of security necessarily implies that those having that obligation must actually take out such security. Indeed, the obligation laid down in Article 7 would be pointless in the absence of security actually enabling money paid over to be refunded or the consumer to be repatriated, should occasion arise.
42 Consequently, it must be concluded that the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing the refund of money that they have paid over and their repatriation in the event of the organizer' s insolvency.
43 The next point to be examined is whether the content of the rights in question are identifiable on the basis of the provisions of the Directive alone.
44 The persons having rights under Article 7 are sufficiently identified as consumers, as defined by Article 2 of the Directive. The same holds true of the content of those rights. As explained above, those rights consist in a guarantee that money paid over by purchasers of package travel will be refunded and a guarantee that they will be repatriated in the event of the insolvency of the organizer. In those circumstances, the purpose of Article 7 of the Directive must be to grant to individuals rights whose content is determinable with sufficient precision.
45 That conclusion is not affected by the fact that, as the German Government points out, the Directive leaves the Member States considerable latitude as regards the choice of means for achieving the result it seeks. The fact that States may choose between a wide variety of means for achieving the result prescribed by a directive is of no importance if the purpose of the directive is to grant to individuals rights whose content is determinable with sufficient precision.
46 The reply to the first two questions must therefore be that the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer' s insolvency; the content of those rights is sufficiently identifiable.
The measures necessary for proper transposition of the Directive (Questions 3, 4, 5, 6 and 7)
Questions 3 and 4

47 By Questions 3 and 4, the national court is essentially asking the Court to specify what "necessary measures" the Member States should have adopted in order to comply with Article 9 of the Directive.
48 First of all, according to settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty (Case C-59/89 Commission v Germany [1991] ECR I-2607, paragraph 24).
49 Secondly, in providing that the Member States were to bring into force the measures necessary to comply with the Directive before 31 December 1992, Article 9 required the Member States to adopt all the measures necessary to ensure that the provisions of the Directive were fully effective and so guarantee achievement of the prescribed result.
50 In view of the reply given to the first two questions, it must therefore be held that, in order to ensure full implementation of Article 7 of the Directive, the Member States should have adopted, within the prescribed period, all the measures necessary to provide purchasers of package travel with a guarantee that, as from 1 January 1993, they would be refunded money paid over and be repatriated in the event of the organizer' s insolvency.
51 It follows that Article 7 would not have been fully implemented if, within the prescribed period, the national legislature had done no more than adopt the necessary legal framework for requiring organizers by law to provide sufficient evidence of security.
52 According to the order for reference, the German Government claimed that the period prescribed for transposition of the Directive was too short, in particular because of the considerable difficulties which introduction of a system of security conforming with the Directive would create in Germany for the economic sector concerned. In that connection, the German Government pointed out that the Directive could not be implemented simply by enacting legislative amendments: it had to rely on the collaboration of third parties (travel organizers, insurers and credit institutions).
53 That kind of circumstance cannot justify a failure to transpose a directive within the prescribed period. It is settled case-law that a Member State may not rely on provisions, practices or situations prevailing in its own internal legal system to justify its failure to observe the obligations and time-limits laid down by a directive (see, for instance, Case 283/86 Commission v Belgium [1988] ECR 3271, paragraph 7).
54 If the period allowed for the implementation of a directive does, indeed, prove to be too short, the only step compatible with Community law available to the Member State concerned is to take the appropriate initiatives within the Community in order to have the competent Community institution grant the necessary extension of the period (see Case 52/75 Commission v Italy [1976] ECR 277, paragraph 12).
55 The reply to Questions 3 and 4 must therefore be that, in order to comply with Article 9 of the Directive, the Member State should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of organizers' insolvency.
Question 5
56 By its fifth question, the national court asks whether the objective of consumer protection pursued by Article 7 of the Directive is satisfied if the Member State allows the travel organizer to require a deposit of up to 10% towards the travel price, with

a maximum of DM 500, before handing over to his customer documents which the national court describes as "documents of value", namely documents evidencing the consumer' s right to the provision of the various services included in the travel package (by airlines or hotel companies).
57 It appears from the order for reference that this question refers to Paragraph 651k(4) of the BGB, reproduced at paragraph 8 above, and to the "advance payment" judgment of the Bundesgerichtshof of 12 March 1987, referred to in Question 7, which annulled travel organizers' general business conditions in so far as they required travellers to pay a deposit equivalent to 10% of the travel price without receipt of documents of value.
58 It is also clear from the order for reference that by this question the national court is seeking to ascertain in substance whether it is in conformity with Article 7 for the national legislature to make the consumer bear the risk relating to such a deposit so that the deposit is left uncovered by the security mentioned in that provision.
59 As was found in relation to Questions 1 and 2, the purpose of Article 7 of the Directive is to protect the consumer against the risks defined by that provision arising from the insolvency of the organizer. It would be contrary to that purpose to limit that protection by leaving any deposit payment uncovered by the security for a refund or repatriation. The Directive contains no basis for any such limitation of the rights guaranteed by Article 7.
60 So a national rule allowing organizers to require travellers to pay a deposit will be in conformity with Article 7 of the Directive only if, in the event of the organizer' s insolvency, refund of the deposit is also guaranteed.
61 The reply to Question 5 must therefore be that, if a Member State allows the travel organizer to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of the Directive is not satisfied unless a refund of that deposit is also guaranteed in the event of the organizer' s insolvency.
Question 7
62 By Question 7(b) the national court asks whether the security of which organizers must "provide sufficient evidence", in accordance with Article 7 of the Directive, is lacking even if, on payment of the travel price, travellers have documents of value.
63 According to the German Government, the protection guaranteed by Article 7 is not lacking if the traveller has documents guaranteeing a direct right against the actual provider of services (the airline company or the hotelier). In such a situation, the traveller is in fact in a position to require performance of the services, so that there is no risk that he will not receive the services because of the organizer' s insolvency.
64 That argument cannot be accepted. The protection which Article 7 guarantees to consumers could be impaired if they were made to enforce credit vouchers against third parties who are not, in any event, required to honour them and who are likewise themselves exposed to the risks consequent on insolvency.
65 The reply to Question 7(b) must therefore be that Article 7 of the Directive is to be interpreted as meaning that the security of which organizers must "provide sufficient evidence" is lacking even if, on payment of the travel price, travellers are in possession of documents of value.

66 In Question 7(a) the national court asks whether the Federal Republic of Germany could have omitted altogether to transpose Article 7 of the Directive in view of the Bundesgerichtshof' s "advance payment" judgment.
67 Quite apart from the question whether a judgment of a court of law could ensure proper transposition of the Directive, the reply to this question follows in any case from the replies given to Questions 5 and 7(b). Since the aim of Article 7 is to protect the consumer against the risks, set out in that provision, arising from the organizer' s insolvency, a judgment such as the Bundesgerichtshof' s "advance payment" judgment cannot satisfy the requirements of the Directive if it requires the consumer to bear the risk of the organizer' s insolvency as regards the deposit required and also the risk that, when the consumer has received documents of value, the actual provider of the services might not honour them or might become insolvent.
68 The reply to Question 7 must therefore be that Article 7 of the Directive is to be interpreted as meaning that the "security" of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of documents of value and that the Federal Republic of Germany could not have omitted altogether to transpose the Directive on the basis of the Bundesgerichtshof' s "advance payment" judgment.
Question 6
69 By Question 6 the national court asks whether the Directive requires Member States to adopt specific measures to protect package travellers against their own negligence.
70 So framed, that question prompts the following three observations.
71 First, neither the objective of the Directive nor its specific provisions require the Member States to adopt specific provisions in relation to Article 7 to protect package travellers from their own negligence.
72 Secondly, according to the Court' s case-law, in determining the loss or damage for which reparation may be granted, the national court may always inquire whether the injured person showed reasonable care so as to avoid the loss or damage or to mitigate it (see, in particular, Brasserie du Pêcheur and Factortame, at paragraph 84).
73 Lastly, although that principle also applies in actions for damages based on non-transposition of a directive, such as those brought in this case, it follows from the replies given to Questions 5 and 7 that a package traveller who has paid the whole travel price cannot be regarded as acting negligently simply because he has not taken advantage of the possibility, which the "advance payment" judgment affords him, of not paying more than 10% of the total travel price before obtaining documents of value.
74 The reply to Question 6 must therefore be that the Directive does not require Member States to adopt specific measures in relation to Article 7 in order to protect package travellers against their own negligence.
(omissis)
On those grounds,
THE COURT,
in answer to the questions referred to it by the Landgericht Bonn, by orders of 6 June 1994, hereby rules:
1. Failure to take any measure to transpose a directive in order to achieve the result

it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State' s obligation and the loss and damage suffered.
2. The result prescribed by Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer' s insolvency; the content of those rights is sufficiently identifiable.
3. In order to comply with Article 9 of Directive 90/314, the Member States should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of the insolvency of the organizer and/or retailer party to the contract.
4. If a Member State allows the package travel organizer and/or retailer party to a contract to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of Directive 90/314 is not satisfied unless a refund of that deposit is also guaranteed in the event of the insolvency of the package travel organizer and/or retailer party to the contract.
5. Article 7 of Directive 90/314 is to be interpreted as meaning that the "security" of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of documents of value and that the Federal Republic of Germany could not have omitted altogether to transpose Directive 90/314 on the basis of the Bundesgerichtshof' s "advance payment" judgment of 12 March 1987.
6. Directive 90/314 does not require Member States to adopt specific measures in relation to Article 7 in order to protect package travellers against their own negligence.

20.

European Court of Justice 22 December 2008 Case C-549/07
Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA,.
Reference for a preliminary ruling: Handelsgericht Wien - Austria.
(omissis)
1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) 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).
2 The reference was made in the course of proceedings between Mrs Wallentin-Hermann and Alitalia – Linee Aree Italiane SpA ('Alitalia') following Alitalia's refusal to pay compensation to the applicant in the main proceedings whose flight had been cancelled.
Legal context
International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 ('the Montreal Convention'), was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38). That convention entered into force so far as concerns the Community on 28 June 2004.

4 Articles 17 to 37 of the Montreal Convention comprise Chapter III thereof, headed 'Liability of the carrier and extent of compensation for damage'.

5 Article 19 of the Convention, headed 'Delay', provides:

'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.'

Community law

6 Regulation No 261/2004 includes, inter alia, the following recitals:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

…

(12) The trouble and inconvenience to passengers caused by cancellation of flights should … be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

…

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

7 Article 5 of Regulation No 261/2004, headed 'Cancellation', states:

'1. In case of cancellation of a flight, the passengers concerned shall:

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)

(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and
(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.
…
3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
…'
8 Article 7(1) of Regulation No 261/2004, headed 'Right to compensation', provides:
'Where reference is made to this Article, passengers shall receive compensation amounting to:
(a) EUR 250 for all flights of 1 500 kilometres or less;
(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;
(c) EUR 600 for all flights not falling under (a) or (b).
…'
The dispute in the main proceedings and the questions referred for a preliminary ruling
9 It is apparent from the order for reference that Mrs Wallentin-Hermann booked three seats on a flight with Alitalia from Vienna (Austria) to Brindisi (Italy) via Rome (Italy) for herself, her husband and her daughter. The flight was scheduled to depart from Vienna on 28 June 2005 at 6.45 a.m. and to arrive at Brindisi on the same day at 10.35 a.m.
10 After checking in, the three passengers were informed, five minutes before the scheduled departure time, that their flight had been cancelled. They were subsequently transferred to an Austrian Airlines flight to Rome, where they arrived at 9.40 a.m., that is 20 minutes after the time of departure of their connecting flight to Brindisi, which they therefore missed. Mrs Wallentin-Hermann and her family arrived at Brindisi at 2.15 p.m.
11 The cancellation of the Alitalia flight from Vienna resulted from a complex engine defect in the turbine which had been discovered the day before during a check.

Alitalia had been informed of the defect during the night preceding that flight, at 1.00 a.m. The repair of the aircraft, which necessitated the dispatch of spare parts and engineers, was completed on 8 July 2005.

12 Mrs Wallentin-Hermann requested that Alitalia pay her EUR 250 compensation pursuant to Articles 5(1)(c) and 7(1) of Regulation No 261/2004 due to the cancellation of her flight and also EUR 10 for telephone charges. Alitalia rejected that request.

13 In the judicial proceedings that Mrs Wallentin-Hermann then brought, the Bezirksgericht für Handelssachen Wien (District Commercial Court, Vienna) upheld her application for compensation, in particular on the ground that the technical defects which affected the aircraft concerned were not covered by the 'extraordinary circumstances' provided for in Article 5(3) of Regulation No 261/2004 which exempt from the obligation to pay compensation.

14 Alitalia lodged an appeal against that decision before the Handelsgericht Wien (Commercial Court, Vienna), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are there extraordinary circumstances within the meaning of Article 5(3) of Regulation … No 261/2004 … , having regard to recital 14 in the preamble to the regulation, if a technical defect in the aeroplane, in particular damage to the engine, results in the cancellation of the flight, and must the grounds of excuse under Article 5(3) of [that] regulation be interpreted in accordance with the provisions of Article 19 of the Montreal Convention?

(2) If the answer to the first question is in the affirmative, are there extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] where air carriers cite technical defects as a reason for flight cancellations with above average frequency, solely on the basis of their frequency?

(3) If the answer to the first question is in the affirmative, has an air carrier taken all "reasonable measures" in accordance with Article 5(3) of Regulation [No 261/2004] if it establishes that the minimum legal requirements with regard to maintenance work on the aeroplane have been met and is that sufficient to relieve the air carrier of the obligation to pay compensation provided for by Article 5 in conjunction with Article 7 of [that] regulation?

(4) If the answer to the first question is in the negative, are extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] cases of *force majeure* or natural disasters, which were not due to a technical defect and are thus unconnected with the air carrier?'

The questions referred for a preliminary ruling

The first and fourth questions

15 By its first and fourth questions, which it is appropriate to examine together, the referring court is essentially asking whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 in the preamble to that regulation, must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is covered by the concept of 'extraordinary circumstances' within the meaning of that provision or whether, conversely, that concept covers situations of a different kind which are not due to technical problems. The referring court is also asking whether the grounds of exemption under that provision must be interpreted in accordance with the

provisions of the Montreal Convention, in particular Article 19 thereof.
16 It must be stated that the concept of extraordinary circumstances is not amongst those which are defined in Article 2 of Regulation No 261/2004. Moreover, that concept is not defined in the other articles of that regulation.
17 It is settled case-law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. Moreover, when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly (see, to that effect, Case C-336/03 *easyCar* [2005] ECR I-1947, paragraph 21 and the case-law cited). Furthermore, the preamble to a Community measure may explain the latter's content (see, to that effect, inter alia, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 76).
18 In this respect, the objectives pursued by Article 5 of Regulation No 261/2004, which lays down the obligations owed by an operating air carrier in the event of cancellation of a flight, are clear from recitals 1 and 2 in the preamble to the regulation, according to which action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers and take account of the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers (see, to that effect, *IATA and ELFAA*, paragraph 69).
19 As is apparent from recital 12 in the preamble to, and Article 5 of, Regulation No 261/2004, the Community legislature intended to reduce the trouble and inconvenience to passengers caused by cancellation of flights by inducing air carriers to announce cancellations in advance and, in certain circumstances, to offer re-routing meeting certain criteria. Where those measures could not be adopted by air carriers, the Community legislature intended that they should compensate passengers, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
20 In that context, it is clear that, whilst Article 5(1)(c) of Regulation No 261/2004 lays down the principle that passengers have the right to compensation if their flight is cancelled, Article 5(3), which determines the circumstances in which the operating air carrier is not obliged to pay that compensation, must be regarded as derogating from that principle. Article 5(3) must therefore be interpreted strictly.
21 In this respect, the Community legislature indicated, as stated in recital 14 in the preamble to Regulation No 261/2004, that such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an air carrier.
22 It is apparent from that statement in the preamble to Regulation No 261/2004 that the Community legislature did not mean that those events, the list of which is indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances. It follows that all the circumstances surrounding such events are not necessarily grounds of exemption from the obligation to

pay compensation provided for in Article 5(1)(c) of that regulation.

23 Although the Community legislature included in that list 'unexpected flight safety shortcomings' and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the preamble to that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.

24 In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft, it must be stated that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is moreover in order to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft are subject to regular checks which are particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity.

25 Consequently, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004.

26 However, it cannot be ruled out that technical problems are covered by those exceptional circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.

27 It is therefore for the referring court to ascertain whether the technical problems cited by the air carrier involved in the case in the main proceedings stemmed from events which are not inherent in the normal exercise of the activity of the air carrier concerned and were beyond its actual control.

28 As regards the question whether the ground of exemption set out in Article 5(3) of Regulation No 261/2004 must be interpreted in accordance with the provisions of the Montreal Convention, in particular Article 19 thereof, it must be stated that that convention forms an integral part of the Community legal order. Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see Case C-173/07 *Emirates Airlines* [2008] ECR I-0000, paragraph 43).

29 Under Article 19 of the Montreal Convention, a carrier may be exempted from its liability for damage occasioned by delay 'if it proves that it and its servants and

agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures'.

30 In this respect, it must be observed that Article 5(3) of Regulation No 261/2004 refers to the concept of 'extraordinary circumstances', whereas that concept does not appear in either Article 19 or any other provision of the Montreal Convention.

31 It should also be noted that that Article 19 relates to delays, whereas Article 5(3) of Regulation No 261/2004 deals with flight cancellations.

32 Moreover, as is clear from paragraphs 43 to 47 of *IATA and ELFAA*, Article 19 of the Montreal Convention and Article 5(3) of Regulation No 261/2004 relate to different contexts. Article 19 et seq. of that convention governs the conditions under which, if a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis. By contrast, Article 5 of Regulation No 261/2004 provides for standardised and immediate compensatory measures. Those measures, which are unconnected with those whose institution is governed by the Montreal Convention, thus intervene at an earlier stage than the convention. It follows that the carrier's grounds of exemption from liability provided for in Article 19 of that convention cannot be transposed without distinction to Article 5(3) of Regulation No 261/2004.

33 In those circumstances, the Montreal Convention cannot determine the interpretation of the grounds of exemption under that Article 5(3).

34 In the light of the above, the answer to the first and fourth questions referred must be that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Montreal Convention is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.

The second question

35 In the light of all the questions referred, it must be considered that, by this question, the referring court is essentially asking whether the frequency alone of the technical problems precludes them from being covered by 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 where air carriers cite those problems as a reason for flight cancellations with above average frequency.

36 As was stated at paragraph 27 of this judgment, it is for the referring court to ascertain whether the technical problems cited by the air carrier in question in the main proceedings stem from events which are not inherent in the normal exercise of its activity and are beyond its actual control. It is apparent from this that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

37 In view of the foregoing, the answer to the second question referred must be that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

The third question

38 By its third question, the referring court is essentially asking whether it must be considered that an air carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 if it establishes that the minimum legal requirements with regard to maintenance work have been met on the aircraft the flight of which was cancelled and whether that evidence is sufficient to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

39 It must be observed that the Community legislature intended to confer exemption from the obligation to pay compensation to passengers in the event of cancellation of flights not in respect of all extraordinary circumstances, but only in respect of those which could not have been avoided even if all reasonable measures had been taken.

40 It follows that, since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned.

41 That party must establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able – unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time – to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.

42 It is for the referring court to ascertain whether, in the circumstances of the case in the main proceedings, the air carrier concerned took measures appropriate to the situation, that is to say measures which, at the time of the extraordinary circumstances whose existence the air carrier is to establish, met, inter alia, conditions which were technically and economically viable for that carrier.

43 In view of the foregoing, the answer to the third question referred must be that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

(omissis)

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

1. Article 5(3) 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, must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Convention

for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.
2. The frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.
3. The fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

21.

European Court of Justice 13 October 2011 Case C-83/10
Aurora Sousa Rodríguez and Others v Air France SA
Reference for a preliminary ruling: Juzgado de lo Mercantil nº 1 de Pontevedra - Spain.
(omissis)
1 This reference for a preliminary ruling concerns the interpretation of Article 2(1) and Article 12 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) ('Regulation No 261/2004').
2 The reference has been made in proceedings between seven passengers and Air France SA ('Air France') concerning compensation for damage that they consider that they suffered as a result of significant delays and inconveniences caused by technical problems encountered by that airline company's aeroplane on a flight from Paris (France) to Vigo (Spain).
Legal context
International law
3 The European Union ('EU') took part in the International Diplomatic Conference on air law that was held in Montreal from 10 to 28 May 1999, which resulted, on 28 May 1999, in the adoption of the Convention for the unification of certain rules for international carriage by air ('the Montreal Convention'), and it signed that Convention on 9 December 1999.
4 On 5 April 2001 the Council of the European Union adopted Decision 2001/539/EC on the conclusion by the European Community of the Convention for the unification of certain rules for international carriage by air ('the Montreal Convention') (OJ 2001 L 194, p. 38). That Convention entered into force, in relation to the EU, on 28 June 2004.
5 Article 19 of the Montreal Convention, entitled 'Delay', appearing in Chapter III thereof, entitled 'Liability of the carrier and extent of compensation for damage', provides:

'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.'

6 Article 22(1) of the Montreal Convention, entitled 'Limits of liability in relation to delay, baggage and cargo', also falling within Chapter III, states:

'In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.'

7 Article 29 of the Montreal Convention, entitled 'Basis of claims', provides:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention …'

EU law

Regulation (EC) No 2027/97

8 Article 1 of Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ 1997 L 285, p. 1), as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2, 'Regulation No 2027/97'), provides:

'This Regulation implements the relevant provisions of the [Montreal Convention] …'

9 Article 3(1) of Regulation No 2027/97 states:

'The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.'

Regulation No 261/2004

10 Recitals 10 and 17 in the preamble to Regulation No 261/2004 state:

'(10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

…

(17) Passengers whose flights are delayed for a specified time should be adequately cared for and should be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions.'

11 Article 1(1) of Regulation No 261/2004, entitled 'Subject', provides:

'This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

(a) they are denied boarding against their will;

(b) their flight is cancelled;

(c) their flight is delayed.'

12 Article 2(1) of Regulation No 261/2004 provides, under the heading 'Definitions':

'For the purposes of this Regulation:
…
(1) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.'
13 Article 5(1) to (3) of Regulation No 261/2004, entitled 'Cancellation', states:
'1. In case of cancellation of a flight, the passengers concerned shall:
(a) be offered assistance by the operating air carrier in accordance with Article 8; and
(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and
(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.
2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.
3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'
14 Article 6(1) of Regulation No 261/2004, entitled 'Delay', provides:
'When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:
(a) for two hours or more in the case of flights of 1 500 kilometres or less; or
(b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or
(c) for four hours or more in the case of all flights not falling under (a) or (b),
passengers shall be offered by the operating air carrier:
(i) the assistance specified in Article 9(1)(a) and 9(2); and
(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and
(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).'
15 Article 7(1) of Regulation No 261/2004, entitled 'Right to compensation', provides:
'1. Where reference is made to this Article, passengers shall receive compensation

amounting to:
(a) EUR 250 for all flights of 1 500 kilometres or less;
…'
16 Article 8 of Regulation No 261/2004, entitled 'Right to reimbursement or re-routing', provides:
'1. Where reference is made to this Article, passengers shall be offered the choice between:
(a) – reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
– a return flight to the first point of departure, at the earliest opportunity;
(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.
…
3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.'
17 Article 9(1) and 9(2) of Regulation No 261/2004, entitled 'Right to care', provides:
'1. Where reference is made to this Article, passengers shall be offered free of charge:
(a) meals and refreshments in a reasonable relation to the waiting time;
(b) hotel accommodation in cases
– where a stay of one or more nights becomes necessary, or
– where a stay additional to that intended by the passenger becomes necessary;
(c) transport between the airport and place of accommodation (hotel or other).
2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or emails.'
18 Article 12(1) of Regulation No 261/2004, entitled 'Further compensation', states:
'This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'
The dispute in the main proceedings and the questions referred for a preliminary ruling
19 The applicants in the main proceedings entered into an air transport contract with Air France to carry them from Paris (France) to Vigo (Spain) on that company's Flight 5578. That flight was scheduled for 25 September 2008, with a departure time from Paris (Charles de Gaulle) of 19.40.
20 A few minutes after the flight took off as planned, the pilot decided to return

to the departure point, Paris Charles de Gaulle airport, because of a technical failure of the aeroplane. After the return to the airport of departure, there is nothing in the file to indicate that the plane then took off again and belatedly reached its destination.
21 Three passengers of the flight in question were invited to take a flight leaving the next day, 26 September 2008, at 07.05, from Paris Orly airport to Porto (Portugal), from where they travelled to Vigo by taxi. Another traveller was offered a seat, the same day, on a flight from Paris to Vigo, via Bilbao. As for the other passengers, Air France put them on a flight from Paris to Vigo, also departing on 26 September 2008, at the same time as the one that had broken down (19.40). With the exception of one of them, none of the passengers of the flight from the day before was provided with accommodation at Air France's cost or received any assistance from that airline.
22 Seven passengers on Flight 5578, that is to say the applicants in the main proceedings, brought an action against Air France for damages before the Juzgado de lo Mercantil No 1 de Pontevedra (Commercial Court No 1 of Pontevedra) for breach of contracts of carriage by air.
23 The applicants in the main proceedings seek the compensation referred to in Article 7 of Regulation No 261/2004 in the fixed amount of EUR 250 each, as prescribed by that article. One of the applicants claims, furthermore, repayment of the costs that he incurred for his transfer by taxi from Porto airport to Vigo. Another applicant claims the repayment of his meal costs at the Paris airport, as well as those in respect of his dog's being kept in boarding kennels for a day longer than initially expected. All the applicants claim, finally, that Air France should be ordered to pay them an additional sum in respect of the non-material damage that they consider they have suffered.
24 It is in those circumstances that the Juzgado de lo Mercantil no 1 de Pontevedra decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
'1. Is the term "cancellation", defined in Article 2(l) of [Regulation No 261/2004], to be interpreted as meaning only the failure of the flight to depart as planned or is it also to be interpreted as meaning any circumstance as a result of which the flight on which places are reserved takes off but fails to reach its destination, including the case in which the flight is forced to return to the airport of departure for technical reasons?
2. Is the term "further compensation", used in Article 12 of [Regulation No 261/2004], to be interpreted as meaning that, in the event of a cancellation, the national court may award compensation for damage, including non-material damage, for breach of a contract of carriage by air in accordance with rules established in national legislation and case-law on breach of contract or, on the contrary, must such compensation relate solely to appropriately substantiated expenses incurred by passengers and not adequately indemnified by the carrier in accordance with the requirements of Articles 8 and 9 of [Regulation No 261/2004], even if such provisions have not been relied upon or, lastly, are the two aforementioned notions of further compensation compatible one with another?'

Consideration of the questions referred

The first question

25 For the purpose of compensating the passengers on the basis of the combined provisions of Article 5 and Article 7 of Regulation No 261/2004, the national court, called on to determine whether the flight in question can be classified as 'cancelled'

within the meaning of Article 2(1) of Regulation No 261/2004, asks, in essence, whether the meaning of 'cancellation' refers only to the situation in which the aeroplane in question fails to take off at all, or whether it also covers the case in which that aeroplane, although having taken off, must return to the airport of departure following a technical failure of the aircraft.

26 It must be noted at the outset that Article 2(1) of Regulation No 261/2004 defines 'cancellation' as 'the non-operation of a flight which was previously planned and on which at least one place was reserved'. Before being able to determine the meaning of 'cancellation', the meaning of 'flight' for the purpose of Article 2(1) must therefore firstly be specified.

27 In that regard, the Court has already held that a flight consists, in essence, of an air transport operation, being as it were a 'unit' of such transport, performed by an air carrier which fixes its itinerary (Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, paragraph 40). Moreover, it has specified that the itinerary is an essential element of the flight, as the flight is operated in accordance with the carrier's pre-arranged planning (Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 30).

28 As the term 'itinerary' means the journey to be made by aeroplane from the airport of departure to the airport of arrival according to a fixed schedule, it follows that, for a flight to be considered to have been operated, it is not enough that the aeroplane left in accordance with the scheduled itinerary, but it must also have reached its destination as appearing in the said itinerary. The fact that take-off occurred but that the aeroplane then returned to the airport of departure without having reached the destination appearing in the itinerary means that the flight, as initially scheduled, cannot be considered as having been operated.

29 Next, it in no way follows from the definition in Article 2(1) of Regulation No 261/2004 that, in addition to the fact that the initially scheduled flight was not operated, the 'cancellation' of that flight, within the meaning of Article 2(1), requires the adoption of an express decision cancelling it.

30 In that regard, the Court has held that it is possible, as a rule, to conclude that there is a cancellation where the delayed flight for which the booking was made is 'rolled over' onto another flight, that is to say, where the planning for the original flight is abandoned and the passengers from that flight join passengers on a flight which was also planned but independently of the flight for which the passengers so transferred had made their bookings (*Sturgeon and Others*, paragraph 36).

31 In such a situation, it is not at all necessary that all the passengers who had booked a place on the originally scheduled flight be transported on another flight. All that matters in that regard is the individual situation of each passenger so transported, that is to say, the fact that, in relation to the passenger in question, the original planning of the flight has been abandoned.

32 In that regard, it must be noted that both Article 1(1)(b) and recitals 10 and 17 of Regulation No 261/2004, in the various language versions of Regulation No 261/2004, refer to the cancellation of 'their' flight.

33 It is undisputed that all the applicants to the main proceedings were transferred to other flights, scheduled for the day after the scheduled departure date, allowing

them to reach their final destination, Vigo, subject to a transfer for certain of them. 'Their' originally scheduled flight must, consequently, be classified as 'cancelled'.

34 Finally, it must be noted that the reason why the aeroplane was forced to return to the airport of departure and did not, therefore, reach its destination, is irrelevant to the classification of 'cancellation' within the abovementioned definition in Article 2(1) of Regulation No 261/2004. That reason is relevant only to determine, in the context of compensation for damage suffered by passengers due to the cancellation of their flight, whether, depending on the circumstances, that cancellation is 'caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken' within the meaning of Article 5(3) of Regulation No 261/2004, in which case no compensation is payable.

35 In light of the foregoing, the answer to the first question is that 'cancellation', as defined in Article 2(1) of Regulation No 261/2004, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, it does not refer only to the situation in which the aeroplane in question fails to take off at all, but also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of that aeroplane were transferred onto other flights.

The second question

36 By its second question, the national court asks, in essence, whether, in respect of the further compensation provided for by Article 12 of Regulation No 261/2004, the national court may order the air carrier to pay for all types of damage, including non-material damage, arising from breach of a contract of carriage by air, in accordance with national rules. It asks, in particular, whether such further compensation may cover expenses incurred by passengers due to the failure of the air carrier to fulfil its obligations to assist and provide care under Articles 8 and 9 of Regulation No 261/2004.

37 At the outset, it must be noted that Article 1 of Regulation No 261/2004 notes the minimum nature of the rights that it establishes for air passengers in the event of being denied boarding against their will, or of cancellation or delay of their flight. Moreover, Article 12 of Regulation No 261/2004, entitled 'Further compensation', provides that Regulation No 261/2004 applies without prejudice to a passenger's right to further compensation. It is also made clear that compensation granted under Regulation No 261/2004 may be deducted from such compensation.

38 It follows from those provisions that the compensation granted to air passengers on the basis of Article 12 of Regulation No 261/2004 is intended to supplement the application of measures provided for by Regulation No 261/2004, so that passengers are compensated for the entirety of the damage that they have suffered due to the failure of the air carrier to fulfil its contractual obligations. That provision thus allows the national court to order the air carrier to compensate damage arising, for passengers, from breach of the contract of carriage by air on a legal basis other than Regulation No 261/2004, that is to say, in particular, in the conditions provided for by the Montreal Convention and national law.

39 In that regard, it must be recalled that the Court has already held that standardised and immediate measures taken pursuant to Regulation No 261/2004 do not

themselves prevent the passengers concerned, should the same failure of the air carrier to fulfil its contractual obligations also cause them damage conferring entitlement to compensation, from being able to bring, in addition, actions to redress that damage under the conditions laid down by the Montreal Convention (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 47).

40 In particular, the provisions of Articles 19, 22 and 29 of the Montreal Convention, applicable, pursuant to Article 3(1) of Regulation No 2027/97, to the liability of an air carrier established within the territory of a Member State, specify the conditions in which, following the delay or cancellation of a flight, the passengers in question may bring actions to obtain, by way of redress on an individual basis, damages from the carriers liable for damage arising from breach of a contract of carriage by air.

41 In that regard, it should be recalled that, in its judgment in Case C-63/09 *Walz* [2010] ECR I-0000, paragraph 29, the Court held that the term 'damage', referred to in Chapter III of the Montreal Convention, must be construed as including both material and non-material damage. It follows that damage for which compensation may be payable pursuant to Article 12 of Regulation No 261/2004 may be not only material damage, but also non-material damage.

42 On the other hand, in respect of further compensation, on the basis of Article 12 of Regulation No 261/2004, the national court may not order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of the carrier to fulfil its obligations to assist (reimbursement of ticket or re-routing to the final destination, taking into account the cost of transfer between the airport of arrival and the originally scheduled airport) and provide care (meal, accommodation and communication costs) under Article 8 and Article 9 of Regulation No 261/2004.

43 The air passengers' claims based on the rights conferred on them by Regulation No 261/2004, such as those set out in Article 8 and Article 9, cannot be considered as falling within 'further' compensation in the sense in which it has been defined in paragraph 38 herein.

44 However, when a carrier fails to fulfil its obligations under Article 8 and Article 9 of Regulation No 261/2004, air passengers are justified in claiming a right to compensation on the basis of the factors set out in those articles.

45 Finally, as the national court has raised the question whether the rights of air passengers established in Article 8 and Article 9 of Regulation No 261/2004 are conditional on being claimed by those passengers, it must be stated that, as the Advocate General noted in point 61 of her Opinion, there is nothing in Regulation No 261/2004 that precludes the award of compensation in respect of a failure to fulfil the obligations provided for by Article 8 and Article 9 therein, if those provisions are not invoked by the air passengers.

46 In light of the foregoing, the answer to the second question is that the meaning of 'further compensation', used in Article 12 of Regulation No 261/2004, allows the national court to award compensation, under the conditions provided for by the Montreal Convention or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air. On the other hand, that meaning of 'further compensation' may not be the legal basis for the national court to order an air carrier to

reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of that carrier to fulfil its obligations to assist and provide care under Article 8 and Article 9 of Regulation No 261/2004.
(omissis)
On those grounds, the Court (Third Chamber) hereby rules:
1. 'Cancellation', as defined in Article 2(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, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, it does not refer only to the situation in which the aeroplane in question fails to take off at all, but also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of the said aeroplane were transferred to other flights.
2. The meaning of 'further compensation', used in Article 12 of Regulation No 261/2004, must be interpreted to the effect that it allows the national court to award compensation, under the conditions provided for by the Convention for the unification of certain rules for international carriage by air or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air. On the other hand, that meaning of 'further compensation' may not be the legal basis for the national court to order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of that carrier to fulfil its obligations to assist and provide care under Article 8 and Article 9 of Regulation No 261/2004.

22.

European Court of Justice 4 October 2012, Case 321/11
Germán Rodríguez Cachafeiro and María de los Reyes Martínez-Reboredo Varela-Villamor v Iberia, Líneas Aéreas de España SA.
Reference for a preliminary ruling: Juzgado de lo Mercantil nº 2 de A Coruña - Spain.
(omissis)
1 This reference for a preliminary ruling concerns the interpretation of Articles 2(j), 3(2) and 4(3) 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).
2 The reference has been made in proceedings between, on the one hand, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor and, on the other, the airline Iberia, Líneas Aéreas de España SA ('Iberia'), following Iberia's refusal to compensate them for not allowing them to board a flight from Madrid (Spain) to Santo Domingo (Dominican Republic).
Legal framework
Regulation (EEC) No 295/91

3 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5), which was in force until 16 February 2005, provided at Article 1:
'This Regulation establishes common minimum rules applicable where passengers are denied access to an overbooked scheduled flight for which they have a valid ticket and a confirmed reservation departing from an airport located in the territory of a Member State to which the [EC] Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger and the point of destination.'

Regulation No 261/2004

4 Recitals 1, 3, 4, 9 and 10 in the preamble to Regulation No 261/2004 state:
'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.
…
(3) While [Regulation No 295/91] created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.
(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.
…
(9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.
(10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.'

5 Article 2 of Regulation No 261/2004, entitled 'Definitions', provides:
'For the purposes of this Regulation:
…
(j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;
…'

6 Article 3 of that regulation, entitled 'Scope', provides in paragraph 2:
'Paragraph 1 shall apply on the condition that passengers:
(a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in:
– as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent, or, if no time is indicated,
– not later than 45 minutes before the published departure time; or
…'

7 Article 4 of Regulation No 261/2004, entitled 'Denied boarding', reads as follows:

'1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.'

8 Article 7 of that regulation, entitled 'Right to compensation', provides in paragraph 1:

'Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

…'

9 Articles 8 and 9 of that regulation, read in conjunction with Article 4 thereof, provide a right to reimbursement or re-routing and a right to care for passengers who are denied boarding.

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

10 The applicants in the main proceedings, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor (or 'the applicants'), both bought airline tickets from Iberia for the journey from Corunna (Spain) to Santo Domingo. That ticket comprised two flights: flight IB 513 Corunna-Madrid on 4 December 2009 (from 13.30 to 14.40), and flight IB 6501 Madrid-Santo Domingo the same day (from 16.05 to 19.55).

11 At the Iberia check-in counter at Corunna airport, the applicants checked their luggage in — direct to their final destination — in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004, and were given two boarding cards for the two successive flights.

12 The first flight was delayed by 1 hour and 25 minutes. In anticipation that that delay would result in the two passengers missing their connection in Madrid, at 15.17 Iberia cancelled their boarding cards for the second flight scheduled for 16.05. The referring court notes that, on arrival in Madrid, the applicants presented themselves at the departure gate in the final boarding call to passengers. The Iberia staff did not, however, allow them to board on the grounds that their boarding cards had been cancelled and their seats allocated to other passengers.

13 The applicants waited until the following day in order to be taken to Santo Domingo on another flight and they reached their final destination 27 hours late.

14 On 23 February 2010, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor brought an action before the Juzgado de lo Mercantil No 2, A Coruña (Commercial Court No 2, Corunna), seeking a decision ordering Iberia to pay them the sum of EUR 600 each by way of compensation for 'denied boarding', pursuant to Articles 4(3) and 7(1)(c) of Regulation No 261/2004. Iberia disputed those claims, contending that the facts on the basis of which the action had been brought before that court did not amount to a case of 'denied boarding', but should rather be construed as a missed connection, since the decision to deny the applicants boarding was not attributable to overbooking, but was caused by the delay to the earlier flight.

15 The referring court also notes that Iberia paid the compensation provided for under Articles 4(3) and 7 of Regulation No 261/2004 to seven passengers for denied boarding on the Madrid-Santo Domingo flight in question.

16 In that context, the referring court seeks to ascertain whether the concept of 'denied boarding' refers exclusively to situations in which flights have been overbooked initially or whether that concept may be extended to cover other situations such as that of the applicants.

17 In those circumstances the Juzgado de lo Mercantil No 2, A Coruña, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'May the concept of "denied boarding" contained in Article 2(j), in conjunction with Articles 3(2) and 4(3), of [Regulation No 261/2004], be regarded as including a situation in which an airline refuses to allow boarding because the first flight included in the ticket is subject to a delay attributable to the airline and the latter mistakenly expects the passengers not to arrive in time to catch the second flight, and so allows their seats to be taken by other passengers?'

The question referred for a preliminary ruling

18 By its question, the referring court asks, in essence, whether Article 2(j) of Regulation No 261/2004, read in conjunction with Article 3(2) of that regulation, must be interpreted as meaning that the concept of 'denied boarding' includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies some passengers boarding on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

19 In that regard, it is to be noted that, pursuant to Article 2(j) of Regulation No 261/2004, characterisation as 'denied boarding' presupposes that an air carrier refuses to carry a passenger on a flight for which he had a reservation and presented himself for boarding in accordance with the conditions laid down in Article 3(2) of that regulation, unless there are reasonable grounds for denying that passenger boarding, such as the reasons mentioned in Article 2(j).

20 In the main proceedings, the question raised by the referring court is based on the premiss that the applicants presented themselves for boarding on the Madrid-Santo Domingo flight in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004. In addition, it is apparent from the file that the applicants were prevented from boarding that flight not because of an alleged failure to comply

with those conditions, but because their reservations had been cancelled as a result of the delay on the earlier Corunna-Madrid flight.

21 Without prejudging the possible consequences of the fact that, as a result of that delay, the applicants reached their final destination (Santo Domingo) 27 hours after the scheduled arrival time indicated when they reserved their travel, the Court observes that, as regards the reasons for a carrier denying boarding to a passenger who holds a reservation and has duly presented himself for boarding, the wording of Article 2(j) of Regulation No 261/2004 does not link 'denied boarding' to a carrier's 'overbooking' the flight concerned for economic reasons.

22 As regards the context of that provision and the objectives pursued by the legislation of which it is part, it is apparent not only from recitals 3, 4, 9 and 10 of Regulation No 261/2004, but also from the *travaux préparatoires* for that regulation — and in particular from the Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, presented by the Commission of the European Communities on 21 December 2001 (COM(2001) 784 final) — that the European Union ('EU') legislature sought, by the adoption of that regulation, to reduce the number of passengers denied boarding against their will, which was too high at that time. This would be achieved by filling the gaps in Regulation No 295/91 which confined itself to establishing, in accordance with Article 1 thereof, common minimum rules applicable where passengers are denied access to an overbooked scheduled flight.

23 It is in that context that by means of Article 2(j) of Regulation No 261/2004 the EU legislature removed from the definition of 'denied boarding' any reference to the ground on which an air carrier refuses to carry a passenger.

24 In so doing, the EU legislature expanded the scope of the definition of 'denied boarding' beyond merely situations where boarding is denied on account of overbooking referred to previously in Article 1 of Regulation No 295/91, and construed 'denied boarding' broadly as covering all circumstances in which an air carrier may refuse to carry a passenger.

25 That interpretation is supported by the finding that limiting the scope of 'denied boarding' exclusively to cases of overbooking would have the practical effect of substantially reducing the protection afforded to passengers under Regulation No 261/2004 and would therefore be contrary to the aim of that regulation — referred to in recital 1 in the preamble thereto — of ensuring a high level of protection for passengers. Consequently, a broad interpretation of the rights granted to passengers is justified (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69, and Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 18).

26 Accordingly, to accept that only situations of overbooking are covered by the concept of 'denied boarding' would have the effect of denying all protection to passengers who find themselves in a situation such as that of the applicants, by precluding them from relying on Article 4 of Regulation No 261/2004, paragraph 3 of which refers to the provisions of that regulation relating to rights to compensation, reimbursement or re-routing and to care, as laid down in Articles 7 to 9 of that regulation.

27 In the light of the foregoing, denial of boarding by an air carrier in circumstances

such as those of the main proceedings must, in principle, be included in the concept of 'denied boarding' within the meaning of Article 2(j) of Regulation No 261/2004.
28 Nevertheless, it must be confirmed that, as laid down in that provision, there are not reasonable grounds to deny boarding, 'such as reasons of health, safety or security, or inadequate travel documentation'.
29 In that regard, it is to be noted that, in using the expression 'such as', the EU legislature intended to provide a non-exhaustive list of the situations in which there are reasonable grounds for denying boarding.
30 None the less, it cannot be inferred from such wording that there are reasonable grounds to deny boarding on the basis of an operational reason such as that in question in the main proceedings.
31 The referring court states that, in the context of a single contract of carriage involving a number of reservations on two immediately connected flights and a single check-in, the first of those flights was subject to a delay attributable to the carrier in question, that the latter mistakenly expected the passengers in question not to arrive in time to board the second flight and that, as a consequence, it allowed other passengers to take the seats on that second flight which were to have been occupied by the passengers to whom boarding was denied.
32 However, such a reason for denying boarding is not comparable to those specifically mentioned in Article 2(j) of Regulation No 261/2004, since it is in no way attributable to the passenger to whom boarding is denied.
33 In addition, it cannot be accepted that an air carrier may increase considerably the situations in which it would have reasonable grounds for denying a passenger boarding. That would necessarily have the consequence of depriving such a passenger of all protection, which would be contrary to the objective of Regulation No 261/2004 which seeks to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them.
34 In a situation such as that in the main proceedings, that would, moreover, result in the passengers concerned suffering the serious trouble and inconvenience inherent in a denial of boarding, even though that denial is attributable, in any event, to the carrier alone, which either caused the delay to the first flight operated by it, mistakenly considered that the passengers concerned would not be able to present themselves in time to board the following flight or sold tickets for successive flights for which the time available for catching the following flight was insufficient.
35 Consequently, there are no reasonable grounds for a denial of boarding such as that at issue in the main proceedings which must therefore be characterised as 'denied boarding' within the meaning of Article 2(j) of Regulation No 261/2004.
36 In the light of the foregoing, the answer to the question referred is that Article 2(j) of Regulation No 261/2004, read in conjunction with Article 3(2) of that regulation, must be interpreted as meaning that the concept of 'denied boarding' includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

(omissis)

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

Article 2(j) 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, read in conjunction with Article 3(2) of Regulation No 261/2004, must be interpreted as meaning that the concept of 'denied boarding' includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

23.

European Court of Justice 31 January 2013, Case C-12/11.
Denise McDonagh v Ryanair Ltd.
Reference for a preliminary ruling: Dublin Metropolitan District Court - Ireland.
(omissis)

1 This request for a preliminary ruling concerns the interpretation and assessment of the validity of Articles 5(1)(b) and 9 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).

2 The request has been made in proceedings between Ms McDonagh and Ryanair Ltd ('Ryanair') regarding the airline company's refusal to give Ms McDonagh the care provided for in Article 5(1)(b) of Regulation No 261/2004 after the eruption of the Icelandic volcano Eyjafjallajökull had caused the cancellation of her flight and, more generally, closure of part of European airspace.

Legal context

International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38; 'the Montreal Convention').

4 The last paragraph of the preamble to the Montreal Convention states:

'Convinced that collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests …'

5 Article 29 of the Convention states:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in

this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.'

European Union law

6 Recitals 1, 2, 14 and 15 in the preamble to Regulation No 261/2004 state:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

…

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

7 Article 5 of Regulation No 261/2004, headed 'Cancellation', states:

1. In case of cancellation of a flight, the passengers concerned shall:

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

…

3. An operating air carrier shall not be obliged to pay compensation in accordance

with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
…'
8 Article 8 of Regulation No 261/2004 defines the manner in which assistance is provided by air carriers to passengers as regards their right to reimbursement or re-routing.
9 Article 9 of Regulation No 261/2004, headed 'Right to care', is worded as follows:
'1. Where reference is made to this Article, passengers shall be offered free of charge:
(a) meals and refreshments in a reasonable relation to the waiting time;
(b) hotel accommodation in cases
– where a stay of one or more nights becomes necessary, or
– where a stay additional to that intended by the passenger becomes necessary;
(c) transport between the airport and place of accommodation (hotel or other).
2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.
…'
10 Under the heading 'Further compensation', Article 12(1) of Regulation No 261/2004 provides that 'this Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'
11 Article 16 of Regulation No 261/2004, headed 'Infringements', reads as follows:
'1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.
…
3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.'
The dispute in the main proceedings and the questions referred for a preliminary ruling
12 On 11 February 2010, Ms McDonagh booked a flight with Ryanair from Faro (Portugal) to Dublin (Ireland) scheduled for 17 April 2010, for EUR 98. On 20 March 2010, the Eyjafjallajökull volcano in Iceland began to erupt. On 14 April 2010, it entered an explosive phase, casting a cloud of volcanic ash into the skies over Europe. On 15 April 2010, the competent air traffic authorities closed the airspace over a number of Member States because of the risks to aircraft.
13 On 17 April 2010, Ms McDonagh's flight was cancelled following the closure of Irish airspace. Ryanair flights between continental Europe and Ireland resumed on 22 April 2010 and Ms McDonagh was not able to return to Dublin until 24 April 2010.
14 During the period between 17 and 24 April 2010, Ryanair did not provide Ms McDonagh with care in accordance with the detailed rules laid down in Article 9

of Regulation No 261/2004.

15 Ms McDonagh brought an action against Ryanair before the referring court for compensation in the amount of EUR 1 129.41, corresponding to the costs which she had incurred during that period on meals, refreshments, accommodation and transport.

16 Ryanair claims that the closure of part of European airspace following the eruption of the Eyjafjallajökull volcano does not constitute 'extraordinary circumstances' within the meaning of Regulation No 261/2004 but 'super extraordinary circumstances', releasing it not only from its obligation to pay compensation but also from its obligations to provide care under Articles 5 and 9 of that regulation.

17 In light of its doubts as to whether the obligation to provide that care may be subject to limitations in circumstances such as those at issue in the main proceedings and taking the view that the Court of Justice has not yet ruled on that matter, the Dublin Metropolitan District Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do circumstances such as the closures of European airspace as a result of the eruption of the Eyjafjallajökull volcano in Iceland, which caused widespread and prolonged disruption to air travel, go beyond "extraordinary circumstances" within the meaning of Regulation No 261/2004?

(2) If the answer to Question 1 is yes, is liability for the duty to provide care excluded under Articles 5 and 9 [of Regulation No 261/2004] in such circumstances?

(3) If the answer to Question 2 is no, are Articles 5 and 9 [of Regulation No 261/2004] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an "equitable balance of interests" enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union ["the Charter"]?

(4) Is the obligation in Articles 5 and 9 [of Regulation No 261/2004] to be interpreted as containing an implied limitation, such as a temporal and/or a monetary limit, to provide care in cases where cancellation is caused by "extraordinary circumstances"?

(5) If the answer to Question 4 is no, are Articles 5 and 9 [of Regulation No 261/2004] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an "equitable balance of interests" enshrined in the Montreal Convention, and Articles 16 and 17 of the [Charter]?'

Consideration of the questions referred

Admissibility

18 The Council of the European Union claims, in essence, that the questions are inadmissible on the basis that they are not relevant to the dispute in the main proceedings, since, in the event of cancellation of a flight and regardless of the cause of that cancellation, air passengers cannot invoke before a national court failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier.

19 It is to be recalled that, under Article 5(1)(b) of Regulation No 261/2004, in the event of cancellation of a flight the passengers concerned are to be offered assistance by the air carrier, under the conditions laid down in that subparagraph, meeting the

costs of meals, accommodation and communication as provided for in Article 9 of that regulation.

20 The Court has already had occasion to explain that, when an air carrier fails to fulfil its obligations under Article 9 of Regulation No 261/2004, an air passenger is justified in claiming a right to compensation on the basis of the factors set out in those provisions (see, to that effect, Case C-83/10 *Sousa Rodríguez and Others* [2011] ECR I-9469, paragraph 44) and that such a claim cannot be understood as seeking damages, by way of redress on an individual basis, for the harm resulting from the cancellation of the flight concerned in the conditions laid down, inter alia, in Article 22 of the Montreal Convention (see, to that effect, *Sousa Rodríguez and Others*, paragraph 38).

21 A claim such as that at issue in the main proceedings seeks to obtain, from the air carrier, equivalent compliance with its obligation to provide care arising from Articles 5(1)(b) and 9 of Regulation No 261/2004, an obligation which, it should be recalled, operates at an earlier stage than the system laid down by the Montreal Convention (see Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 32, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR, paragraph 57).

22 The fact, noted in this connection by the Council, that each Member State designates a body responsible for the enforcement of Regulation No 261/2004 which, where appropriate, takes the measures necessary to ensure that the rights of passengers are respected and which each passenger may complain to about an alleged infringement of that regulation, in accordance with Article 16 of the regulation, is not such as to affect the right of a passenger to such reimbursement.

23 Article 16 cannot be interpreted as allowing only national bodies responsible for the enforcement of Regulation No 261/2004 to sanction the failure of air carriers to comply with their obligation laid down in Articles 5(1)(b) and 9 of that regulation to provide care.

24 Consequently, it must be held that an air passenger may invoke before a national court the failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier for the costs which it should have borne under those provisions.

25 Since the questions are relevant to the outcome of the dispute, the request for a preliminary ruling is therefore admissible.

Substance

The first question

26 By its first question the referring court asks, in essence, whether Article 5 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care or, on the contrary and because of their particular scale, go beyond the scope of that notion, thus releasing air carriers from that obligation.

27 At the outset, it should be noted that the term 'extraordinary circumstances' is not defined in Article 2 of Regulation No 261/2004 or in the other provisions of that

regulation, even though a non-exhaustive list of those circumstances can be derived from recitals 14 and 15 in the preamble to the regulation.

28 It is settled case-law that the meaning and scope of terms for which European Union law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (*Wallentin-Hermann*, paragraph 17).

29 In accordance with everyday language, the words 'extraordinary circumstances' literally refer to circumstances which are 'out of the ordinary'. In the context of air transport, they refer to an event which is not inherent in the normal exercise of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin (*Wallentin-Hermann*, paragraph 23). In other words, as the Advocate General noted in point 34 of his Opinion, they relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity.

30 Regulation No 261/2004 contains nothing that would allow the conclusion to be drawn that it recognises a separate category of 'particularly extraordinary' events, beyond 'extraordinary circumstances' referred to in Article 5(3) of that regulation, which would lead to the air carrier being exempted from all its obligations, including those under Article 9 of the regulation.

31 Next, as for the context of and the aims pursued by Article 5 of Regulation No 261/2004, which prescribes the obligations of an air carrier in the event of cancellation of a flight, it must be noted, first, that when exceptional circumstances arise, Article 5(3) exempts the air carrier only from its obligation to pay compensation under Article 7 of that regulation. The European Union legislature thus took the view that the obligation on the air carrier to provide care under Article 9 of that regulation is necessary whatever the event which has given rise to the cancellation of the flight. Second, it is clear from recitals 1 and 2 of Regulation No 261/2004 that the regulation aims at ensuring a high level of protection for passengers and takes account of the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers (*Wallentin-Hermann*, paragraph 18, and *Nelson and Others*, paragraph 72).

32 If circumstances such as those at issue in the main proceedings went beyond the scope of 'extraordinary circumstances' within the meaning of Regulation No 261/2004 due in particular to their origin and scale, such an interpretation would go against not only the meaning of that notion in everyday language but also the objectives of that regulation.

33 Such an interpretation would in fact mean that air carriers would be required to provide care pursuant to Article 9 of Regulation No 261/2004 to air passengers who find themselves, due to cancellation of a flight, in a situation causing limited inconvenience, whereas passengers, such as the plaintiff in the main proceedings, who find themselves in a particularly vulnerable state in that they are forced to remain at an airport for several days would be denied that care.

34 In the light of the foregoing, the answer to the first question is that Article 5 of Regulation No 261/2004 must be interpreted as meaning that circumstances such

as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.

35 It follows from the answer given to the first question that there is no need to answer the second and third questions.

The fourth and fifth questions

36 By its fourth and fifth questions, which should be examined together, the referring court asks, in essence, whether Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to 'extraordinary circumstances' such as those at issue in the main proceedings, the obligation to provide care to passengers laid down in those provisions is limited in temporal or monetary terms and, if not, whether those provisions thus interpreted are invalid in the light of the principles of proportionality and non-discrimination, the principle of an 'equitable balance of interests' referred to in the Montreal Convention or Articles 16 and 17 of the Charter.

37 It should be noted that, in the case of cancellation of a flight on account of 'extraordinary circumstances', the European Union legislature sought to modify the obligations of air carriers laid down in Article 5(1) of Regulation No 261/2004.

38 Under recital 15 and Article 5(3) of Regulation No 261/2004, by way of derogation from the provisions of Article 5(1), the air carrier is thus exempted from its obligation to compensate passengers under Article 7 of that regulation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances which are beyond the air carrier's actual control (*Nelson and Others*, paragraph 39).

39 In that regard, the Court has held that, in such circumstances, the air carrier is only released from its obligation to provide compensation under Article 7 of Regulation No 261/2004 and that, consequently, its obligation to provide care in accordance with Article 9 of that regulation remains (see, to that effect, Case C-294/10 *Eglītis and Ratnieks* [2011] ECR I-3983, paragraphs 23 and 24).

40 Furthermore, no limitation, whether temporal or monetary, of the obligation to provide care to passengers in extraordinary circumstances such as those at issue in the main proceedings is apparent from the wording of Regulation No 261/2004.

41 It follows from Article 9 of Regulation No 261/2004 that all the obligations to provide care to passengers whose flight is cancelled are imposed, in their entirety, on the air carrier for the whole period during which the passengers concerned must await their re-routing. To that effect, it is clear from Article 9(1)(b) that hotel accommodation is to be offered free of charge by the air carrier during the 'necessary' period.

42 Moreover, any interpretation seeking the recognition of limits, whether temporal or monetary, on the obligation of the air carrier to provide care to passengers whose flight has been cancelled would have the effect of jeopardising the aims pursued by Regulation No 261/2004 recalled in paragraph 31 of this judgment, in that, beyond the limitation adopted, passengers would be deprived of all care and thus left to themselves. As the Advocate General noted in point 52 of his Opinion, the provision of care to such passengers is particularly important in the case of extraordinary circumstances

which persist over a long time and it is precisely in situations where the waiting period occasioned by the cancellation of a flight is particularly lengthy that it is necessary to ensure that an air passenger whose flight has been cancelled can have access to essential goods and services throughout that period.

43 Consequently, and contrary to what Ryanair claims, it cannot be deduced from Regulation No 261/2004 that, in circumstances such as those at issue in the main proceedings, the obligation referred to in Articles 5 and 9 of that regulation to provide care to passengers must be subject to a temporal or monetary limitation.

44 However, it is necessary to ensure that the interpretation in the preceding paragraph does not conflict with the principles of proportionality, of an 'equitable balance of interests' referred to in the Montreal Convention and of non-discrimination, or with Articles 16 and 17 of the Charter. Under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole (Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 43).

45 As regards, first, the principle of proportionality, it must be noted that the Court has already had occasion to find, in Case C-344/04 *IATA and ELFAA* [2010] ECR I-403, paragraphs 78 to 92, that Articles 5 to 7 of Regulation No 261/2004 are not invalid by reason of infringement of the principle of proportionality.

46 There is nothing to justify, even on the basis of the lack of a temporal or monetary limit on the obligation to provide care in circumstances such as those at issue in the main proceedings, the finding of validity made by the Court in that case being called into question.

47 The fact that the obligation defined in Article 9 of Regulation No 261/2004 to provide care entails, as Ryanair claims, undoubted financial consequences for air carriers is not such as to invalidate that finding, since those consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for passengers.

48 The importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators (*Nelson and Others*, paragraph 81 and the case-law cited).

49 In addition, as the Advocate General noted in points 58 and 60 of his Opinion, air carriers should, as experienced operators, foresee costs linked to the fulfilment, where relevant, of their obligation to provide care and, furthermore, may pass on the costs incurred as a result of that obligation to airline ticket prices.

50 It follows that Articles 5(1)(b) and 9 of Regulation No 261/2004 are not contrary to the principle of proportionality.

51 None the less, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

52 As regards, second, the principle of an 'equitable balance of interests' referred to in the last paragraph of the preamble to the Montreal Convention, suffice it to note

that the standardised and immediate compensatory measures laid down by Regulation No 261/2004, which include the obligation to provide care to passengers whose flight has been cancelled, are not among those whose institution is governed by the Montreal Convention (see, to that effect, *Wallentin-Hermann*, paragraph 32 and the case-law cited).

53 Therefore, there is no need to assess the validity of the aforesaid provisions in the light of the principle of an 'equitable balance of interests' referred to in that Convention.

54 As regards, third, the general principle of non-discrimination or equal treatment, Ryanair claims that the obligation laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care in a situation such as that as issue in the main proceedings imposes obligations on air carriers which, in circumstances similar to those at issue in the main proceedings, do not fall upon other modes of transport governed by Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14), Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ 2010 L 334, p. 1) and Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ 2011 L 55, p. 1), even though passengers stranded by widespread and prolonged disruption of transport find themselves in an identical situation whatever their mode of transport.

55 In that respect, it should be noted that the Court has already held in *IATA and ELFAA*, paragraphs 93 to 99, that Articles 5 to 7 of Regulation No 261/2004 do not infringe the principle of equal treatment.

56 The situation of undertakings operating in the different transport sectors is not comparable since the different modes of transport, having regard to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, are not interchangeable as regards the conditions of their use (*IATA and ELFAA*, paragraph 96).

57 In those circumstances, the European Union legislature was able to establish rules providing for a level of customer protection that varied according to the transport sector concerned.

58 It follows that Articles 5(1)(b) and 9 of Regulation No 261/2004 do not infringe the principle of non-discrimination.

59 As regards, fourth, Articles 16 and 17 of the Charter, guaranteeing freedom to conduct a business and the right to property respectively, Ryanair claims that the obligation to provide care to passengers imposed on air carriers in circumstances such as those at issue in the main proceedings has the effect of depriving air carriers of part of the fruits of their labour and of their investments.

60 In that regard, it must be noted, first, that freedom to conduct a business and the right to property are not absolute rights but must be considered in relation to their social function (see, to that effect, Case C-544/10 *Deutsches Weintor* [2012] ECR, paragraph 54 and the case-law cited).

61 Next, Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights enshrined by it as long as the limitations are provided for by law, respect the essence of those rights and freedoms, and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

62 Lastly, when several rights protected by the European Union legal order clash, such an assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and striking a fair balance between them (see, to that effect, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraphs 65 and 66, and *Deutsches Weintor*, paragraph 47).

63 In this case, the referring court mentions Articles 16 and 17 of the Charter. However, it is also necessary to take account of Article 38 thereof which, like Article 169 TFEU, seeks to ensure a high level of protection for consumers, including air passengers, in European Union policies. As has been noted in paragraph 31 of this judgment, protection of those passengers is among the principal aims of Regulation No 261/2004.

64 It follows from paragraphs 45 to 49 of this judgment relating to the principle of proportionality that Articles 5(1)(b) and 9 of Regulation No 261/2004, as interpreted in paragraph 43 of this judgment, must be considered to comply with the requirement intended to reconcile the various fundamental rights involved and strike a fair balance between them.

65 Therefore, those provisions do not breach Articles 16 and 17 of the Charter.

66 Consequently, the answer to the fourth and fifth questions is that Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to 'extraordinary circumstances' of a duration such as that in the main proceedings, the obligation to provide care to air passengers laid down in those provisions must be complied with, and the validity of those provisions is not affected. However, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

(omissis)

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

1. Article 5 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, must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.

2. Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to 'extraordinary cir-

cumstances' of a duration such as that in the main proceedings, the obligation to provide care to air passengers laid down in those provisions must be complied with, and the validity of those provisions is not affected.
However, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

24.

European Court of Justice 6 May 2010, Case C-63/09.
Axel Walz v Clickair SA.

1 This reference for a preliminary ruling concerns the interpretation of Article 22(2) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 39; 'the Montreal Convention').
2 The reference was made in proceedings between Mr Walz, a passenger of the air carrier Clickair SA ('Clickair'), and Clickair, concerning compensation for the damage resulting from the loss of checked baggage in the context of a flight operated by that company.

Legal framework

European Union legislation

3 Article 1 of Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ 1997 L 285, p. 1), as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2, 'Regulation No 2027/97'), provides:
'This Regulation implements the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions. …'
4 Article 3(1) of Regulation No 2027/97 states:
'The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.'

The Montreal Convention

5 In the third recital in the preamble to the Montreal Convention, the States Parties to that convention 'recognis[e] the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution'.
6 As provided in the fifth recital in that preamble:

'… collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests …'.

7 Chapter III of the Montreal Convention is headed 'Liability of the carrier and extent of compensation for damage'.

8 Article 17 of that convention, headed 'Death and injury of passengers – damage to baggage', provides:

'1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destruction or loss of, or damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

...'

9 Article 22 of the Montreal Convention lays down the 'Limits of liability in relation to delay, baggage and cargo' as follows:

'...

'2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights [SDR] for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

...'

The main proceedings and the question referred for a preliminary ruling

10 On 14 April 2008, Mr Walz brought an action against Clickair claiming damages from it for the loss of checked baggage in the context of a flight from Barcelona (Spain) to Oporto (Portugal) operated by that company.

11 Mr Walz claims total damages of EUR 3 200: EUR 2 700 for the value of the lost baggage and EUR 500 for non-material damage resulting from that loss.

12 Clickair opposed Mr Walz's claim, maintaining, inter alia, that the damages claimed exceed the limit of liability for loss of baggage of 1 000 SDR laid down by Article 22(2) of the Montreal Convention.

13 Since the dispute arose in relation to the manner in which air transport was provided by a European Union carrier between two cities in different Member States, the Juzgado de lo Mercantil nº 4 de Barcelona (Commercial Court No 4, Barcelona), before which the proceedings were brought, applied Regulation No 2027/97.

14 Thus, the referring court observed that, as regards the liability of European Union carriers for the carriage of passengers and their baggage by air in the territory

of the Union, Regulation No 2027/97 merely implements the relevant provisions of the Montreal Convention. It therefore considered the interpretation which should be given to certain of those provisions, inter alia Article 22(2) of that convention, which sets the limit of air carriers' liability in the case of loss of baggage.

15 In that connection, the referring court refers to the case-law of the Audiencia Provincial (Provincial Court) de Barcelona. In a judgment of 2 July 2008, that court held that the limit referred to did not include both material and non-material damage, but that, on the one hand, material damage was subject to the limit of 1 000 SDR, while on the other, non-material damage was subject to a further limit of another 1 000 SDR, so that the total combined limit for material and non-material damage is 2 000 SDR.

16 However, the Juzgado de lo Mercantil nº 4 de Barcelona did not concur with that interpretation and decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the limit of liability referred to in Article 22(2) of the [Montreal] Convention … include both non-material damage and material damage resulting from the loss of baggage?'

The question referred for a preliminary ruling

17 By its question, the referring court asks, in essence, whether the term 'damage', which underpins Article 22(2) of the Montreal Convention that sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, must be interpreted as including both material and non-material damage.

18 First of all, it should be recalled that, as regards the liability of European Union carriers for the carriage of passengers and their baggage by air in the territory of the Union, Regulation No 2027/97, applicable in this case, implements the relevant provisions of the Montreal Convention. It is apparent, in particular, from Article 3(1) of that regulation that the liability of European Union air carriers in respect of passengers and their baggage is to be governed by all provisions of the Montreal Convention relevant to such liability. The referring court therefore seeks an interpretation of the relevant provisions of that convention.

19 The Montreal Convention, signed by the Community on 9 December 1999 on the basis of Article 300(2) EC, was approved on its behalf by Decision 2001/539, and entered into force, so far as the Community is concerned, on 28 June 2004.

20 Since the provisions of that convention have been an integral part of the European Union legal order from the date on which the convention entered into force, the Court has jurisdiction to give a preliminary ruling concerning its interpretation (see, by analogy, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 2, 4 and 5, and, in relation to the Montreal Convention, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 28).

21 Since the Montreal Convention does not contain any definition of the term 'damage', it must be emphasised at the outset that, in the light of the aim of that convention, which is to unify the rules for international carriage by air, that term must be given a uniform and autonomous interpretation, notwithstanding the different meanings given to that concept in the domestic laws of the States Parties to that convention.

22 In those circumstances, the term 'damage', contained in an international agreement, must be interpreted in accordance with the rules of interpretation of general international law, which are binding on the European Union.

23 In that connection, Article 31 of the Convention on the Law of Treaties, signed in Vienna on 23 May 1969, which codifies rules of general international law, states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to that effect, in particular, Opinion 1/91 [1991] ECR I-6079, paragraph 14; Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraph 12; Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 47, and Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 35).

24 First of all, it must be stated that, for the purposes of interpreting the Montreal Convention, the 'préjudice' referred to in both the heading of Chapter III and Article 17(1) of the French-language version of that convention must be regarded as synonymous with the 'dommage' referred to in the heading of Article 17 and in Article 17(2) of the convention. Indeed, it is apparent from other authentic language versions of the Montreal Convention that an identical term ('daño' in the Spanish-language version; 'damage' in the English-language version) is used without distinction to designate both the 'préjudice' and the 'dommage' of the French-language version. In addition, although like the French-language version the Russian-language version of the convention uses two terms, namely 'вред' (damage) and 'повреждение' (damaging), those two terms, derived from a common stem and used without distinction, must also be regarded as synonymous for the purposes of interpreting the convention.

25 Next, as regards the context in which the term 'damage' is referred to in Article 17 of the Montreal Convention, it must be emphasised that, as has been noted in the previous paragraph of this judgment, that term is also found in the very heading of Chapter III of which Article 17 forms part. Consequently, in the absence of any indication to the contrary in that convention, the term 'damage' must bear an identical meaning throughout that chapter.

26 In addition, Article 22 of the Montreal Convention, which itself forms part of Chapter III and thus the relevant context, limits a carrier's liability in the case of destruction, loss, damage or delay, which implies that the nature of the damage sustained by a passenger is irrelevant in that regard.

27 Lastly, in order to determine the ordinary meaning to be given to the term 'damage' in accordance with the rule of interpretation referred to at paragraph 23 above, it should be recalled that there is a concept of damage which does not originate in an international agreement and is common to all the international law sub-systems. Thus, Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts, drawn up by the International Law Commission of the United Nations, and of which the General Assembly of that organisation took note in its Resolution 56/83 of 12 December 2001, provides that '[i]njury includes any damage, whether material or moral …'.

28 The two aspects of the concept of damage apparent from that Article 31(2), which aims precisely to codify the current state of general international law, may thus be regarded as jointly expressing the ordinary meaning to be given to the concept of damage in international law. In addition, it must be noted that there is nothing in the

Montreal Convention to indicate that the contracting States intended to attribute a special meaning to the concept of damage, in the context of a harmonised system of liability in private international air law, and to derogate from its ordinary meaning. Therefore, the concept of damage, as arising under general international law, remains applicable in the relations between the parties to the Montreal Convention, in accordance with Article 31(3)(c) of the Convention on the Law of Treaties, cited above.

29 It follows that the term 'damage', referred to in Chapter III of the Montreal Convention, must be construed as including both material and non-material damage.

30 That conclusion is supported by the objectives which governed the adoption of the Montreal Convention.

31 In that connection, it should be noted that, in accordance with the third recital in the preamble to the Montreal Convention, the States Parties to that convention, recognising 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution', decided to lay down a system of strict liability for air carriers.

32 Thus, with regard, more specifically, to damage sustained in case of destruction or loss of, or damage to, checked baggage, under Article 17(2) of the Montreal Convention a carrier is presumed liable for that damage, 'upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier'.

33 A system of strict liability of that kind implies, however, as is apparent, moreover, from the fifth recital in the preamble to the Montreal Convention, that an 'equitable balance of interests' be maintained, in particular as regards the interests of air carriers and of passengers.

34 In order to maintain such a balance, the contracting States agreed, in certain situations – in particular, in accordance with Article 22(2) of the Montreal Convention, in the case of destruction, loss, damage or delay of baggage – to limit the liability of air carriers. The resulting limitation of compensation must be applied 'per passenger'.

35 It follows that, in the various situations in which a carrier is held liable pursuant to Chapter III of the Montreal Convention, the 'equitable balance of interests' referred to requires that there be clear limits on compensation relating to the total damage sustained by each passenger in each of those situations, regardless of the nature of the damage caused to that passenger.

36 Indeed, a limitation of the compensation so designed enables passengers to be compensated easily and swiftly, yet without imposing a very heavy burden of damages on air carriers, which would be difficult to determine and to calculate, and would be liable to undermine, and even paralyse, the economic activity of those carriers.

37 It follows that the various limitations of compensation referred to in Chapter III of the Montreal Convention, including that set in Article 22(2) of that convention, must be applied to the total damage caused, regardless of whether that damage is material or non-material.

38 In addition, Article 22(2) of the Montreal Convention provides that a passenger may make a special declaration of interest at the time when the checked baggage is handed over to the carrier. That possibility confirms that the limit of an air carrier's liability for the damage resulting from the loss of baggage, laid down in that article, is,

in the absence of any declaration, an absolute limit which includes both non-material and material damage.

39 In the light of the foregoing considerations, the answer to the question referred is that the term 'damage', which underpins Article 22(2) of the Montreal Convention that sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, must be interpreted as including both material and non-material damage.

(omissis)

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

The term 'damage', which underpins Article 22(2) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, that sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, must be interpreted as including both material and non-material damage.

25.

European Court of Justice 22 October 2009, Case C-301/08.
Irène Bogiatzi, married name Ventouras v Deutscher Luftpool and Others.
Reference for a preliminary ruling: Cour de cassation - Luxembourg.

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (OJ 1997 L 285, p. 1), in connection with the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975 ('the Warsaw Convention').

2 The reference was made in the course of proceedings brought by Ms Bogiatzi, married name Ventouras, against Société Luxair, société luxembourgeoise de navigation aérienne SA ('Luxair'), and Deutscher Luftpool, an association under German law, concerning joint and several liability to compensate her for the injury she suffered as a result of an accident which occurred while boarding a Luxair aeroplane.

Legal background

International rules

3 The European Community is not party to the Warsaw Convention, to which the 15 Member States of the European Union at the material time had acceded.

4 The Warsaw Convention in its original version has been amended and supplemented on a number of occasions, by the Hague Protocol of 28 September 1955, the Guadalajara Convention of 18 September 1961, the Guatemala Protocol of 8 March 1971, and the four additional Montreal protocols of 25 September 1975.

5 Article 29 of the Warsaw Convention provides:

'1. The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court seised of the case.'

Community legislation

6 The first five recitals in the preamble to Regulation No 2027/97 are worded as follows:

'(1) … in the framework of the common transport policy, it is necessary to improve the level of protection of passengers involved in air accidents;

(2) … the rules on liability in the event of accidents are governed by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, or that Convention as amended at The Hague on 28 September 1955 and the Convention done at Guadalajara on 18 September 1961, whichever may be applicable each being hereinafter referred to, as applicable, as the "Warsaw Convention"; … the Warsaw Convention is applied worldwide for the benefit of both passengers and air carriers;

(3) … the limit set on liability by the Warsaw Convention is too low by today's economic and social standards and often leads to lengthy legal actions which damage the image of air transport; … as a result Member States have variously increased the liability limit, thereby leading to different terms and conditions of carriage in the internal aviation market;

(4) … in addition the Warsaw Convention applies only to international transport; … in the internal aviation market, the distinction between national and international transport has been eliminated; … it is therefore appropriate to have the same level and nature of liability in both national and international transport;

(5) … a full review and revision of the Warsaw Convention is long overdue and would represent, in the long term, a more uniform and applicable response, at an international level, to the issue of air carrier liability in the event of accidents; … efforts to increase the limits of liability imposed in the Warsaw Convention should continue through negotiation at multilateral level'.

7 Recital 7 in the preamble to Regulation No 2027/97 states:

'… it is appropriate to remove all monetary limits of liability within the meaning of Article 22(1) of the Warsaw Convention or any other legal or contractual limits, in accordance with present trends at international level'.

8 Article 2(1) of Regulation No 2027/97 defines the concepts of 'air carrier', 'Community air carrier', 'person entitled to compensation', 'ecu', 'SDR' and 'Warsaw Convention'.

9 Article 2(2) of Regulation No 2027/97 provides:

'Concepts contained in this Regulation which are not defined in paragraph 1 shall be equivalent to those used in the Warsaw Convention.'

10 Article 5(1) and (3) of Regulation No 2027/97 state:

'1. The Community air carrier shall without delay, and in any event not later than 15 days after the identity of the natural person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered.

…

3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of Community air carrier liability, but is not returnable, except in the cases prescribed in Article 3(3) or in circumstances

where it is subsequently proved that the person who received the advance payment caused, or contributed to, the damage by negligence or was not the person entitled to compensation.'

11 Regulation No 2027/97 was amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2), which is not applicable to the main proceedings.

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

12 On 21 December 1998, Ms Bogiatzi suffered a fall on the tarmac at Luxembourg airport while boarding a Luxair aeroplane.

13 On 22 December 2003, she brought proceedings for damages against Deutscher Luftpool – an association of aviation insurers which is governed by German civil law – and Luxair before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg), relying on Regulation No 2027/97 and the Warsaw Convention. Ms Bogiatzi's claim, brought five years after the events at issue took place, was held inadmissible. The court held that the two-year limitation period provided for in Article 29 of the Warsaw Convention for bringing actions for damages is predetermined and may not be suspended or interrupted.

14 The inadmissibility of the claim was confirmed on appeal. Ms Bogiatzi then appealed on a point of law to the Cour de cassation (Court of Cassation).

15 In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the [Warsaw] Convention, as amended at The Hague on 28 September 1955, to which Regulation … No 2027/97 refers, form part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC?

(2) Must … Regulation … No 2027/97 … in the version applicable at the time of the accident, namely 21 December 1998, be interpreted as meaning that, with regard to issues for which no express provision is made, the provisions of the Warsaw Convention, in this case Article 29, continue to apply to a flight between Member States of the Community?

(3) If the answer to the first and second questions is in the affirmative, is Article 29 of the Warsaw Convention, in conjunction with Regulation … No 2027/97, to be interpreted as meaning that the period of two years laid down in that article can be suspended or interrupted or that the carrier or its insurer can waive that time-limit, by an act deemed by the national court to constitute recognition of liability?'

Consideration of the questions referred for a preliminary ruling

The first question

16 By its first question, the national court asks essentially whether the Warsaw Convention forms part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC.

17 As a preliminary point, it is appropriate to reply to the argument put forward by Luxair that, in the main proceedings, the Court is in fact required not to interpret the Warsaw Convention but to apply Article 307 EC, under which, in the event of conflict between a Community rule and an agreement which precedes the EC Treaty,

the principle of primacy does not affect the obligations of a Member State with respect to third countries.

18 In that connection, it must be recalled that, in accordance with settled case-law, the purpose of the first paragraph of Article 307 EC is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations (see Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraphs 144 and 145; Case C-205/06 *Commission* v *Austria* [2009] ECR I-0000, paragraph 33; and Case C-249/06 *Commission* v *Sweden* [2009] ECR I-0000, paragraph 34).

19 However, it is equally settled case-law that the provisions of an agreement concluded prior to the entry into force of the Treaty cannot be relied on in intra-Community relations (see, in particular, Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 18; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 84; and Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 40).

20 Therefore, Article 307 EC does not fall to be applied.

21 In those circumstances, it is necessary to return to the question referred, relating to the jurisdiction of the Court to interpret the Warsaw Convention.

22 In that connection, it must be stated at the outset that, pursuant to Article 234 EC, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the EC Treaty and on the validity and interpretation of acts of the institutions of the Community.

23 According to settled case-law, an agreement concluded by the Council, in accordance with Articles 300 EC and 310 EC, is, as far as the Community is concerned, an act of one of the institutions of the Community, within the meaning of subparagraph (b) of the first paragraph of Article 234 EC. The provisions of such an agreement form an integral part of the Community legal order as from its entry into force and, within the framework of that order, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7; Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, paragraph 26; and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 31).

24 In the main proceedings, it is common ground that the Community is not a contracting party to the Warsaw Convention. Accordingly, the Court does not, in principle, have jurisdiction to interpret the provisions of that convention in preliminary ruling proceedings (see Case 130/73 *Vandeweghe and Others* [1973] ECR 1329, paragraph 2, and the order in Case C-162/98 *Hartmann* [1998] ECR I-7083, paragraph 9).

25 However, the Court has also held that, where and in so far as, pursuant to the Treaty, the Community has assumed the powers previously exercised by the Member States in the field to which an international convention applies and, therefore, its provisions have the effect of binding the Community, the Court has jurisdiction to

interpret such a convention, even though it has not been ratified by the Community (see, to that effect, Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 18; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 16; and Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 48).

26 In the case in the main proceedings, it is common ground that all the Member States of the Community were parties to the Warsaw Convention at the material time.

27 It should therefore be considered whether, in that case, the Community has, pursuant to the Treaty, assumed the powers previously exercised by the Member States in the field to which the Warsaw Convention applies, a convention which covers all international carriage by air of persons, baggage and cargo.

28 At the material time, the Community had adopted, on the basis of Article 80(2) EC, three regulations in the field to which the Warsaw Convention applies.

29 First of all, mention should be made of Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5). The purpose of that regulation is limited however to establishing certain common minimum rules with respect to compensation from air carriers, applicable to passengers who are denied access to an overbooked scheduled flight. Unlike that regulation, which covers only denied boarding, the Warsaw Convention covers the liability of air carriers, including for flight delays.

30 Next, Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1) lays down, in Article 7, an obligation for air carriers to have civil liability insurance cover in case of accidents causing inter alia injury to passengers or damage to baggage. However, unlike the Warsaw Convention, the conditions for liability of the air carriers are not governed by that regulation.

31 Finally, Regulation No 2027/97, unlike the Warsaw Convention, covers only damage suffered as a result of death, wounding or other bodily injury, and not material damage to baggage and cargo.

32 It follows that the Community has not assumed all the powers previously exercised by the Member States in the field to which the Warsaw Convention applies.

33 In the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because at the material time all those States were parties to the Warsaw Convention, be bound by the rules set out therein, which it has not itself approved (see, by analogy, *Intertanko and Others*, paragraph 49).

34 In the light of the foregoing, the answer to the first question is that the Warsaw Convention does not form part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC.

The second question

35 By its second question, given that Regulation No 2027/97 operates in the sphere governed by the Warsaw Convention, to which, at the material time, all the Member States of the Community were parties, and taking account of the principle of primacy of Community law, the national court asks essentially whether Regulation No 2027/97 must be interpreted as not precluding the application of the various provisions of that convention, in particular Article 29 thereof, to a situation in which a

passenger seeks to establish the liability of the air carrier on account of harm suffered by him when flying between Member States of the Community.

36 It must be noted at the outset that, under Article 29 of the Warsaw Convention, the right to damages in the case of an accident is to be extinguished if an action is not brought against the air carrier within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. On the other hand, Regulation No 2027/97 does not contain any explicit provision relating to the limitation period for such an action for damages, nor does it expressly refer to Article 29 of the Warsaw Convention.

37 Ms Bogiatzi submits essentially that, since Regulation No 2027/97 does not expressly refer to the provisions of the Warsaw Convention applicable in the main proceedings and does not expressly render the provisions of the convention, in particular Article 29 thereof, applicable to those proceedings, that regulation must be applied and interpreted autonomously.

38 It must be stated that an answer cannot be given to the question referred by the national court on the basis of just the wording of Regulation No 2027/97 and its context.

39 In those circumstances, it is to be recalled that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording and the context in which it occurs, but also the objective pursued by the rules of which it is part (see, to that effect, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21; Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 15; and Case C-466/07 *Klarenberg* [2009] ECR I-0000, paragraph 37).

40 As regards the objective pursued by Regulation No 2027/97, it is clear from recital 1 in its preamble that it aims to improve, in the framework of the common transport policy, the level of protection of passengers involved in air accidents.

41 It is also apparent, both from the *travaux préparatoires* in respect of Regulation No 2027/97 and from recitals 3, 5 and 15 in its preamble, that the desire to improve the level of protection for passengers involved in air accidents takes the form of the introduction of provisions intended to replace, as regards air transport between the Member States of the Community, certain provisions of the Warsaw Convention, pending a full review and revision of that convention.

42 In particular, the Community legislature took the view that the limits of liability of air carriers, as laid down by the Warsaw Convention, were too low having regard to the economic and social conditions prevailing when Regulation No 2027/97 was drafted. Accordingly, it sought to increase a number of those limits.

43 On the other hand, it is clear from recitals 2 and 4 in the preamble to Regulation No 2027/97 and Article 2(2) thereof that, where the regulation does not preclude the application of the Warsaw Convention in order to raise the level of protection of passengers, that protection involves the regulation and the system established by the convention being complementary and equivalent to each other.

44 Since Article 29 of the Warsaw Convention simply governs a procedural rule for bringing an action for damages against an air carrier in the event of an accident, it is not in the category of provisions whose application the Community legislature sought to preclude.

45 Having regard to the foregoing considerations, the answer to the second question is that Regulation No 2027/97 must be interpreted as not precluding the application of Article 29 of the Warsaw Convention to a situation in which a passenger seeks to establish the liability of the air carrier on account of harm suffered by him when flying between Member States of the Community.

The third question

46 Having regard to the answer given to the first question, it is not necessary to answer the third question.

(omissis)

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

1. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975, does not form part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC.

2. Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents must be interpreted as not precluding the application of Article 29 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975, to a situation in which a passenger seeks to establish the liability of the air carrier on account of harm suffered by him when flying between Member States of the European Community.

26.

European Court of Justice 22 November 2012, Case C-136/11.
Westbahn Management GmbH v ÖBB-Infrastruktur AG.
Reference for a preliminary ruling: Schienen-Control Kommission - Austria.

(omissis)

1 This reference for a preliminary ruling concerns the interpretation of Article 8(2) of, in conjunction with Part II of Annex II to, Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14) and Article 5 of, in conjunction with Annex II to, Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ 2001 L 75, p. 29, and corrigendum OJ 2004 L 220, p. 16), as amended by Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 164, p. 44) ('Directive 2001/14').

2 The reference has been made in proceedings between Westbahn Management GmbH ('Westbahn Management') and ÖBB-Infrastruktur AG ('ÖBB-Infrastruktur') concerning the refusal of ÖBB-Infrastruktur to provide Westbahn Management with real time data relating to other railway undertakings which would allow Westbahn Management to inform its passengers of the actual departure times of

connecting trains.

Legal context

European Union legislation

Directive 2001/14

3 According to recital 1 in the preamble to Directive 2001/14:

'Greater integration of the Community railway sector is an essential element of the completion of the internal market and moving towards achieving sustainable mobility.'

4 Article 5 of Directive 2001/14, 'Services', provides:

'1. Railway undertakings shall, on a non-discriminatory basis, be entitled to the minimum access package and track access to service facilities that are described in Annex II. The supply of services referred to in Annex II, point 2 shall be provided in a non-discriminatory manner and requests by railway undertakings may only be rejected if viable alternatives under market conditions exist. If the services are not offered by one infrastructure manager, the provider of the "main infrastructure" shall use all reasonable endeavours to facilitate the provision of these services.

2. Where the infrastructure manager offers any of the range of services described in Annex II, point 3 as additional services he shall supply them upon request to a railway undertaking.

3. Railway undertakings may request a further range of ancillary services, listed in Annex II, point 4 from the infrastructure manager or from other suppliers. The infrastructure manager is not obliged to supply these services.'

5 Annex II to that directive, 'Services to be supplied to the railway undertakings', provides:

'1. The minimum access package shall comprise:

(a) handling of requests for infrastructure capacity;

(b) the right to utilise capacity which is granted;

(c) use of running track points and junctions;

(d) train control including signalling, regulation, dispatching and the communication and provision of information on train movement;

(e) all other information required to implement or operate the service for which capacity has been granted.

2. Track access to services facilities and supply of services shall comprise:

(a) use of electrical supply equipment for traction current, where available;

(b) refuelling facilities;

(c) passenger stations, their buildings and other facilities;

(d) freight terminals;

(e) marshalling yards;

(f) train formation facilities;

(g) storage sidings;

(h) maintenance and other technical facilities.

3. Additional services may comprise:

(a) traction current;

(b) pre-heating of passenger trains;

(c) supply of fuel, shunting, and all other services provided at the access services

facilities mentioned above;
(d) tailor-made contracts for:
– control of transport of dangerous goods,
– assistance in running abnormal trains.
4. Ancillary services may comprise:
(a) access to telecommunication network;
(b) provision of supplementary information;
(c) technical inspection of rolling stock.'

Regulation No 1371/2007

6 According to recitals 1 to 5 and 7 to 9 in the preamble to Regulation No 1371/2007:

'(1) In the framework of the common transport policy, it is important to safeguard users' rights for rail passengers and to improve the quality and effectiveness of rail passenger services in order to help increase the share of rail transport in relation to other modes of transport.

(2) The Commission's communication "Consumer Policy Strategy 2002-2006" [(OJ 2002 C 137, p. 2)] sets the aim of achieving a high level of consumer protection in the field of transport in accordance with Article 153(2) [EC].

(3) Since the rail passenger is the weaker party to the transport contract, passengers' rights in this respect should be safeguarded.

(4) Users' rights to rail services include the receipt of information regarding the service both before and during the journey. Whenever possible, railway undertakings and ticket vendors should provide this information in advance and as soon as possible.

(5) More detailed requirements regarding the provision of travel information will be set out in the technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the conventional rail system [(OJ 2001 L 110, p. 27), as amended by Commission Directive 2007/32/EC of 1 June 2007 (OJ 2007 L 141, p. 63)].

…

(7) Railway undertakings should cooperate to facilitate the transfer of rail passengers from one operator to another by the provision of through tickets, whenever possible.

(8) The provision of information and tickets for rail passengers should be facilitated by the adaptation of computerised systems to a common specification.

(9) The further implementation of travel information and reservation systems should be executed in accordance with the TSIs.'

7 Article 8(2) of Regulation No 1371/2007 provides:

'Railway undertakings shall provide the passenger during the journey with at least the information set out in Annex II, Part II.'

8 Article 9(1) of that regulation provides:

'Railway undertakings and ticket vendors shall offer, where available, tickets, through tickets and reservations.'

9 Article 18(1) of that regulation provides:

'In the case of a delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure time and estimated arrival time by the railway undertaking or by the station manager as soon as such information is available.'

10 Under Part II, 'Information during the journey', of Annex II to that regulation the following information is to be provided:

'On-board services
Next station
Delays
Main connecting services
Security and safety issues.'

Austrian legislation

11 Paragraph 54 of the Law on railways (Eisenbahngesetz, BGBl. 60/1957, 'the EisbG') provides:

'The aim of the provisions of Part Six of the present federal law is to ensure the economical and efficient use of railway lines in Austria

1. by establishing equal and functional competition between rail transport undertakings on the rail transport market on principal railway lines and on secondary lines connected with other principal or secondary railway lines,
2. by encouraging the entry of new rail transport undertakings to the rail transport market,
3. by ensuring access to railway infrastructure for those entitled to access,
4. by establishing supervision of competition in order to protect those entitled to access from abuse of a dominant position.'

12 Paragraph 58 of the EisbG provides:

'1. The railway infrastructure undertaking shall make available on a non-discriminatory basis to those entitled to access, for the purpose of access to the railway infrastructure, in addition to that access, a minimum access package comprising the following services:

1. use of points and junctions;
2. train control including … the transmission and provision of information on train movements;
3. those communication and information system services without which the exercise of access rights by those entitled to access is impossible for legal, practical and economic reasons.

…

4. The railway infrastructure undertaking may make the following ancillary services available to those entitled to access, for the purpose of access to the railway infrastructure, but it is not obliged to do so:

1. access to the telecommunications network which goes beyond the access provided for under subparagraph 1(3);
2. provision of additional information;
3. technical inspection of rolling stock.

…'

13 Paragraph 81 of the EisbG provides:

'1. A Schienen-Control Kommission [Rail Supervisory Commission] shall be established attached to the company Schienen-Control GmbH.
2. The Schienen-Control Kommission shall be responsible for performing the duties assigned to it in Parts 3, 5 to 6b, and 9 of the present federal law … and for ruling on appeals against decisions of Schienen-Control GmbH …
3. Schienen-Control GmbH shall be responsible for the management of the Schienen-Control Kommission. Schienen-Control GmbH staff, when acting for the Schienen-Control Kommission, shall be bound by the instructions of the chairperson or the member designated in the rules of procedure.'

14 In accordance with Paragraph 82 of the EisbG:

'1. The Schienen-Control Kommission shall consist of a chairperson and two other members. A substitute member shall be appointed for each member. The substitute members shall take the place of members who are prevented from acting. The chairperson and the substitute chairperson, who must belong to the judiciary, shall be appointed by the Bundesminister für Justiz (Federal Minister for Justice). The other members and substitute members, who must be specialists in the relevant transport sectors, shall be appointed by the Federal Government, acting on a proposal of the Bundesminister für Verkehr, Innovation und Technologie (Federal Minister for Transport, Innovation and Technology).
2. The following may not belong to the Schienen-Control Kommission:
1. Members of the Federal Government or of a provincial government, or State Secretaries;
2. Persons who have a close legal or de facto connection with persons who perform duties for the Schienen-Control Kommission;
3. Persons who are not eligible for election to the Nationalrat (National Council).
3. Members of the Schienen-Control Kommission and their substitute members shall be appointed for a term of five years. On expiry of that term, they shall continue to perform their duties until a new appointment is made. Appointments may be renewed. If a member or substitute member leaves office before that person's term expires, a new member or substitute member shall be appointed in accordance with subparagraph 1 for the remainder of the term of office.
4. Membership or substitute membership shall cease:
1. on death;
2. on expiry of the term of office;
3. on resignation;
4. where all other members find that the member or substitute member is unable to perform his duties properly because of severe physical or mental illness;
5. where all other members find that the member or substitute member has not complied with invitations to attend three successive sittings without sufficient excuse;
6. in the case of the chairperson or substitute chairperson, on ceasing to belong to the judiciary.
5. Members and substitute members are obliged to observe confidentiality in accordance with Article 20(3) of the Austrian Federal Constitution (Bundes-Ver-

fassungsgesetz).'

15 Paragraph 83 of the EisbG provides:

'Decisions of the Schienen-Control Kommission shall be taken by a majority of votes; abstentions are not permitted. In the event of a tie, the chairperson shall have the casting vote. The Schienen-Control Kommission shall adopt rules of procedure, under which individual members may be assigned to conduct current business, including adoption of procedural decisions. Members shall be independent and not bound by any instructions in the performance of their duties.'

16 Paragraph 84 of the EisbG provides:

'Unless provided otherwise in the present federal law, the Schienen-Control Kommission shall apply the General Law on administrative procedure (Allgemeines Verwaltungsverfahrensgesetz), including, in particular, its provisions on procedure before the independent administrative tribunals. Decisions of the Schienen-Control Kommission may not be set aside or varied by administrative action. An appeal may be brought before the Verwaltungsgerichtshof (Higher Administrative Court).'

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

17 Westbahn Management provides passenger rail transport services between Vienna and Salzburg (Austria) from the 2011/12 timetable period.

18 ÖBB-Infrastruktur manages the major part of the Austrian railway network, including the line between Vienna and Salzburg. It has at its disposal real time data on all trains operating on the rail network for which it is responsible. The data includes the current position of the train and the arrival, passing, and departure times for the remainder of the journey.

19 ÖBB-Infrastruktur transmits to each railway undertaking the real time data relating to that undertaking's trains. By using a password-protected program, all railway undertakings can consult on ÖBB-Infrastruktur's website the real time data of all trains running on the railway network it manages, but the various railway undertakings are not named in that data.

20 In some principal stations ÖBB-Infrastruktur displays the actual arrival and departure times of passenger trains on screens.

21 Westbahn Management requested ÖBB-Infrastruktur to provide it with real time data relating to other railway undertakings, in order for it to be able to inform its passengers of the actual departure times of connecting trains.

22 ÖBB-Infrastruktur, by letter of 22 October 2010, refused to accede to the request, on the ground that, in principle, it only transmitted data relating to the railway undertaking concerned. It advised Westbahn Management to reach an agreement with the other railway undertakings by which those undertakings would agree to the transmission of the data relating to them.

23 No such agreement was reached, however, between Westbahn Management and any other railway undertaking. In particular, ÖBB-Personenverkehr AG ('ÖBB-PV') refused to conclude an agreement of that kind. ÖBB-PV is the leading passenger transport undertaking in the Austrian market. Its sole shareholder is ÖBB-Holding AG, which is also the sole shareholder in ÖBB-Infrastruktur.

24 Westbahn Management contends that the failure to transmit the data is con-

trary to Part II of Annex II to Regulation No 1371/2007, and demands to be given access to that information. It consequently made an application to that effect to the Schienen-Control Kommission.

25 Since it took the view that the outcome of the dispute before it depended on the interpretation of European Union law, the Schienen-Control Kommission decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 8(2) of, in conjunction with Part II of Annex II to, Regulation … No 1371/2007 … to be interpreted as meaning that information on main connecting services must include, in addition to scheduled departure times, notification of delays to or cancellations of those connecting trains?

2. If the answer to Question 1 is in the affirmative:

Is Article 5 of, in conjunction with Annex II to, Directive 2001/14 … to be interpreted, in the light of Article 8(2) of, in conjunction with Part II of Annex II to, Regulation No 1371/2007, as meaning that the infrastructure manager is under an obligation to make available to railway undertakings, in a non-discriminatory manner, real time data on other railway undertakings' trains, in so far as those trains constitute main connecting services within the meaning of Part II of Annex II to Regulation No 1371/2007?'

Consideration of the questions referred

Jurisdiction of the Court

26 Before answering the questions referred, the Court must ascertain whether, as asserted in the order for reference, the Schienen-Control Kommission is a court or tribunal within the meaning of Article 267 TFEU, and hence whether the Court has jurisdiction to answer the questions referred for a preliminary ruling.

27 It is settled case-law that, in order to determine whether a body making a reference is a court or tribunal within the meaning of Article 267 TFEU, which is a question governed by European Union law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16; Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 19; and Case C-205/08 *Umweltanwalt von Kärnten* [2009] ECR I-11525, paragraph 35).

28 On this point, as the Advocate General observes in point 28 of his Opinion, it must be stressed that the Schienen-Control Kommission was established as a permanent body by Paragraph 81(1) of the EisbG. Paragraphs 81 to 84 of that law make it clear that the Schienen Control-Kommission meets the criteria that such a body should be established by law, have compulsory jurisdiction, be permanent, apply rules of law and be independent.

29 Moreover, it must be observed, first, that according to the order for reference the General Law on administrative procedure applies to proceedings before the Schienen-Control Kommission and thus guarantees that the procedure before it is *inter partes*, since the parties are able to put forward their rights and their legal interests and the *inter partes* proceedings may take the form of a hearing in which

witnesses and experts can take part.

30 It must also be observed, secondly, that under Paragraph 84 of the EisbG the Schienen-Control Kommission is governed by the ordinary law of administrative procedure, and that its decisions cannot be set aside by administrative decisions, but may be the subject of proceedings before the Verwaltungsgerichtshof.

31 It follows from the foregoing that the Schienen-Control Kommission must be regarded as a court or tribunal within the meaning of Article 267 TFEU, so that the Court has jurisdiction to answer the questions referred for a preliminary ruling.

Question 1

32 By its first question the Schienen-Control Kommission asks essentially whether Article 8(2) of, in conjunction with Part II of Annex II to, Regulation No 1371/2007 must be interpreted as meaning that the information on main connecting services must, in addition to scheduled departure times, also include delays to or cancellations of those connecting services, in particular those of other railway undertakings.

33 To answer the question, it must be recalled that, according to settled case-law, in interpreting provisions of European Union law such as those at issue here, it is necessary to consider not only their wording but also their context and the objectives pursued by the rules of which they form part (see, inter alia, Case C-185/89 *Velker International Oil Company* [1990] ECR I-2561, paragraph 17, and Case C-33/11 *A* [2012] ECR, paragraph 27).

34 The objectives pursued by Regulation No 1371/2007 are mentioned in its preamble. Thus recital 1 in the preamble emphasises that, in the framework of the common transport policy, it is important to safeguard users' rights for rail passengers and to improve the quality and effectiveness of rail passenger services. According to recitals 2 and 3 in the preamble, a high level of consumer protection must be achieved and the passenger, as the weaker party to the transport contract, must be protected. Recital 4 refers to the right to obtain travel information both before and during the journey, and to do so as soon as possible. Furthermore, recitals 5, 8 and 9 in the preamble to the regulation also demonstrate the aim of facilitating access to the information in question at cross-border level.

35 It is in the light of those objectives that Article 8 of Regulation No 1371/2007 must be interpreted.

36 Article 8(2) of that regulation lays down that railway undertakings are to provide the passenger during the journey with at least the information set out in Part II of Annex II to the regulation. That information concerns on-board services, the next station, delays, main connecting services and security and safety issues.

37 In order to observe the interests of passengers and the general objectives pursued by Regulation No 1371/2007, set out in paragraph 34 above, the information supplied to the passenger must be of use to him.

38 Information concerning delays to or cancellations of connecting trains which the passenger could have found out by consulting the screens before departure, if the delays or cancellations had been known at that time, is information which must also be communicated to the passenger where those delays or cancellations occur after departure. Passengers would otherwise, contrary to the objectives pursued by

Regulation No 1371/2007, be informed only of the scheduled timetable of the main connecting services, and not of any changes occurring after departure, the information communicated to them thus being out of date.

39 Railway undertakings are therefore obliged under Article 8(2) of and Part II of Annex II to Regulation No 1371/2007 to provide information relating to the main connecting services in real time.

40 Furthermore, Part II of Annex II to Regulation No 1371/2007 mentions 'main connecting services', an expression which does not limit the railway undertaking's obligation to provide information to its own main connecting services alone.

41 Consequently, that obligation must be understood as referring to all main connecting services, comprising the main connecting services of the railway undertaking concerned as well as those operated by other railway undertakings. If that were not the case, the objective pursued by Regulation No 1371/2007 of providing passengers with information would not be attained.

42 That interpretation is confirmed by Article 9(1) of Regulation No 1371/2007, under which railway undertakings and ticket vendors are to offer, where available, tickets, through tickets and reservations. Recital 7 in the preamble to that regulation specifies that the provision of through tickets facilitates the transfer of rail passengers from one operator to another. A restrictive interpretation of the information to which passengers must have access would hinder transfers by them, and compromise the objective thus pursued, by encouraging passengers to give preference to large railway undertakings which would be in a position to provide them in real time with information relating to all stages of their journey.

43 Having regard to all the foregoing, the answer to Question 1 is that Article 8(2) of, in conjunction with Part II of Annex II to, Regulation No 1371/2007 must be interpreted as meaning that the information on main connecting services must, in addition to scheduled departure times, also include delays to or cancellations of those connecting services, whichever railway undertaking operates them.

Question 2

44 To answer this question on the obligations of the infrastructure manager, it must be noted that Article 5 of Directive 2001/14 provides that railway undertakings are to be entitled, on a non-discriminatory basis, to the minimum access package and to track access to service facilities that are described in Annex II to that directive.

45 Point 1(d) of Annex II to Directive 2001/14, which provides that those services include the communication and provision of information on train movements, must, as the Advocate General observes in point 51 of his Opinion, be read in conjunction with point 1(e) of that annex, which entitles railway undertakings to all other information required to implement or operate the service for which capacity has been granted.

46 It must be recalled, as stated in paragraph 41 above, that real time information on main connecting services, in particular information relating to other railway undertakings, is necessary for any railway undertaking to be in a position to fulfil the obligations it has under Regulation No 1371/2007.

47 Moreover, it is clear that, to ensure fair competition on the passenger rail

transport market, it must be ensured that all railway undertakings are in a position to provide passengers with a comparable quality of service. As pointed out in paragraphs 40 and 41 above, if a railway undertaking could provide information only on its own connecting services, an undertaking with a larger network would be able to provide its passengers with more complete information than could be provided by an undertaking operating a limited number of lines, which would run counter both to the objective of greater integration of the railway sector, mentioned in recital 1 in the preamble to Directive 2001/14, and to the obligation of providing passengers with information.

48 Railway undertakings must therefore, for the purposes of the exercise of the right of access to railway infrastructure, be given information by the infrastructure manager in real time relating to the main connecting services operated by other railway undertakings, in order to be able, in accordance with Article 5 of, in conjunction with point 1(e) of Annex II to, Directive 2001/14, to implement the service for which capacity has been granted.

49 Moreover, contrary to the submissions of ÖBB-Infrastruktur, that information, which is available on screens at the various stations, cannot be regarded as being of a confidential or sensitive nature which would prevent its disclosure to the various railway undertakings concerned.

50 Consequently, the answer to Question 2 is that Article 8(2) of, in conjunction with Part II of Annex II to, Regulation No 1371/2007 and Article 5 of, in conjunction with Annex II to, Directive 2001/14 must be interpreted as meaning that the infrastructure manager is required to make available to railway undertakings, in a non-discriminatory manner, real time data relating to trains operated by other railway undertakings, in so far as those trains constitute main connecting services within the meaning of Part II of Annex II to Regulation No 1371/2007.

(omissis)

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

1. Article 8(2) of, in conjunction with Part II of Annex II to, Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations must be interpreted as meaning that the information on main connecting services must, in addition to scheduled departure times, also include delays to or cancellations of those connecting services, whichever railway undertaking operates them.

2. Article 8(2) of, in conjunction with Part II of Annex II to, Regulation No 1371/2007 and Article 5 of, in conjunction with Annex II to, Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, as amended by Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004, must be interpreted as meaning that the infrastructure manager is required to make available to railway undertakings, in a non-discriminatory manner, real time data relating to trains operated by other railway undertakings, in so far as those trains constitute main connecting services within the meaning of Part II of Annex II to Regulation No 1371/2007.

27.

European Court of Justice 26 September 2013, Case C-509/11.
Proceedings brought by ÖBB-Personenverkehr AG.
Reference for a preliminary ruling: Verwaltungsgerichtshof - Austria.
(omissis)
1 This request for a preliminary ruling concerns the interpretation of Articles 17 and 30 of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14).
2 The request has been made in an action brought by ÖBB-Personenverkehr AG ('ÖBB-Personenverkehr') against the decision of the Schienen-Control Kommission (Rail Network Control Commission) (the 'Kommission') of 6 December 2010 relating to the terms governing compensation payable to rail passengers by ÖBB-Personenverkehr.

Legal context

International law

3 The Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (the 'COTIF') signed in Bern (Switzerland) on 23 June 2011, entered into force on 1 July 2011, in accordance with Article 9 of that agreement.
4 Article 2 of the agreement states as follows:
'Without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned.'

European Union law

5 Recitals 1 to 3 in the preamble to Regulation No 1371/2007 state as follows:
'(1) In the framework of the common transport policy, it is important to safeguard users' rights for rail passengers and to improve the quality and effectiveness of rail passenger services in order to help increase the share of rail transport in relation to other modes of transport.
(2) The Commission's communication "Consumer Policy Strategy 2002-2006" … sets the aim of achieving a high level of consumer protection in the field of transport in accordance with Article 153(2) of the [EC] Treaty.
(3) Since the rail passenger is the weaker party to the transport contract, passengers' rights in this respect should be safeguarded.'
6 Recitals 6, 13 and 14 in the preamble to that regulation state as follows:
'(6) Strengthening of the rights of rail passengers should build on the existing system of international law on this subject contained in Appendix A – Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail

(CIV) to the [COTIF] [(the "CIV Uniform Rules")]. However, it is desirable to extend the scope of this Regulation and protect not only international passengers but domestic passengers too.

…

(13) Strengthened rights of compensation and assistance in the event of delay, missed connection or cancellation of a service should lead to greater incentives for the rail passenger market, to the benefit of passengers.

(14) It is desirable that this Regulation create a system of compensation for passengers in the case of delay which is linked to the liability of the railway undertaking, on the same basis as the international system provided by the COTIF and in particular appendix CIV thereto relating to passengers' rights.'

7 Recitals 22 and 23 in the preamble to Regulation No 1371/2007 are worded as follows:

'(22) Member States should lay down penalties applicable to infringements of this Regulation and ensure that these penalties are applied. The penalties, which might include the payment of compensation to the person in question, should be effective, proportionate and dissuasive.

(23) Since the objectives of this Regulation, namely the development of the Community's railways and the introduction of passenger rights, cannot be sufficiently achieved by the Member States, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the [EC] Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.'

8 Article 3 of Regulation No 1371/2007 provides as follows:

'For the purposes of this Regulation the following definitions shall apply:

1. "railway undertaking" means a railway undertaking as defined in Article 2 of Directive 2001/14/EC …, and any other public or private undertaking the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction; this also includes undertakings which provide traction only;

…

8. "transport contract" means a contract of carriage for reward or free of charge between a railway undertaking or a ticket vendor and the passenger for the provision of one or more transport services;

…

16. "General Conditions of Carriage" means the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it;

…'

9 Article 6 of that regulation provides as follows:

'1. Obligations towards passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the transport contract.

2. Railway undertakings may offer contract conditions more favourable for the passenger than the conditions laid down in this Regulation.'

10 Article 11 of the regulation states as follows:
'Subject to the provisions of this Chapter, and without prejudice to applicable national law granting passengers further compensation for damages, the liability of railway undertakings in respect of passengers and their luggage shall be governed by Chapters I, III and IV of Title IV, Title VI and Title VII of Annex I.'
11 Article 15 of that regulation provides as follows:
'Subject to the provisions of this Chapter, the liability of railway undertakings in respect of delays, missed connections and cancellations shall be governed by Chapter II of Title IV of Annex I.'
12 Article 17 of Regulation No 1371/2007 states as follows:
'1. Without losing the right of transport, a passenger may request compensation for delays from the railway undertaking if he or she is facing a delay between the places of departure and destination stated on the ticket for which the ticket has not been reimbursed in accordance with Article 16. The minimum compensations for delays shall be as follows:
(a) 25% of the ticket price for a delay of 60 to 119 minutes,
(b) 50% of the ticket price for a delay of 120 minutes or more.
Passengers who hold a travel pass or season ticket and who encounter recurrent delays or cancellations during its period of validity may request adequate compensation in accordance with the railway undertaking's compensation arrangements. These arrangements shall state the criteria for determining delay and for the calculation of the compensation.
Compensation for delay shall be calculated in relation to the price which the passenger actually paid for the delayed service.
Where the transport contract is for a return journey, compensation for delay on either the outward or the return leg shall be calculated in relation to half of the price paid for the ticket. In the same way the price for a delayed service under any other form of transport contract allowing travelling several subsequent legs shall be calculated in proportion to the full price.
The calculation of the period of delay shall not take into account any delay that the railway undertaking can demonstrate as having occurred outside the territories in which the Treaty establishing the European Community is applied.
2. The compensation of the ticket price shall be paid within one month after the submission of the request for compensation. The compensation may be paid in vouchers and/or other services if the terms are flexible (in particular regarding the validity period and destination). The compensation shall be paid in money at the request of the passenger.
3. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Railway undertakings may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 4.
4. The passenger shall not have any right to compensation if he is informed of a delay before he buys a ticket, or if a delay due to continuation on a different service or re-routing remains below 60 minutes.'
13 Article 18(1) to (3) of that regulation provides as follows:

'1. In the case of a delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure time and estimated arrival time by the railway undertaking or by the station manager as soon as such information is available.
2. In the case of any delay as referred to in paragraph 1 of more than 60 minutes, passengers shall also be offered free of charge:
(a) meals and refreshments in reasonable relation to the waiting time, if they are available on the train or in the station, or can reasonably be supplied;
(b) hotel or other accommodation, and transport between the railway station and place of accommodation, in cases where a stay of one or more nights becomes necessary or an additional stay becomes necessary, where and when physically possible;
(c) if the train is blocked on the track, transport from the train to the railway station, to the alternative departure point or to the final destination of the service, where and when physically possible.
3. If the railway service cannot be continued anymore, railway undertakings shall organise as soon as possible alternative transport services for passengers.
…'

14 Article 30 of that regulation provides as follows:

'1. Each Member State shall designate a body or bodies responsible for the enforcement of this Regulation. Each body shall take the measures necessary to ensure that the rights of passengers are respected.
Each body shall be independent in its organisation, funding decisions, legal structure and decision-making of any infrastructure manager, charging body, allocation body or railway undertaking.
Member States shall inform the Commission of the body or bodies designated in accordance with this paragraph and of its or their respective responsibilities.
2. Each passenger may complain to the appropriate body designated under paragraph 1, or to any other appropriate body designated by a Member State, about an alleged infringement of this Regulation.'

15 Article 32 of that regulation provides as follows:

'Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those rules and measures to the Commission by 3 June 2010 and shall notify it without delay of any subsequent amendment affecting them.'

16 Annex I to Regulation No 1371/2007 contains an extract from the CIV Uniform Rules.

17 Chapter II of Title IV of those rules, entitled 'Liability in case of failure to keep to the timetable', includes Article 32, sole article of that chapter, which is worded as follows:

'1. The carrier shall be liable to the passenger for loss or damage resulting from the fact that, by reason of cancellation, the late running of a train or a missed connection, his journey cannot be continued the same day, or that a continuation of the journey the same day could not reasonably be required because of given circumstances. The damages shall comprise the reasonable costs of accommodation as well as the reason-

able costs occasioned by having to notify persons expecting the passenger.
2. The carrier shall be relieved of this liability, when the cancellation, late running or missed connection is attributable to one of the following causes:
(a) circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent;
(b) fault on the part of the passenger;
(c) the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent; another undertaking using the same railway infrastructure shall not be considered as a third party; the right of recourse shall not be affected.
3. National law shall determine whether and to what extent the carrier must pay damages for harm other than that provided for in paragraph 1. This provision shall be without prejudice to Article 44.'

Austrian law

18 Paragraph 22a(1) of the federal Law on railways, railway rolling stock and railway traffic (Bundesgesetz über Eisenbahnen, Schienenfahrzeuge auf Eisenbahnen und den Verkehr auf Eisenbahnen, BGBl. 60/1957), as amended (BGBl. I, 25/2010, the 'Law on the railways'), provides as follows:
'Tariffs for the provision of rail services on main routes and connected ancillary routes shall include compensation terms in accordance with the provisions on compensation of the ticket price established in Article 2 of the federal Law relating to [Regulation No 1371/2007] and Article 17 of [Regulation No 1371/2007].'
19 Paragraph 78b(2) of the Law on the railways is worded as follows:
'The [Kommission] shall of its own motion:
…
2. declare null and void either in full or in part compensation terms adopted pursuant to [Regulation No 1371/2007] where the railway undertaking does not adopt terms in accordance with the requirements of Article 17 of [Regulation No 1371/2007].'
20 Paragraph 167(1) of the Law on the railways provides that an administrative offence is to be deemed to have been committed and sanctioned by the district administrative authority by a fine of up to EUR 2 180 where the person responsible does not publish compensation terms in accordance with Article 22a(1) of that legislation.

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

21 ÖBB-Personenverkehr is a railway undertaking within the meaning of Article 3(1) of Regulation No 1371/2007.
22 The Kommission regarded the terms of ticket price compensation which ÖBB-Personenverkehr applied to passenger transport contracts as not complying with Article 17 of Regulation No 1371/2007 and, by decision of 6 December 2010, it ordered that undertaking to amend them.
23 In particular, the Kommission ordered the undertaking to delete a provision under which there was no right to compensation or reimbursement of costs incurred where the cause of the delay could be attributed to one of the following:

– fault on the part of the passenger;
– the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent;
– circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent;
– where services are restricted as a result of strikes, provided that passengers were adequately informed of these; and
– if the delay results from transport services not included in the transport contract.

24 ÖBB-Personenverkehr brought proceedings before the Verwaltungsgerichtshof (Administrative Court) against that decision.

25 ÖBB-Personenverkehr argues, first, that the Kommission does not have the power to order an amendment to the terms and conditions of sale, and, secondly, that it flows from Regulation No 1371/2007 that railway undertakings are exempt from the requirement to pay compensation to passengers where the delay is attributable to force majeure. In that regard ÖBB-Personenverkehr submits in particular that Article 15 of that regulation refers to Article 32 of the CIV Uniform Rules, so that the exemptions from liability laid down in the latter provision are also applicable in the context of Article 17 of that regulation.

26 On the other hand, the Kommission submits that directions given to a railway undertaking to apply certain compensation terms or to refrain from applying terms of transport which restrict the passenger rights set out in Regulation No 1371/2007 may be based directly on Article 30(1) of that regulation. It also maintains that Article 17 of that regulation is exhaustive. Consequently, a railway undertaking which, in accordance with Article 6(1) of that regulation, may not limit or waive its obligations towards passengers cannot do so either under Article 17, including in cases of force majeure.

27 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the first subparagraph of Article 30(1) of [Regulation No 1371/2007] to be interpreted as meaning that the national body responsible for the enforcement of that regulation may prescribe, with binding effect on a railway undertaking whose compensation terms do not comply with the criteria laid down in Article 17 of that regulation, the specific content of the compensation scheme to be used by that railway undertaking even where national law permits that body only to declare such compensation terms null and void?

(2) Is Article 17 of Regulation No 1371/2007 to be interpreted as meaning that a railway undertaking may exclude its obligation to pay compensation in cases of force majeure, either through application by analogy of the grounds for exclusion laid down in [Regulations (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), (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning

the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ 2010 L 334, p. 1) and (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ 2011 L 55, p. 1)] or by taking into account the exclusions from liability laid down in Article 32(2) of the [CIV Uniform Rules] also for cases requiring compensation for the ticket price?'

The questions referred

The second question

28 By its second question, which it is appropriate to answer first, the referring court asks, in essence, whether Article 17 of Regulation No 1371/2007 must be interpreted as meaning that a railway undertaking is entitled to include in its general terms and conditions of carriage a clause under which it is exempt from its obligation to pay compensation as a result of a delay, where the delay is attributable to force majeure or one of the reasons listed at Article 32(2) of the CIV Uniform Rules.

29 As a preliminary point, it should be noted that Article 17(1) of Regulation No 1371/2007 lays down minimum compensation, determined by reference to the ticket price, which passengers are entitled to claim from railway undertakings in the event of delay.

30 Under Article 17(4) of that regulation, however, passengers have no right to compensation if they are informed of the delay before they buy a ticket or if the delay is under 60 minutes. In addition, the last subparagraph of Article 17(1) of that regulation states that the calculation of the period of delay is not to take into account any delay that the railway undertaking can demonstrate as having occurred outside the territories in which the EC Treaty is applicable.

31 On the other hand, nothing in Regulation No 1371/2007 provides that railway undertakings are exempt from the obligation to pay compensation laid down in Article 17(1) of that regulation where the delay is attributable to force majeure.

32 Article 15 of Regulation No 1371/2007 nonetheless provides that the liability of railway undertakings in respect of delays, missed connections and cancellations is, subject to Articles 16 to 18 of that regulation, governed by Article 32 of the CIV Uniform Rules.

33 As is apparent from recital 14 of Regulation No 1371/2007, the EU legislature took the view that it was desirable for the system of compensation for passengers in the case of delay to use the same basis as the international system established by the COTIF, of which the CIV Uniform Rules form part.

34 Under Article 32(1) of the CIV Uniform Rules, the railway carrier is liable to the passenger for loss or damage resulting from the fact that, due to the cancellation or late running of a train or a missed connection, his journey cannot be continued the same day. The damages to which the railway passenger is entitled in those circumstances include the reasonable costs of accommodation as well as the reasonable costs incurred in having to notify persons expecting the passenger.

35 Reasons exempting the carrier from the liability referred to in that provision are set out in Article 32(2) of the CIV Uniform Rules.

36 In that context, the referring court asks first whether, in the circumstances

referred to in Article 32(2) of the CIV Uniform Rules, a railway carrier may be exempted from its obligation to pay compensation to passengers under Article 17 of Regulation No 1371/2007.

37 In that regard, it should be noted that Article 32 of the CIV Uniform Rules relates to the right of railway passengers to receive compensation for damage or loss resulting from the delay or cancellation of a train.

38 On the other hand, the purpose of the compensation provided for in Article 17 of Regulation No 1371/2007, in so far as it is calculated on the basis of the ticket price, is to compensate the passenger for the consideration provided for a service which was not ultimately supplied in accordance with the transport contract. It is also a fixed-rate standard form of financial compensation, unlike that provided for under the system of liability established at Article 32(1) of the CIV Uniform Rules, which requires an individual assessment of the damage suffered.

39 Therefore, as the purpose of the above provisions and the procedures for their implementation are different, the compensation system provided for by the EU legislature in Article 17 of Regulation No 1371/2007 cannot be treated in the same way as the railway carrier's liability system under Article 32(1) of the CIV Uniform Rules.

40 It follows, in the light of Article 15 of Regulation No 1371/2007, that where railway passengers receive compensation under Article 17 of that regulation, that does not prevent such passengers from bringing, in addition, a claim for compensation pursuant to Article 32(1) of the CIV Uniform Rules or, pursuant to Article 32(3) thereof, on the basis of the applicable national law.

41 That interpretation is, moreover, compatible with the Explanatory Report on the Uniform Rules concerning the Contract for International Carriage of Passengers by Rail (CIV), which appears in the document entitled 'Central Office Report on the Revision of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and the Explanatory Reports on the texts adopted by the Fifth General Assembly' of 1 January 2011, which states that 'passenger traffic delays represent a typical case of improper performance of the contract of carriage [which,] in numerous legal systems, … justifies reduced remuneration, namely [in the present case] reduction of the cost of transport'.

42 It follows from the foregoing considerations that the carrier's grounds of exemption from liability provided for in Article 32(2) of the CIV Uniform Rules cannot be considered applicable in the context of Article 17 of Regulation No 1371/2007.

43 That interpretation is supported by the *travaux préparatoires* for Regulation No 1371/2007, from which it is apparent that, whilst the EU legislature has chosen to bring the provisions relating to the liability of railway undertakings in the case of delays, missed connections and cancellations into line with the corresponding chapters of the CIV Uniform Rules, it has, in addition, considered it necessary to include in that regulation specific provisions governing reimbursement and re-routing, compensation and the obligation to provide passengers with assistance in the event of delay.

44 As shown by the Council of the European Union's rejection of an amendment, adopted by the European Parliament at second reading, specifying that Article 32(2)

of the CIV Uniform Rules is also applicable to the provisions set out in Articles 16 and 17 of Regulation No 1371/2007, the EU legislature deliberately chose not to provide that railway undertakings are to be exempt from their obligation to pay compensation in the event of delay in the circumstances referred to at Article 32(2).

45 In so doing, the EU legislature considered that the railway carrier is under an obligation to pay compensation on the basis of the price paid by way of consideration for transport services which are not supplied in accordance with the transport contract, including where the delay is attributable to one of the reasons listed at Article 32(2) of the CIV Uniform Rules.

46 Secondly, the referring court asks whether the grounds for excluding the carrier's liability under Regulations Nos 261/2004, 1177/2010 and 181/2011, relating to the transport of passengers by plane, by boat, and by bus and coach, respectively, may be applied by analogy to carriage by rail.

47 In that regard, it should be noted that the situation of undertakings operating in different transport sectors is not comparable since the different modes of transport – having regard to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks – are not interchangeable as regards the conditions of their use. In those circumstances, the EU legislature was entitled to establish rules for providing a level of customer protection that varied according to the transport sector concerned (Case C-12/11 *McDonagh* [2013] ECR, paragraphs 56 and 57).

48 Accordingly, the grounds for exemption provided for by EU legislation applicable to other modes of transport cannot be applied by analogy to carriage by rail.

49 Similarly the Court cannot uphold the argument that the general principle of EU law relating to force majeure must be applied in circumstances such as those in the main proceedings, as a consequence of which a railway carrier is entitled to refuse to pay the relevant passengers compensation in the event of delay attributable to force majeure.

50 Indeed, neither force majeure nor any circumstances that are equivalent to it are mentioned in Article 17 of Regulation No 1371/2007 or in any other provision of that regulation relevant to the interpretation of that article.

51 In those circumstances, any other interpretation of Article 17 of Regulation No 1371/2007 would have the effect of calling into question the essential purpose of protecting the rights of railway passengers pursued by that regulation, as set out at recitals 1 to 3 thereof.

52 It follows from all of the preceding considerations that the answer to the second question is that Article 17 of Regulation No 1371/2007 must be interpreted as meaning that a railway undertaking is not entitled to include in its general terms and conditions of carriage a clause under which it is exempt from its obligation to pay compensation in the event of a delay where the delay is attributable to force majeure or to one of the reasons set out at Article 32(2) of the CIV Uniform Rules.

The first question

53 By its first question, the referring court asks, in essence, whether the first subparagraph of Article 30(1) of Regulation No 1371/2007 must be interpreted as meaning that the national body responsible for the enforcement of that regulation

may, in the absence of any national provision to that effect, impose upon a railway undertaking whose compensation terms do not meet the criteria set out at Article 17 of that regulation the specific content of those terms.

54 That court is of the view that Article 78b(2) of the Law on the railways, under which the Kommission is required to declare null and void compensation terms which do not comply with the requirements of Article 17 of Regulation No 1371/2007, does not ensure that railway passenger rights will be respected in all cases.

55 In particular, since it is not followed by the necessary amendments required for compliance with the second subparagraph of Article 17(1) of Regulation No 1371/2007, any declaration that the relevant clauses are null and void will not ensure that railway passengers benefit from the compensation terms set out under that provision.

56 In those circumstances, the referring court's first question must be understood as relating in essence to whether, given the limited powers available to it under Austrian law, the Kommission is entitled to rely directly on Article 30(1) of Regulation No 1371/2007 to adopt the measures necessary to ensure that the rights of railway passengers are respected.

57 In that regard, it must be borne in mind that, by virtue of the very nature of regulations and of their function in the system of sources of EU law, the provisions of a regulation, as a general rule, have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application (see Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraph 32 and the case-law cited).

58 However some of the provisions of a regulation may necessitate, for their implementation, the adoption of measures of application by the Member States (*SGS Belgium and Others*, paragraph 33).

59 In the present case, Article 30(1) of Regulation No 1371/2007 provides that the national body responsible for the enforcement of that regulation must take the necessary measures to ensure that passengers' rights are respected.

60 None the less, it is clear that the specific measures which that body must be able to adopt have not been identified by the EU legislature.

61 It must in addition be noted that, under the third subparagraph of Article 30(1) of Regulation No 1371/2007, Member States are required to inform the Commission of that body's responsibilities.

62 It follows from the preceding considerations that Article 30(1) of Regulation No 1371/2007 requires for its implementation that Member States adopt measures defining the powers available to the national supervisory body.

63 Therefore, contrary to what the Kommission submits, the first subparagraph of Article 30(1) of Regulation No 1371/2007 cannot be interpreted as constituting a legal basis authorising national bodies to impose on railway undertakings the specific content of their contractual terms relating to the circumstances in which they are to pay compensation.

64 The fact remains that, in accordance with Article 4(3) TEU, it is for all the authorities of Member States, including, for matters within their jurisdiction, the

courts, to take the steps necessary to ensure that the obligations arising under Regulation No 1371/2007 are fulfilled. In order to ensure the full effect of that regulation and to ensure that the rights which it confers upon individuals are protected, those authorities are required to interpret and apply national law, in so far as possible, in the light of the wording and purpose of that regulation in order to achieve the result envisaged by it.

65 In the present case, taking into account the objectives set out at recitals 1 to 3 of Regulation No 1371/2007, the relevant provisions of Austrian law, including those governing the penalties applicable in the event of a breach of that regulation, must be interpreted and applied in a manner consistent with the requirement of a high level of protection for railway passengers, in such a way as to ensure that the rights conferred upon them are guaranteed.

66 Having regard to all the foregoing, the answer to the first question is that the first subparagraph of Article 30(1) of Regulation No 1371/2007 must be interpreted as meaning that the national body responsible for the enforcement of that regulation may not, in the absence of any national provision to that effect, impose upon a railway undertaking whose compensation terms do not meet the criteria set out at Article 17 of that regulation the specific content of those terms.

(omissis)

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

1. The first subparagraph of Article 30(1) of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations must be interpreted as meaning that the national body responsible for the enforcement of that regulation may not, in the absence of any national provision to that effect, impose upon a railway undertaking whose compensation terms do not meet the criteria set out at Article 17 of that regulation the specific content of those terms.

2. Article 17 of Regulation No 1371/2007 must be interpreted as meaning that a railway undertaking is not entitled to include in its general terms and conditions of carriage a clause under which it is exempt from its obligation to pay compensation in the event of a delay where the delay is attributable to force majeure or to one of the reasons set out at Article 32(2) of the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail of the Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999.

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