OPINION OF ADVOCATE GENERAL COSMAS

delivered on 16 May 2000 [1]

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1 — Original language: Greek.

I — Introduction

1. In the present application the Italian Government (hereinafter 'the applicant') is seeking annulment of Commission Decision 98/710/EC of 16 September 1998 (hereinafter 'the contested decision'),[2] under which Italy was prohibited from applying the traffic distribution rules for the airport system of Milan laid down in national decrees which, in particular, provided for the transfer of air traffic from Linate to Malpensa airport. The applicant maintains that the contested decision, which is based on allegedly disproportionate restrictions on the freedom to provide services, exceeded the terms of Regulation (EEC) No 2408/92[3] which is cited as the legal basis for the contested decision. At the same time the applicant submits that, in any event, the Commission specifically erred in its application of the principle of proportionality. Finally, according to the applicant, the Commission wrongly appraised the facts on the basis of which it found there to be indirect discrimination in favour of the national air carrier (Alitalia).

2 — OJ 1998 L 337, p. 42.

3 — 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).

II — Legislative framework

2. The first paragraph of Article 59 of the EC Treaty (now, after amendment, the first paragraph of Article 49 EC) provides that:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the community other than that of the person for whom the services are intended.'

3. Article 61(1) of the EC Treaty (now, after amendment, Article 51(1) EC) provides that:

'Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.'

4. Moreover, under Article 84(2) of the EC Treaty (now, after amendment, Article 80(2) EC):

'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.'

5. The first two recitals in the preamble to Regulation No 2408/92 state that:

'it is important to establish an air transport policy for the internal market over a period expiring on 31 December 1992 as provided for in Article 8a of the Treaty;

Whereas the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.'

6. According to the 19th recital in the preamble thereto:

'it is appropriate to deal with all matters of market access in the same Regulation.'

7. Moreover, under Article 3(1) of Regulation No 2408/92:

'Subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.'

8. Finally, Article 8 thereof provides that:

'1. This Regulation shall not affect a Member State's right to regulate without discrimination on grounds of nationality or identity of the air carrier, the distribution of traffic between the airports within an airport system.

2. The exercise of traffic rights shall be subject to published Community, national, regional or local operational rules relating

to safety, the protection of the environment and the allocation of slots.

3. At the request of a Member State or on its own initiative the Commission shall examine the application of paragraphs 1 and 2 and, within one month of receipt of a request and after consulting the Committee referred to in Article 11, decide whether the Member State may continue to apply the measure. The Commission shall communicate its decision to the Council and to the Member States.

4. Any Member State may refer the Commission's decision to the Council within a time-limit of one month. The Council, acting by a qualified majority, may in exceptional circumstances take a different decision within a period of one month.

...'

III — Facts and contested decision

9. The airport system of Milan comprises the airports of Linate, Malpensa and Orio al Serio (Bergamo). The distribution of air traffic between those airports was determined by the laws of the market, taking into account existing operational constraints. That resulted in inefficiency in the use of existing airport capacity, since Linate airport was overutilised and Malpensa airport was underutilised. [4] In addition, none of the airports in that system has been able to develop as a major hub for national, international and intercontinental flights.

10. In light of those factors, the Italian authorities decided to reorganise the airport system of Milan in order to create a hub at Malpensa and provide adequate airport capacity for the future. That objective, known as the Malpensa 2000 project, was to be achieved through the extension

4 — The airport of Linate, located 10 km from the city centre, attracts most of the intra-Community international and domestic traffic. Linate airport faced severe capacity problems since 14.2 million passengers used the airport in 1997 whereas its optimum capacity is estimated at around 8 million. The airport of Malpensa, located 53 km from the city centre, concentrates all intercontinental flights, since operating constraints prevent their operation at Linate airport. Only a few intra-Community flights are operated from that airport since passengers tend to favour Linate airport because of its location close to the city centre. Thus, Malpensa airport received only 3.9 million passengers in 1997 whereas its optimum capacity is estimated at around 6 million. Orio al Serio airport, located approximately 50 km from the city centre and close to Bergamo, is mainly used for cargo and charter traffic, although a limited number of scheduled passenger services are also operated from that airport.

and upgrading of Malpensa airport. [5] The financial arrangements underlying the new Malpensa airport required a concentration of traffic at that airport. That necessarily involved a transfer of traffic from Linate airport.

11. To that end, on 5 July 1996 the Italian Minister for Transport issued Decree No 46-T. That decree laid down traffic distribution rules for the airport system of Milan. Article 1(1) provided that, from the date of entry into service of priority structures at Malpensa 2000, which was to be determined by a further decree, all scheduled and non-scheduled services on intercontinental and intra-Community air routes (including domestic or international intra-Community air routes) were to be operated to and from Malpensa airport. Article 1(2) provided that the same services could also be operated to and from Orio al Serio airport. Article 1(3) and (4) provided that Linate airport was to be used only for general aviation and for the operation of direct air services on routes serving Milan whose total annual passenger volume was equal to or more than 2 million in the year prior to the abovementioned date of entry into service of priority structures, or had reached an annual average of 1.75 million over the previous three-year period.

12. On 13 October 1997 the Italian Government adopted Decree No 57-T Article 1(1) of which provided that the priority arrangements referred to in Decree No 46-T were to enter into force on 25 October 1998. The effect of Decrees No 46-T and No 57-T is that, from 25 October 1998 onwards, all air services to and from Milan will have to be operated either from Malpensa airport or Orio al Serio airport, with the exception of general aviation services and air transport services meeting the traffic thresholds defined by Article 1(4) of Decree No 46-T. In practice, the only route meeting those thresholds was Milan-Rome.

13. On 16 February 1998 the air carriers British Airways, Iberia, Lufthansa, Olympic Airways, Sabena, Scandinavian Airlines System and TAP Air Portugal submitted to the Commission a joint request asking for it to take a decision declaring the traffic distribution rules adopted by the Italian authorities for the airport system of Milan incompatible with Community law, in particular with Regulation (EEC)

5 — That project was one of the 14 priority projects of the trans-European network under Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 (OJ 1996 L 228, p.1). It was financially supported by the Community, the European Investment Fund and the European Investment Bank.

No 2408/92, and requiring the Italian authorities not to apply those rules and to adopt other rules fully compatible with Community law. [6] The air carriers specifically maintained that the Italian rules in fact discriminated unfairly in favour of Alitalia, [7] whilst at the same time being in breach of the principle of proportionality. [8]

14. After following the procedure provided for, [9] the Commission on 16 September 1998 adopted the contested decision under Article 8(3) of Regulation No 2408/92.

15. In the reasoning of the contested decision the Commission first outlines the facts and procedure before giving its legal assessment of the contested Italian rules in light of Regulation No 2408/92. According to the Commission, whatever restriction was approved under Article 8(1) of the Regulation must be in conformity with both the principle of non-discrimination, as expressly mentioned in that provision, and with the general principles governing free-

6 — On 15 April 1998, Air France informed the Commission that it was joining the abovementioned carriers in their action against the Italian rules. On 22 April 1998, those carriers submitted to the Commission an additional request asking it to take an interim decision prior to any decision on the substance of the Italian rules in order to ensure that those rules were not put into effect until adequate transport links to Malpensa airport were established. On 27 May 1998, Austrian Airlines submitted to the Commission a separate request which had the same object as the initial and additional requests of the complainant carriers and was based on the same grounds.

7 — According to the above carriers the effect of those rules will be that only the Milan-Rome route will operate out of Linate, a route operated by several Community carriers including Alitalia. Consequently, Alitalia will be able to be based to a significant degree at Rome airport which will be served by Linate, whilst non-Italian carriers will not be able to serve the hub of their airport activity from Linate airport, but will be compelled to do so from Malpensa. That will lead to a competitive advantage in favour of Alitalia as opposed to non-Italian Community carriers in the provision of medium and long-haul air-transport services using its airport hub. In other words, passengers on flights from Milan to medium or long-haul destinations via an airport will prefer flights which use Alitalia's hub to those used by other Community carriers. In addition, according to the air carriers the absence of adequate transport connections will reinforce the inconvenient situation of Malpensa airport in contrast with Linate and consequently the discrimination as a result of the Italian rules.

8 — The abovementioned carriers took the view that the Italian rules are disproportionate given that the purposes which they pursue could be attained without discrimination and with a more rational use of airport capacity, avoiding both the incorrect use of Linate and the congestion at Malpensa. In that context all Community carriers ought to have been permitted to offer services to all relevant airports from Linate airport.

9 — In order to ensure full elucidation of the case under the procedure laid down in Article 8(3) of Regulation No 2408/92 and the rights of the defence, on 3 March 1998 the Commission transmitted the request lodged by the carriers to the Italian authorities and invited them to comment thereon. As regards the different treatment under the Italian rules, the Italian authorities considered that no discrimination was involved since access to the Milan-Rome route was open to all Community carriers in accordance with the applicable Community rules. As regards the principle of proportionality the Italian authorities contended that the traffic distribution rules were necessary in order to attain the objective of creating a hub at Malpensa and keeping Linate as a supplementary airport.
In the course of various exchanges of correspondence and meetings, the Commission informed the Italian authorities of its view of the matter at issue on the basis of the facts in its knowledge, summarising the grounds on which it entertained doubts as to the compatibility of the Italian rules with Article 8(1) of Regulation No 2408/92. The Italian authorities reiterated that the criteria laid down in Decree No 46-T for the distribution of air traffic within the Milan airport system entailed absolutely no discrimination in favour of Alitalia. None the less, in order to reassure the Commission on this aspect, the Italian authorities mentioned that they might envisage conditions for the operation of the Milan-Rome route from Linate airport. However, conditions of the kind envisaged were not deemed adequate or expedient by the Commission.

dom to provide services, as enunciated in the Court's case-law. Those principles go beyond the mere prohibition of discrimination on the basis of the nationality or identity of the carrier. Even if the national measures which restrict the freedom at issue are applied without discrimination they continue to be unacceptable if they are not justified by overriding general-interest requirements or if the same result may be attained by means of less restrictive rules in accordance with the principle of proportionality.

16. In the present case, as regards compatibility of the Italian rules with the principle of non-discrimination, the Commission, in light of the competitive situation as between Alitalia and the other Community carriers, reached the conclusion that the criteria laid down in Decree No 46-T under which only Alitalia is allowed to service its hub at Fiumicini Airport, Rome, from Linate airport, and the other operators will be compelled to service their hubs from Malpensa airport, will confer on Alitalia a competitive advantage. That advantage will subsist for as long as Malpensa airport does not have the requisite infrastructure permitting access in order to overcome the present situation in which users are reluctant to resort to it. Accordingly, the Commission considered that application of the criteria laid down in Decree No 46-T of 25 October 1998, under Decree No 57-T, will in practice lead to discrimination in favour of Alitalia. Accordingly, application of the criteria laid down in Decree No 46-T as at 25 October 1998, as provided for in Decree No 57-T, is incompatible with the principle of non-discrimination on the ground of the carrier's identity, as provided for in Article 8(1) of Regulation No 2408/92.

17. As regards compatibility of the Italian legislation with the principle of proportionality, the Commission emphasised at the outset that Article 8(1) of Regulation No 2408/92 expressly recognises the legitimacy of an active planning policy for Malpensa airport and that the Malpensa 2000 project was aimed at creating a fully operational and viable hub at that airport. The Commission then went on to examine the restrictions introduced by the rules on distribution of air traffic and reached the conclusion that the operational viability of the Malpensa 2000 project (including the timely operation of all flights and the prerequisite of normal access by passengers to the airport) did not necessitate the complete transfer on 25 October 1998 of the volume of traffic provided for in the Italian rules. The operational viability of the Malpensa hub necessitated the transfer of a volume of traffic compatible with the level of airport facilities and access infrastructures. Otherwise, the development and future positioning of Malpensa airport as a

successful hub in the Community would be put at risk. Postponement of the transfer or a gradual transfer of that volume from 25 October 1998 onwards would be better suited to that objective and would also reduce the effect on freedom to provide air services to and from Milan. Therefore, the Italian rules were not indispensable to secure the objective pursued by the Italian authorities which could be attained with rules less restrictive of the freedom to provide air services. Further, the imposition of restrictions resulting in an immediate and drastic reduction of activities at Linate from 14.2 million passengers per year in 1997 to 2.5 million after the new measures take effect would not appear to be an appropriate means of attaining the objective indicated in the 11th recital in the preamble to Decree No 46-T, namely that Linate airport should in any event be kept in service. Consequently, the Commission considered that the traffic distribution rules set out in Decree No 46-T and Decree No 57-T were not compatible with the principle of proportionality.

18. On the basis of the reasoning set out above, the Commission decided that Italy was not authorised to apply the traffic distribution rules for the Milan airport system laid down in the decrees in question.

19. No Member State applied to the Council pursuant to the opportunity to do so afforded by Article 8(4) of Regulation No 2408/92.

20. The Italian Republic challenged the decision in an application lodged at the Court on 8 October 1998. In its application it is asking the Court to annul the Commission's decision and to order it to pay the costs. Conversely, the Commission seeks dismissal of the action and an order for costs against the applicant.

IV — Grounds of nullity

21. For the sake of schematic coherence of analysis I will examine the first and second pleas of nullity together, since they both raise the same general problem of interpretation of the legal basis of the contested decision (A). I will then go on to examine the third plea of nullity in which it is submitted that in any event the Commission misapplied the principle of proportionality (B). Finally, I will examine the fourth plea of nullity going to a breach of the rules governing indirect discrimination and a manifest misappraisal by the Com-

mission of the facts in the reasoning of the contested decision (C).

A — *Interpretation of the legal basis of the contested decision (first and second grounds of nullity)*

(a) Parties' submissions

(aa) Lack of competence stemming from infringement of Article 8(1) and (3) of Regulation No 2408/92 and Articles 155 (now Article 211 EC) and 169 (now Article 226 EC) of the EC Treaty (first plea of nullity)

22. In the first plea of nullity the applicant submits that the contested decision should be annulled because the Commission disregarded the proper meaning of Article 8(3) of Regulation No 2408/92, which provides the legal basis for the adoption of the decision at issue, and reviewed the Italian rules for compatibility with the principles governing freedom to provide services and, in particular, the principle of proportionality, and did not confine itself, as it ought to have done, to a review of their compatibility with the principle of non-discrimination. [10]

23. The Commission refutes the arguments put forward in support of the first plea of nullity and contends that, in the sector of air transport, Regulation No 2408/92 applies all the rules concerning freedom to provide services under Article 59 of the Treaty. Under the literal, systematic and teleological method of interpretation, Arti-

10 — Specifically, the Italian Government is maintaining that Article 8(1) of Regulation No 2408/92 confers on the Member States exclusive competence to regulate the distribution of air traffic as between the airports; and that that competence is limited by the requirement to observe the principle of non-discrimination on the ground of the nationality and/or identity of the carrier. Article 8(3) confers power on the Commission to review whether the national measures adopted are in conformity with the provisions of Article 8(1). It may be inferred from the formulation of that paragraph, which is clear in terms, that the subject-matter of review may be only the compatibility of national measures with the principle of non-discrimination, as laid down in Article 8(1), and not the compatibility of those measures generally with Community law. Moreover, where the Community legislature has sought to make provision for a general power of review of that nature, as in the case of Article 9(4) and (5), it has expressly stipulated that such review should not be limited solely to compatibility of national measures with the provisions of the regulation at issue, but should also examine whether those measures are 'contrary to Community law'.
According to the applicant, the Commission took the view in the contested decision that it was empowered under Article 8(3) of Regulation No 2408/92 to review the Italian rules in the light of Community law generally and, specifically, in the light of the principle of proportionality which governs restrictions on freedom to provide services. That fact renders the Commission guilty of an unduly extensive interpretation of the provision conferring decision-making power on the Commission, inasmuch as that provision is being applied in cases and under conditions not provided for therein. Such application runs counter to Treaty principles in connection with the institutional organisation of the Community and, in particular, with the principles of strict legality of the Commission's decision-making power under Article 155 of the Treaty. According to the applicant, Article 8(3) of Regulation No 2408/92 must, on account of its exceptional nature in regard to Article 169 of the Treaty, be strictly interpreted. Consequently, it cannot be construed as authorising the Commission to use its decision-making power to make appraisals or adopt binding decisions which are not strictly connected with the application of Article 8(1). The latter provision lays down a prohibition on discrimination whose application does not involve discretionary appraisals.

cle 8(1) of the Regulation cannot be construed as allowing a Member State to infringe other applicable provisions or principles of Community law, such as the principle of proportionality. [11]

(ab) Infringement of Articles 3(1) and 8(1) of Regulation No 2408/92 and of Articles 59, 61(1) and 84(1) and (2) of the Treaty, and of the principles laid down in the Court's case-law in connection with the freedom to provide services (second plea of nullity)

24. In the second plea of nullity, which is raised by way of an ancillary plea to the first plea, the applicant is calling in question the substantive legality of the contested decision, inasmuch as it was therein decided that the Italian decrees at issue infringe Community law because they fail to observe the principle of proportionality. In the first limb of that plea the applicant is challenging the reasoning underlying the contested decision according to which national rules governing the distribution of air traffic must be held to be contrary to

11 — Specifically, the Commission is maintaining, on the one hand, that Article 8(1) of Regulation No 2408/92 does not allow the Member States to distribute air traffic in such a way as to breach Community law and that, on the other, Article 8(3) does not limit the powers of the Commission to a review of compatibility of the national measure with the provisions of Article 8(1). On the contrary, Article 8(3) requires the Commission to examine whether the Member State may continue to apply the measure.
The Commission stresses that the principle of proportionality constitutes a general principle of Community law which must be observed by the Member States whenever a provision of Community law reserves to them the exercise of specific powers. It also points out that, under Article 155 of the Treaty, 'the Commission shall ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.' In light of the above, the Commission considers that Article 8(3) of Regulation No 2408/92 cannot be interpreted as precluding the Commission from adopting decisions which disregard any serious breach of the principle of proportionality, whilst the Commission is exposed to actions which may be brought against it under Article 173 of the Treaty for breach of that principle, if it fails to examine the case in light of all the general principles of Community law. The fact that the provisions of Article 9(4) and (5) of Regulation No 2408/92 expressly provide for general review of the legality of national measures does not preclude application of analogous reasoning to Article 8(1). In that connection, the Commission relies, in support of its analysis, on the judgment in Case T-260/94 *Air Inter* [1997] ECR II-997 in which the Court of First Instance examined the head of claim concerning a defect in the decision on the ground of an infringement of Article 90(2) of the EC Treaty (now Article 86(2) EC), notwithstanding the fact that that article was not mentioned in Article 8 of Regulation No 2408/92.
The Commission goes on to add that to circumscribe its decision-making power in that way would be contrary to the principle of sound administration since it would be required to approve a measure on the basis of Article 8(1) and (3) in order then to initiate proceedings under Article 169 of the Treaty. However, such a procedure, which would comprise two stages, review under Article 8(1) and (3), and then under Article 169, would not be consonant either with the principle of legal certainty or with the need, in terms of air-transport market requirements, for swift resolution of doubts as to the legality of national measures.

Community law if they do not observe that principle. [12] In the second limb of that plea the applicant challenges the finding in the contested decision that, from the point of view of proportionality, the appraisal of the national decrees in connection with the airport system of Milan justifies the prohibition imposed on Italy. In particular, the applicant maintains that the Commission erred, at paragraph 49 of the contested decision, in appraising the compatibility of the Italian decrees with the Community rules, by basing itself on an economic-interest criterion, such as the viability of an airport system. [13]

25. As regards the first limb of the second plea of nullity, the Commission counters the applicant's argument by replying that the principle of freedom to provide air-transport services within the Community is laid down in Article 3(1) of Regulation No 2408/92. The Commission considers that national measures restricting that freedom must accord with the general principles governing freedom to provide services laid down by the Court. In that connection the Commission points out that the above-

12 — The applicant maintains that, even if the principles laid down in Article 59 of the Treaty are appropriate for the interpretation of the provisions of the decree, the Commission relied on them not in order to interpret Article 8 of the Regulation but mainly in order to supplement it, by giving it a significance and breadth which go beyond the clear content of that provision. Nor, moreover, may the Commission base itself on Article 59 and the case-law in connection with that fundamental Treaty provision. The provisions of Title IV do not apply to sea and air transport (Article 84(1)). It is for the Council to regulate air transport (Article 84(2)). Regulation No 2408/92 was adopted specifically on that legal basis and, consequently, represents the sole source of rules in the sector covered by the contested decision.
According to the applicant, the Commission did not correctly apply the principles laid down in the case-law concerning restrictions on freedom to provide services. The latter cannot be applied in the sector of air transport once Regulation No 2408/92 harmonised the conditions for access to the intra-Community routes. Moreover, as the applicant stresses in its reply, Article 8(1) — which allows for the distribution of air traffic to be regulated subject to observance of the principle of non-discrimination, in the same way, moreover, as other articles of the regulation, particularly Article 9, which expressly mentions (paragraph 2, last indent) the need for the principle of proportionality to be observed where restrictions are imposed on the exercise of traffic rights — forms part of the discretionary power enjoyed by the Council in regulating the freedom to provide services in the sector of air transport (judgment in Case 13/83 *Parliament* v *Council* [1985] ECR 1513, paragraph 65). Accordingly, in the present case, the relevant Italian decrees fall to be reviewed solely under Article 8(1) of the Regulation and not also under the above principles laid down in the case-law.

13 — The applicant maintains that, under the Court's case-law, the principle of proportionality is applied in order to appraise the legality of restrictions based on overriding requirements in the general interest. Consequently, if a restriction is not based on such a requirement, the question of the application of the principle of proportionality does not arise. The applicant considers that, if Article 8(1) of Regulation No 2408/92 allows the decrees at issue on the basis of reasonable economic requirements (and subject to observance of the principle of non-discrimination), recourse to general principles in order to subject the measures at issue to a review of proportionality would appear to be arbitrary.
Nor, according to the applicant, may the Commission be heard to say that it is remedying the omission from Article 8(1) of Regulation No 2408/92 of a reference to the principle of proportionality by itself creating a new general-interest concept covering requirements of a purely economic nature, such as the establishment of an effective airport complex. The Italian Government goes on to add that the Commission should not 'play' with the notion of overriding general-interest requirements by relying on provisions which are not relevant, such as Article 129b of the EC Treaty (now Article 154 EC).
Finally, the applicant submits that the programme of works for establishing a connection with Malpensa airport, to which the Commission had regard, is of no significance for the application of Regulation No 2408/92 because it is not evident in what way it can have a bearing on the lawfulness under Community law of the decrees distributing traffic between Malpensa and Linate, even in light of the legal views — which moreover are called in question — on which the contested decision is based.

mentioned general principles, to which recourse must be had whenever Regulation No 2408/92 is interpreted, are not confined merely to prohibition of unfair discrimination on the ground of nationality but also preclude measures which, although they apply to service providers irrespective of their nationality, restrict that freedom, unless those measures are justified by overriding general-interest requirements, or where the same result can be achieved by means of less restrictive rules.

26. As regards the second limb of the second plea of nullity based on the alleged absence of any overriding general-interest requirement, the Commission points out that there can be no definitive enumeration of such requirements. It follows that the objective of realising a viable operational hub, which might also be termed achieving 'the objective of efficient management of traffic' or the 'need for an appropriate adjustment of traffic', is to be deemed an overriding general-interest requirement. [14]

14 — The Commission takes the view that considerations of transport infrastructures come under the definition of the general interest, as is borne out by Articles 8(1) and 9 of Regulation No 2408/92. Moreover, according to the Commission, even if the objective of establishing a viable operational hub entails macro-economic consequences, those are in fact not the same as the micro-economic factors held by the Court not to be permitted for the purpose of justifying restrictions on the freedom to provide services. In any event, however, the Court has acknowledged that the fact that the national measures seek at the same time to pursue economic objectives does not prevent them from being deemed lawful, inasmuch as they also seek to satisfy overriding general-interest requirements; this analysis is justified also by the provisions of Article 129c of the Treaty (now, after amendment, Article 155 EC).

(b) My opinion

27. In the first two pleas of nullity the applicant is calling in question the validity of the contested decision essentially on the ground that the Commission reviewed the Italian decrees at issue not only in light of the principle of non-discrimination but also in light of the principle of proportionality.

28. That challenge does not carry conviction, nor can it give rise to the annulment of the contested decision. I consider that in the result it was right for review of the Italian rules to be based on both the abovementioned principles of Community law. None the less, I have reached that conclusion following reasoning which partly differs both from the reasoning in the contested decision and from the Commission's arguments before the Court.

29. Both the applicant and the Commission start from the assumption that to opt for the principle of proportionality as the legal basis for review of the Italian decrees at issue presupposes either the direct application of the general principles enunciated by the Court under Article 59 of the Treaty in connection with the review of restrictions on freedom to provide services or the interpretation of Article 8(1) and (3) of Regulation No 2408/92 in light of those principles. None the less, before inquiring into the possible concurrence of those two alternative preconditions in this case and raising the prior issue as to whether and to what extent Regulation No 2408/92 set out

to apply the fundamental principle of freedom to provide services in the sector of air transport, it must be determined whether the need to apply the principle of proportionality may as a matter of principle be inferred from the very prohibition on discrimination expressly laid down in Article 8(1) of the regulation at issue. If that is the case, it will then be necessary to examine whether the general preconditions of the applicable principle of proportionality tally with the general preconditions of the principle of proportionality as applied by the Commission in the contested decision. In the event that this should turn out to be the case, the arguments raised in the first two pleas of nullity would in any event have to be rejected as unfounded, irrespective of the outcome of any inquiry into the possibility of applying or taking account of the principles established by the Court under Article 59 of the Treaty.

30. As a matter of principle I consider that the need for the principle of proportionality to be applied may be inferred from the very prohibition of discrimination whose observance is expressly required by Article 8(1) of Regulation No 2408/92.

31. There can be no doubt that the prohibition of discrimination contained in Article 8(1) is to be interpreted in the light of both the general theory of Community law and the Court's case-law under both of which direct and indirect discrimination are both acknowledged to come within the scope of the general principle of the prohibition of discrimination. [15] Accordingly, it is correctly stated in the contested decision that: 'the principle of non-discrimination set out in Article 8(1) also precludes any measure which, even without explicitly making reference to the carrier's nationality or identity, none the less produces, even indirectly, discriminatory effects in practice.' [16]

32. At this juncture it should be recalled that, in the case of direct discrimination, proof of its existence is by definition self-evident: both the existence of different treatment of similar situations and the similar treatment of different situations (*de facto* discrimination) and the unlawful nature of that treatment (*de jure* discrimination) may be directly inferred from reference in the measures at issue of a prohibited criterion. Conversely, a finding of indirect discrimination presupposes a complex reasoning based, in the first instance, on a thorough analysis of the concrete factual situation governed by the measure at issue, and on an examination of whether, in light of that situation, the apparent neutrality of the criterion applied leads in the end to unfair discrimination in

15 — As regards academic doctrine see, for instance, K. Lenaerts, 'l'Égalité de traitement en droit communautaire, un principe unique aux apparences multiples', *Cahiers de droit européen*, 1991, p. 3.
As regards case-law see, for instance, judgments in Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11) which laid the foundations for the formulation of the case-law in connection with the prohibition of indirect discrimination on the ground of nationality. As far as freedom to provide services is concerned, see, for instance, amongst recent judgments, judgment in Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 13 et seq.

16 — See paragraph 30 of the contested decision.

practice. The second stage is the finding that that discrimination is unlawful, that is to say that it is indirectly but closely connected to a prohibited criterion. In other words, under the above reasoning it is appropriate to determine initially whether the emergence in practice of discrimination is, in general terms, the unavoidable consequence of the criterion applied or whether it is rather a random consequence not attributable to the provision at issue. It is not always easy to reach that determination immediately, nor may it, in any event, prejudge the existence of *de jure* discrimination,[17] whether reliance is placed on the precepts of common experience or on statistical data. For that reason, what is henceforth required is an inquiry from the opposite starting point into whether the provision adopted is objective in nature. That inquiry should logically be conducted on the basis of a reasoning process which examines whether the provision at issue is proportionate, that is to say necessary, appropriate and not unduly burdensome, in relation to its purpose. That purpose must be connected with an overriding general-interest requirement, as interpreted in each given case. That purpose may indeed be defined generally by a legal provision, which is the case in regard to Article 8(1) of Regulation No 2408/92 which provides that the objective of the measures at issue must concern distribution of traffic between the airports within an airport system. If the provision at issue is proportionate to its objective, it must be regarded as lawful even if it results in *de facto* discrimination because then plainly that discrimination cannot be attributed to the provision at issue but either occurs randomly or is attributable to the legitimate objectives of the law of which the provision at issue constitutes the culmination. It is, then, to be inferred from the foregoing that, whenever it is a question of determining indirect discrimination the proportionality of the provision at issue has to be reviewed in relation to the legitimate purpose for which that provision was adopted. That review should not be seen exclusively as an element of the possible justification for the indirect discrimination but should be deemed to constitute an element of the reasoning leading to a finding of discrimination,[18] a fact that

17 — An absolute degree of proof of discrimination occurs only in the case of direct discrimination. Direct proof of indirect discrimination, as in other cases of legal proof, is based on its probability or, more correctly, on the formation of a judicial view as to the probability of its existence.

18 — See, for instance, judgment of the Court in Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617, paragraph 20: 'a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.' See also judgment in Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 37 et seq.
Moreover, the specific nature of the case of indirect discrimination has already manifested itself in the case-law relating to the legitimate restrictions on the freedom to provide services (see paragraph 51 below), in the same way as it is not evident whether indirect discrimination applies to those provisions whose application is discretionary or to provisions in regard to whose application there is no discretion (see, in that connection, Opinion of Advocate General Tesauro (paragraph 44 et seq., particularly paragraph 50) in Cases C-120/95 *Decker* [1998] ECR I-1831 and C-158/96 *Kohll* [1998] ECR I-1931, a fact which affects both the choice of the grounds which may lead to a legitimate justification of such discrimination and determination of the contribution of that justification to the finding itself of the discrimination at issue (see in that connection commentary by A. Whelan and A. Schouten on *Decker* and *Kohll* in *Revue des Affaires Européennes — Law & European Affairs*, 1999, p. 90 et seq.).

distinguishes the logic of indirect discrimination from that of direct discrimination. [19]

33. In the present case, the Commission correctly took the view, first, that, owing to their purpose and subject-matter, the Italian decrees at issue fell to be subsumed under Article 8(1) of Regulation No 2408/92 concerning the provisions relating to the distribution of traffic between the airports within an airport system and, secondly, that it had to be determined, under that provision, whether those decrees indirectly discriminated on the ground of the nationality or identity of the carrier. Accordingly, in light of the above observations, the Commission had first to examine the effects of the application of the decrees at issue and to determine whether such application gave rise to different treatment of the carriers concerned on the ground of nationality or identity of the carrier. Secondly, it had to be examined whether those decrees served an overriding need in the general interest in accordance with one of the various legitimate objectives in the general interest which may be pursued by a measure providing for the distribution of traffic between airports within an airport system; and, thirdly, whether the provisions of those decrees were proportionate to the abovementioned general-interest requirement.

34. On this point it should be pointed out that, irrespective of the legal basis invoked and possible failings in the interpretation and application of the prohibition on indirect discrimination, the Commission took all the necessary steps mentioned above.

35. Indeed, at paragraph 31 et seq. of the contested decision, the Commission, in assessing whether the criteria laid down in Decree No 46-T result in *de facto* discrimination, examined the effects which would be produced by the application thereof as from 25 October 1998, as provided for in Decree No 57-T.

36. It may be inferred from a reading of paragraphs 27, 27.1, 27.2 and 53 of the contested decision that the view was taken, in both the reasoning and the operative part of the decision, that the provisions introduced by the Italian decrees at issue had to

19 — In regard to the significance of the principle of proportionality to the doctrine of indirect discrimination, see K. Yiannakopoulos, 'Statistical data and proof of discrimination founded on sex at Community law', Ed. A.N. Sakkoulas, Athens-Komotini, 1999, p. 144: 'The abovementioned application of the principle of proportionality plays a very significant role in the review of indirect discrimination based on sex. First, it is that which essentially confers on the justification of indirect discrimination the objectivity which it should have and which accords with both the objective nature of indirect discrimination and the objective nature of the statistical information from which the existence of such indirect discrimination is deduced. Thus, such justification is not based on the subjective aims which the provisions in question may have in contemplation but on the objective possibility, by the means provided under those provisions, of attaining the purpose — regarded as generally legitimate — for which they were enacted. Secondly, application of the principle of proportionality is the review mechanism which conforms with the classification (categorisation of cases according to a paradigm) and schematisation (general and abstract) of the value judgments necessitated by the structural nature of indirect discrimination. Thirdly, in the endeavour to establish those important differences which justify the different treatment of the contrasting categories, that is to say to establish whether there is a proportionate relationship between the different provision and the reason justifying it, review of the proportionality of the criteria of objective justification of manifest discrimination essentially adds the requisite proportional dimension to the mathematical equality — or rather inequality — to be deduced from the statistical data which give rise to the presumption of the existence of such discrimination (...).'

observe both the principle of non-discrimination and that of proportionality.

37. At paragraph 47 of the contested decision, the Commission defined the purpose of the decrees at issue and reviewed it for conformity with the aims pursued under Article 8(1) of Regulation No 2408/92. In fact, the Commission considered that: 'The Malpensa project, by extending and upgrading existing facilities at Malpensa airport, aims at creating a fully operational and viable hub at that airport. The Italian rules contribute to that objective by ensuring that a sufficient amount of traffic will be transferred from Linate airport to Malpensa airport so as to ensure the viability of the hub. Article 8(1) of Regulation No 2408/92 expressly recognises the legitimacy of an active airport planning policy.'

38. Finally, at paragraph 47 et seq. of the contested decision the Commission examined whether the measures adopted in the Italian decrees at issue were proportionate to the aim pursued, that is to say whether they were necessary in order to create a viable and operational hub and to implement the trans-European networks project, and also whether the same result could be achieved by the application of less restrictive rules.

39. Accordingly, it may be inferred from the foregoing that the Commission at least in the result followed the general dictates of the reasoning process which it was required to conduct. That is true particularly of the dictates of the principle of proportionality which it applied as regards determination of the overriding general-interest requirement and analysis of the programme of works for establishing the connection with Malpensa airport.

40. At this juncture it should be noted that determination of the general purpose of the national measures under Article 8(1) of Regulation No 2408/92 not only does not prohibit but rather dictates determination of the specific objective of the national legislation in each case and review of the compatibility of that specific objective with the general purpose of the Community legislation. Accordingly, the Commission correctly sought and identified that specific objective by particular reference to the creation of an operational and viable hub. And it was right to hold that that objective constituted a legitimate implementation of the general aim of Article 8(1). Moreover, as the applicant itself acknowledges, [20] there is no doubt that the operating and financial needs of a hub constitute legitimate grounds for adopting measures to regulate and distribute traffic within an

20 — See paragraph 15 of the application.

airport system, as provided for in Article 8(1).

41. In that connection I consider that the applicant's allegations that the Commission erred in opting for an overriding general-interest requirement of an economic nature are unfounded.

42. On the one hand, it should be pointed out that in the present case there can be no application of the Court's case-law according to which: 'national rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty. (...) economic aims cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty.' [21]

First, application of the abovementioned case-law presupposes determination of the issue whether the general principles of Article 59 et seq. apply to Regulation No 2408/92, [22] which is not a preliminary issue to an analysis of the prohibition on discrimination expressly imposed by the letter of Article 8(1) of Regulation No 2408/92.

Secondly, it is not at all clear that the aforementioned immediate objectives of the Italian decrees at issue concern public order, public security or public health.

Thirdly, in any event, it is clear, as the Commission rightly states, that the overriding requirements of the Italian decrees at issue, as mentioned in the contested decision, entail macroeconomic consequences of an organisational and functional nature going to the very existence of a hub and in no way — or at least not primarily — aim to produce microeconomic effects. Accordingly, under the aforementioned case-law, they cannot be deemed to constitute invalid grounds for the adoption of the measures at issue given the fact that the Court held in its *Campus Oil and Others* judgment that 'the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security, other objectives of an economic nature which the Member State may also seek to achieve, does not exclude the application of Article 36.' [23]

21 — See judgment in Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 11.

22 — See below at paragraph 47 et seq. of my Opinion.

23 — See judgment in Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 36.

Fourthly, I consider that the spirit of the judgment in *Campus Oil and Others* must be applied, even if the Court is of the view, not only in regard to restrictions on freedom to provide services entailing discrimination on grounds of public order, public security or public health but also generally, that purely economic grounds cannot objectively justify discrimination. [24] In other words, the existence of secondary aims of an economic nature does not preclude an objective from being classified as an overriding general-interest requirement.

43. However, since in the present case the existence of indirect discrimination is reviewed in the context of Article 8(1) of Regulation No 2408/92, the legality of the objectives pursued by the Italian decrees at issue is not judged in general and abstract terms against the yardstick of the principles laid down by the Court in regard to overriding general-interest requirements capable of justifying the adoption of national measures but on the basis of the specific aim of the Italian decrees at issue and their conformity with the general objective defined in Article 8(1) aforesaid. Indeed, once the objectives of the Italian decrees at issue are found to constitute legitimate grounds for the enactment of measures to regulate the distribution of air traffic within an airport system in conformity with Article 8(1) of Regulation No 2408/92, any subsequent analysis or criticism of their content falls to be conducted with regard to that provision and not its implementing provisions at national level. In that connection, there seems to be no doubt concerning the fact that the regulation of the distribution of air traffic within an airport system constitutes a legitimate general-interest ground which is founded on the specific characteristics and needs of air transport and, consequently, may justify the adoption of measures by the Council and the imposition in that connection of restrictions on freedom to provide services in that sector. [25]

44. Accordingly, the Commission made a correct determination of the general-interest requirement against which the proportionality of the provisions and criteria of the Italian decrees fell to be assessed.

45. Finally, it is equally unfounded for the applicant to maintain that the programme of works for establishing a link with Malpensa airport is of relevance for the purposes of Regulation No 2408/92. Owing to the fact that indirect discrimination is by definition dependent on the actual effects of the measures at issue, it is dynamic and variable over time; this requires the forecasting and monitoring of

24 — See, for example, in regard to discrimination on the ground of sex, judgment in Case C-343/92 *Roks and Others* [1994] ECR I-571 in which it was held that budgetary considerations could not justify discrimination to the detriment of one of the two sexes (paragraph 35).

25 — See, in relation to the discretionary power of the Council, paragraph 50 of my Opinion.

the way in which the factual situation to which the measures apply evolves. Consequently, in order both to determine the effects of the actual application of the Italian decrees at issue and correctly to review whether they are proportionate to their aim, the Commission undoubtedly had to take into account the existing situation (access, infrastructure, etc.) of Malpensa airport and its prospective development within the period of application of the decrees at issue. Indeed the situation of Malpensa airport fell to be examined on the basis of a comparison with the corresponding situation of Linate airport and not by comparison with possible European models of airport location. It is precisely on that comparison between the two airports that the finding in the present case of indirect discrimination and the corresponding disproportionality of the measures in relation to their aim is based. In that connection, if it were accepted a priori that even full implementation of the infrastructure works for Malpensa airport could not offset its disadvantages as opposed to Linate airport, that would simply reinforce the Commission's argument and lend further support to the existence of indirect discrimination.

46. In light of the foregoing I consider that elucidation of the issue as to applicability of the general principles formulated in the Court's case-law in connection with freedom to provide services, and the related question whether Regulation No 2408/92 rendered applicable to air transport the freedom to provide services enshrined in Article 59, do not have the degree of relevance which the parties' submissions on the first two grounds of nullity might suggest. On the contrary, the issue would appear to be otiose, inasmuch as the Commission's duty to review the Italian decrees at issue in light of the principle of proportionality is founded on the prohibition of discrimination itself and does not require reliance to be placed on the case-law concerning Article 59 et seq. of the Treaty.

47. None the less, since it was expedient for the sake of ensuring a complete analysis of the legal basis of the contested decision to elucidate the above issues, I consider that the Commission was right to refer to that case-law.

48. As a matter of principle there can be no doubt that Regulation No 2408/92 transposed freedom to provide services to the field of air transport.[26] That follows clearly, first, from the first two recitals in

26 — As stated, moreover, in the judgment of the Court of First Instance in Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraphs 1 and 2): 'With a view to the gradual establishment of the internal market for air transport, the Community legislature adopted three sets of measures in 1987, 1990 and 1992 which were known as "packages" on account of the fact that they consisted of several documents. The third "package", adopted on 23 July 1992, consists of five regulations which aim to ensure the freedom to provide air transport services and the application of the Community competition rules in that sector. One of those five regulations is Council Regulation (EEC) No 2408/92 of 23 July 1992 (...).'

the preamble to the Regulation in which it is stated that 'it is important to establish an air transport policy for the internal market over a period expiring on 31 December 1992 as provided for in Article 8a of the Treaty'; and that 'the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.' It is borne out, secondly, by the 19th recital which states that it is: 'appropriate to deal with all matters of market access in the same Regulation' and, thirdly, by Article 3 of the Regulation under which: 'Subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.'

49. As the applicant rightly points out, under Article 61(1) of the Treaty in conjunction with Article 84(2), Article 59 et seq. of the Treaty, which enshrine the freedom to provide services, do not apply directly to the field of transport. Those articles may serve only as a point of reference when the Council gives effect to the principle of freedom to provide services. [27] In other words Article 59 et seq., as interpreted by the Court, provide the interpretative benchmark for the special provisions adopted by the Council in Regulation No 2408/92.

50. The question arising in the present case is whether and to what extent the Council, in giving effect to freedom to provide services in the sector of air transport, enjoys a discretion to impose exceptions to the objective pursued under Article 59 et seq. of the Treaty. In *Parliament* v *Council*, the Court resolved that issue by holding that: 'the Council does not have the discretion on which it may rely in other areas of the common transport policy. Since the result to be achieved is determined by the combined effect of Articles 59, 60, 61 and 75(1)(a) and (b), the exercise of a certain measure of discretion is allowed only as regards the means employed to obtain that result, bearing in mind, as required by Article 75, those features which are special to transport.' [28] It may be inferred from the abovementioned judgment that the Council's discretion is purely and simply of a technical nature and is confined to adapting to the sector of transport the provisions of Article 59 et seq. and the relevant general principles laid down in the Court's case-law. In that connection, any departure from the conclusions to be drawn from that case-law must expressly refer to the provisions adopted by the Council and be specifically

27 — See, in that connection, the Opinion of Advocate General Van Gerven (paragraphs 14 and 23) in Case C-18/93 *Corsica Ferries* [1994] ECR I-1783.

28 — Cited above at footnote 11, paragraph 65.

and adequately justified in light of the specific characteristics of the transport sector.

51. As is well known, the Court has held that Article 59, which is directly applicable after the end of the transitional period,[29] requires not only the elimination of all discrimination, direct or indirect,[30] against the service provider on the ground of nationality, but also the elimination of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.[31] Similarly, the Court has held that: 'as one of the fundamental principles of the Treaty, freedom to provide services may be restricted only by rules which are justified by overriding reasons in the general interest and are applied to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established.'[32] Furthermore, under the Court's case-law, the abovementioned restrictive provisions must comply with the principle of proportionality. 'The application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules.'[33]

52. It follows from the foregoing that the provisions on freedom to provide services in air transport must, as a matter of principle, comply with both the principle of the prohibition of discrimination and the general principles governing the measures restrictive of the abovementioned freedom and applicable without distinction. The same applies to Article 8(1) of Regulation No 2408/92. As regards discrimination no question arises because the latter is expressly prohibited by the wording of that provision. However, as regards restrictions applicable without distinction on freedom to provide services in air transport the relevant case-law of the Court requires

29 — See, for instance, judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 25.

30 — See, for instance, judgment in Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraph 11.

31 — See, for instance, judgment mentioned above at footnote 21 in *Stichting Collectieve Antennevoorziening Gouda* (paragraph 12 et seq.) and judgment in Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 25.

32 — See judgment in Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 16. It is worth noting that, unlike restrictions which do not apply indiscriminately (see above at paragraph 42 of my Opinion) it is not necessary in the present case for justification of the measures to be based solely on an express exempting provision, such as Article 56 of the EC Treaty (now, after amendment, Article 46 EC).

33 — See judgment in *Collectieve Antennevoorziening Gouda*, paragraph 15.

Article 8(1) to be interpreted as follows: since the measures adopted in order to regulate distribution of traffic within an airport system constitute restrictions on freedom to provide services as defined in the case-law,[34] then those measures must be proportionate to the aim of those provisions, which is determined by the provision itself and may justify those restrictions.[35] Any exception to that obligation should be expressly provided for by the regulation and justified by the specific features of air transport. However, there is nothing of that kind to be found in the present case, nor would it be logical for there to be, just as it is not conceivable on what ground a measure concerning the regulation of air transport could be disproportionate in relation to the purpose for which it was enacted.

53. Accordingly, the Commission was right to rely on Article 8(1) and (3) in examining the legality at Community law of the Italian decrees at issue in light of the Court's case-law concerning restrictions on freedom to provide services[36] and, in actual fact, it determined, first, whether the measures adopted impose restrictions applied without distinction, as defined in the relevant case-law and, secondly, whether those restrictions were likely to bring about the aim striven for without going beyond what is necessary for attainment of that objective.[37]

54. It is to be inferred, then, from the above observations that in the contested decision the Commission correctly reviewed the legality at Community law of the Italian decrees at issue in light of the principle of proportionality. At the same time, it correctly defined the parameters of that review and, in particular, the overriding general-interest requirement against which the proportionality of the rules and criteria laid down in the decrees at issue falls to be determined. Consequently, whether the interpretation adopted by the Commission in regard to determination of the legal basis of the contested decision is upheld or it is deemed expedient, as contended for, to modify that interpretation in part, the applicant's submissions on the first and second pleas of nullity must be rejected as unfounded.

34 — In that connection I consider there to be no doubt that the provisions at issue indeed constitute restrictions on freedom to provide services. As is correctly stated at paragraph 48 of the contested decision: 'Under the Italian rules, air carriers will no longer be allowed to choose Linate airport for the operation of air routes other than those meeting specific thresholds. In practice, this will apply to all air routes except Milan-Rome. Consequently, these rules will restrict the freedom to provide air services in the Community to and from Milan.'

35 — See above at paragraph 43 of my Opinion.

36 — See paragraph 27.2 of the contested decision.

37 — See paragraph 48 of the contested decision.

B — *Infringement or misinterpretation of Article 8(1) and (3) of Regulation No 2408/92 owing to misapplication of the principle of proportionality (third plea of nullity)*

55. In its third plea of nullity, raised by the applicant in the alternative and in the event that the Court does not uphold the allegations in connection with the preceding pleas, the applicant is calling in question the correctness of the application in the present case of the principle of proportionality. In fact, the Italian Government entirely dismisses the submission that the Italian decrees at issue imposing restrictions on freedom to provide services run counter to the principle of proportionality which the Commission regards as being applicable as a matter of principle to the issue under examination. The applicant is chiefly calling in question the specific parameters of that principle, that is to say the framework within which the specific criteria of proportionality are formulated. At the same time, on certain points it is questioning the correctness of the appraisal of certain factual matters in the application of those criteria.

56. I do not consider that the applicant's submissions can avail it; that is the conclusion to be drawn from a review of the stages in the reasoning of the contested decision.

57. First of all, it should be borne in mind that the aim of the rules as defined by the Italian decrees at issue is not in doubt. Indeed, as paragraph 47 of the contested decision correctly states, the Italian decrees contribute to the Malpensa 2000 project by ensuring that a sufficient amount of traffic will be transferred from Linate airport to Malpensa airport so as to ensure the viability of the hub.

58. Accordingly, on the basis of the generally accepted individual criteria of the principle of proportionality the following matters must be established in the present case: first, whether the provisions at issue were *necessary*, that is to say whether they were justified by their purpose; secondly, whether they were *appropriate*, that is to say whether they were in fact capable of serving that aim; and, thirdly, whether they were *reasonable* (*stricto sensu* proportionate), that is to say whether they imposed differential treatment (case in which the principle of proportionality is applied in order to prove indirect discrimination) or were restrictive of the freedom to provide services (case in which the principle of proportionality is applied in accordance with the Court's case-law on Article 59 et seq. of the Treaty), to the extent actually necessary in order to attain the above aim and provided that the attendant advantages outweigh or are at least equal to the disadvantages.

59. In light of the general definition set out above of the individual criteria of propor-

tionality, the Commission must be deemed to have correctly pointed out, at paragraph 48 of the contested decision, that it was a question of examining whether the measures adopted in the Italian decrees at issue were proportionate to their aim, that is to say were necessary in order to establish viable airport hub and to implement the trans-European networks project, and also whether the same result could have been attained by means of less restrictive rules.

60. At this juncture it should be emphasised that the application, as described above, of the individual criteria of proportionality is not of a theoretical nature, nor can it be founded solely on general and abstract teleological views. In a review of proportionality, as with any legal reasoning, both the major and the minor premiss must be correctly formulated. In that connection, in reviewing proportionality, account has first to be taken of the specific circumstances of the actual situation in which the necessity, appropriateness and reasonableness of the measures at issue are evaluated in relation to their purpose. But that review must then also be determined teleologically by the broader legal reasoning applicable to it. In the present case the individual criteria of proportionality must therefore be applied not in a neutral manner but always within the terms of the logical process by which proof of indirect discrimination is deduced and by reference to the rules determining the limits of restrictions applied without distinction to freedom to provide services in the field of air transport.

61. The applicant's determination of the criteria applicable to proportionality discloses errors precisely in the formulation of the minor premiss of the syllogism. That is a feature of all the allegations made under the heading of the third plea of nullity directed against the statement of reasons on which the contested decision is based.

62. Indeed, in terms of the general notion of the review of proportionality in the present case, the applicant cannot be regarded as accurately following the requisite reasoning process in its plea that the contested decision ought to have appraised the issue of proportionality principally by reviewing whether the projected concentration of traffic at Malpensa airport went beyond the Italian Government's objective of rendering the new airport a viable hub.[38] What is important in the present case is not the concentration *per se* of traffic at Malpensa airport but the degree of different treatment or of the restriction on freedom to provide services engendered by the transfer of traffic from Linate to Malpensa. The matter to be weighed in the

38 — The Italian Government points out that the Commission acknowledges that the rules on traffic distribution adopted by the Italian authorities are in accordance with the objective of transferring a sufficient amount of traffic in order to guarantee the profitability of the investment and that that objective is compatible with Community legislation. In that connection the applicant considers that the concentration of a volume of traffic sufficient to enable connections between flights from regional airports and long-haul flights is a determining factor in the establishment of a hub. The Commission's recommendation that 45% of traffic be allocated to Linate and 55% to Malpensa would guarantee the functioning of the two regional airports but not of an airport intended to serve as a hub. The suggestion therefore runs counter to the declared objective of the plan.

balance cannot, generally and in abstract terms, be the Italian Government's objective of creating an economically viable hub. In other words, the sole focus of attention cannot be on the finally completed hub. Yet, a significant amount of time is undoubtedly required to realise such an ambitious project; there is therefore no room for doubt that proportionality of the provisions at issue must be evaluated in light of the existing situation and of the scheduling and state of completion of the requisite works. The features of the actual situation have a major bearing on review of the reasonableness of the provisions at issue, a matter to which the applicant does not have particular regard. In actual fact, as has already been stated, it is a matter of assessing, on the basis of an evaluation of advantages and disadvantages of the provisions at issue, whether the same result may be attained by less restrictive means. In that connection, however, it is not sufficient merely to say that the measures at issue are justified in general terms by the long-term objectives of the project; plainly, what is needed is an analysis of the factual situation obtaining at the time of adoption of those measures.

63. The errors running through the general conception of the application of the general principle of proportionality in the present case also subsist in regard to the individual allegations made by the applicant against the arguments contained in the statement of reasons on which the contested decision is based.

64. The applicant submits that the Commission's first argument, to the effect that the volume of traffic transferred would not be in keeping with the existing access infrastructure at Malpensa airport, is not relevant to the sole valid criterion of proportionality, namely the adjustment of concentration of flights to Malpensa in line with the Italian Government's objective. However, this fails to take account of the fact that the proportionality of the provisions at issue must be evaluated in relation to the existing factual situation, together with the general schedule and progress of the requisite works. More specifically, by insisting on an overarching teleological approach to the issue of the proportionality of the provisions at issue, the applicant does not take account of the fact that the individual criteria of proportionality (necessity, appropriateness, reasonableness) have to be determined in light of the specific requirements of the Malpensa 2000 project, as they appeared at the time when those provisions were applied.

65. At paragraphs 49, 49.1 and 49.2 of the contested decision, the Commission cor-

rectly pointed up the need for appraisal of necessity [39] and reasonableness [40] of the provisions at issue in relation to the progress of access and infrastructure works at Malpensa airport. That it did so is entirely in keeping with the fact that the Commission also took into account the level of access infrastructure at Malpensa airport, in reaching its determination that there was *de facto* discrimination in favour of Alitalia; and that determination logically governs application of the principle of proportionality. [41]

66. On that point it should also be pointed out that the argument put forward in that connection by the applicant that, in any event, the national authorities demonstrated the compatibility of the access infrastructure with the volume of traffic to be transferred would appear to be of no avail. As may be inferred from paragraphs 49.1 and 39 to 43 of the contested decision — and without there being any need to refer to matters emerging after adoption of that decision [42] — the failings in the infrastructure concerning access to Malpensa airport on which the findings of both *de facto* discrimination and disproportionality of the volume of traffic transferred to Malpensa airport were based, were made on the basis of information actually available to the Commission [43] and unchallenged by the applicant on the basis of factual and appropriate evidence. In order to demonstrate that there is no significant problem of access to Malpensa airport, the applicant merely points to studies which state that there are no traffic problems on the road leading to that airport apart from at certain times, on certain holidays and for 5% of the time during which the road is in use. [44] None the less, the establishment of those facts, which are not called in question by the Commission, [45] militates in favour of the reasoning in the contested decision. In the present case it does not matter whether in general terms the existing access infrastructure impedes attainment of the Italian Government's objectives or whether the originally scheduled infrastructure works

39 — See paragraphs 49 to 49.2 of the contested decision: 'In this regard the Commission notes that it has not been proven that the creation of a viable operational hub and the success of the trans-European networks project make such restrictive measures necessary. (...) The operational viability of the Malpensa hub necessitates the transfer of a volume of traffic which is compatible with the level of airport facilities and access infrastructures. Otherwise, the development and future positioning of Malpensa airport as a successful hub in the Community could be threatened.'

40 — See paragraph 50 of the contested decision: 'In view of the foregoing, the Commission is of the opinion that the creation of a fully viable and operational hub does not necessarily presuppose the transfer of 11.7 million passengers from 25 October 1998. A postponement of the transfer or a gradual transfer of that volume from 25 October 1998 onwards would be better suited to that objective and would also reduce the effect on freedom to provide air services to and from Milan. Therefore, the Italian rules are not indispensable to secure the objective pursued by the Italian authorities which could be attained with rules less restrictive of the freedom to provide air services.'

41 — See paragraphs 45 and 46 of the contested decision.

42 — The Commission observes that, notwithstanding the reduced transfer of passenger traffic, decided upon in the Italian decree of 9 October 1998, numerous operational difficulties occurred at Malpensa. Those problems, together with the fact that conditions for access to the Malpensa hub were not altered, constitute further proof of the legality of the analysis adopted by the Commission in the contested decision.

43 — The contested decision actually refers to data concerning infrastructure established at the meeting of the Christophersen group on 27 October 1997 in charge of the 'Malpensa 2000' project (paragraph 40 of the contested decision). Moreover, in its defence pleadings (paragraph 44) the Commission states that the letter from Minister Burlando of 15 July 1998 mentions May and July 1999 as the commencement dates for the operation of the railway connection with Malpensa airport. Finally, in the rejoinder (paragraph 15) the Commission refers to the information made available by the Italian authorities on 1 April 1998. That information was confirmed at a meeting of the special committee of the Member States on 17 August 1998 and refers to facts ascertained during the work of the Christophersen group.

44 — See paragraph 24 of the application.

45 — See paragraph 44 of the defence.

to improve the access to Malpensa airport have for the most part been completed. What is of prime importance in reviewing the legality of the Italian decrees at issue is whether the conditions for access to that airport render it accessible to the same degree as Linate and fully justify the volume of traffic transferred to it as at 25 October 1998 in such a way as not to give rise, at that specific moment in time, to unjustified discrimination on the ground of the nationality and/or identity of the air carrier or to a disproportionate restriction on the freedom to provide air-transport services. In other words, since there undoubtedly are traffic problems, particularly at peak times and, in general, issues around access infrastructure which could impede passengers from reaching Malpensa airport, cause delayed departures of flights and, finally, are likely to cause travellers to prefer Linate airport to Malpensa, it matters little whether the scheduled infrastructure works are to proceed or have already proceeded in accordance with an initial overall plan.

67. Secondly, there is equally no foundation to the applicant's submission that it is irrelevant that the scheme for funding the Malpensa 2000 project did not require traffic to be transferred prior to 31 December 2000; that is on grounds analogous to those mentioned in connection with the examination of the preceding allegation. The fact that no transfer was required before 31 December 2000, which essentially is not called in question by the applicant, constitutes a clear indication that complete transfer of the volume of traffic as at 25 October 1998 was not necessary. Since, as stated above, the findings in connection with infrastructure failings in the access to Malpensa airport have not been refuted and the applicant has not demonstrated the necessity for transferring all traffic prior to 31 December 2000, the disproportionate nature of the provisions adopted may plainly be inferred from that fact, nor is that altered by the argument as to Member States' autonomy in the conduct of airport policy. Again it must be emphasised that the relevant factor in the present case, over and above a finding of general conformity of the measures adopted in connection with the 'Malpensa 2000' project, is review of the specific and concrete necessity, appropriateness and reasonableness of those measures in light of the actual situation obtaining at the time when they were adopted.

68. Thirdly, the calling in question of the Commission's argument concerning the consequences of the volume of traffic transferred on the operational capability of Linate airport [46] does not appear to be relevant to the correctness of the reasoning

46 — According to the applicant, the Commission's third argument that the decision to transfer traffic from Linate to Malpensa would run counter to the express desiderata of Decree No 46-T as to the continuance in operation of Linate is not borne out by the facts. Linate airport remains in operation even if its use is restricted.

of the contested decision and, in any event, does not carry conviction. First, the Commission's argument is ancillary; to refute it would not invalidate the Commission's earlier assessments concerning the proportionality or otherwise of the provisions at issue. Secondly, as is made clear by paragraph 51 of the contested decision, the relevant factor is not whether, following the transfer of traffic, Linate airport would continue to function in some way but precisely what sector and carriers it would serve and to what extent. Moreover, as stated in the same paragraph of the contested decision, the volume of traffic transferred could not be deemed appropriate to achieving the objective of retaining point-to-point routes, as stated in the preamble to the Italian decrees at issue.

69. Fourthly, as regards the applicant's concluding observation, namely that the Commission exceeded the limits of its competence, as laid down in Article 8(3) of Regulation No 2408/92, because it did not found its judgment on the principle of proportionality but on a discretionary power of assessment of the expediency of the action decided on by the Italian Government concerning Malpensa, I consider that once again the allegation raised stems from a mistaken determination of the method of applying the individual criteria of proportionality. In actual fact, as I have stated, application of the third criterion, that is to say of the *reasonableness* of the provisions at issue, necessitates a review of the actual need for those provisions. In the context of that review, it falls to examine whether the advantages associated with those provisions outweigh or at least are counterbalanced by the disadvantages. In the event that it is established that there was a means of attaining the relevant objectives by the adoption of other fairer or less restrictive measures, then the provisions at issue must be characterised *stricto sensu* as being disproportionate to their objective. Plainly, then, assessment of the reasonableness of those provisions to some extent constitutes a review of their expediency. None the less, such review is not arbitrary but must be set within the relevant interpretative and teleological framework for applying the principle of proportionality.

In light of the foregoing, it may be inferred from paragraph 50 of the contested decision that the Commission correctly applied the principles for evaluating the reasonableness of the national provisions at issue. In actual fact, in reaching its determination that 'postponement of the transfer or a gradual transfer of that volume from 25 October 1998 onwards would be better suited to that objective and would also reduce the effect on freedom to provide air services to and from Milan', the Commission correctly concluded that 'the Italian rules are not indispensable to secure the objective pursued by the Italian authorities which could be attained with rules less restrictive of the freedom to provide air services.' That determination does not constitute an arbitrary assessment of the expediency of the action decided on by the

Italian Government but a correct application of the criterion of the reasonableness of the provisions at issue within the limits of the Commission's competence. Accordingly, the submissions to the contrary put forward by the applicant must be rejected as unfounded.

70. Finally, it should be noted that there is also no foundation to the submission in the reply that there ought to be available to the Commission a Community definition of formal standards for the location of airports intended for intra-Community and extra-Community traffic, and for inter-city connections. In the present case, it does not matter whether access to Malpensa airport is more or less convenient on the basis of common European norms or in comparison with conditions of access to other airports of the European Union. What matters is to determine whether the infrastructure provision for access to Malpensa airport offsets the disadvantages of the location of the airport in question in comparison with Linate airport. Thus, both a review based on the principle of the prohibition of discrimination and a review of the proportionality of the measures must be based on a comparison of the situation of Malpensa airport with that of Linate and not solely on an objective determination of the situation of the former. Consequently, the absence of a Community definition of formal standards for the location of airports does not invalidate the reasoning underpinning the contested decision.

71. In light of the above, I consider, then, that the submissions put forward in connection with the third plea of nullity must be rejected as unfounded in their entirety.

C — *Infringement of Article 8(1) of Regulation No 2408/92 in light of the rules governing indirect discrimination and manifestly erroneous assessment of the facts (fourth plea of nullity)*

72. In its fourth plea of nullity the applicant pleads three errors of law in regard to paragraphs 29 to 46 of the contested decision in which the Italian decrees are examined in light of the principle of prohibition of discrimination.

73. Before I turn to examine those individual allegations, it is as well to point out that those paragraphs of the contested decision concern the procedure for proving indirect discrimination; that covers, first, the finding of *de facto* discrimination as an inevitable consequence of the use of an apparently neutral criterion and, secondly, determination of the issue whether the

provisions at issue are neutral in nature which at the same time calls for a review of the proportionality of those provisions in relation to their objective. [47]

74. In light of the foregoing the first allegation raised by the applicant relates to the second stage of the procedure for proving indirect discrimination, that is to say review of the objectivity of the provisions at issue. In that connection the applicant alleges that there is no indirect discrimination because the measures adopted in the Italian decrees at issue were objectively justified and were aimed at giving effect to the new use of Linate airport and restricting its operation to the flights which were the most appropriate for safeguarding business transfers and the competitiveness of the airport connection as opposed to that of the Milan-Rome connection. [48]

75. None the less, as has already been pointed out, [49] review of the proportionality of the provisions at issue essentially comes within that second stage. That review demonstrated that those provisions are not in actual fact necessary to the objective sought, that is to say the creation of a viable operating hub at Malpensa airport. Accordingly, I do not consider that it can avail the applicant to attempt objectively to justify the provisions at issue on the basis of the specific objective of reorganising the operations at Linate airport entailed by creation of the Malpensa hub. In particular, just as under the situation obtaining until 25 October 1998 the complete transfer of traffic to Malpensa airport was not essential, nor was it essential to restrict the flights operating in and out of Linate airport to the extent to which that restriction was established in the decrees at issue. Conversely, acceptance of the view that the rules introduced by Decree No 46-T were aimed at restricting use of Linate airport solely to the Milan-Rome route in principle corroborates the analysis adopted by the Commission in the contested decision concerning the practical effects of the provisions at issue. Moreover, as the Commission observes, the applicant's submission that the purpose of the provisions was to secure continuity in the Milan-Rome service and not the transfer of travellers to Rome airport is to no avail since the former does not exclude the latter, whilst it is not apparent from any evidence relied on by the applicant that the supply of passengers to the Rome hub was impossible or prohibited. Conversely, it may be inferred from

47 — See above at paragraph 32 of my Opinion.

48 — The Italian Government points out that the Commission viewed Linate as the airport at which, before the redistribution, traffic from and to Community hubs was concentrated and that, following adoption of the decree at issue, Linate would offer connections with one hub, namely that of Rome-Fiumicino, whilst routes for the other hubs (Frankfurt, Paris, etc.) would be transferred to another less convenient airport, namely Malpensa. That, it is said, confers a competitive advantage in favour of Alitalia and a disadvantage for the other air carriers who use hubs other than Fiumicino. In fact, persons who desire to travel outside the Union or outside Europe would prefer to depart from Linate using the Rome hub, rather than from Malpensa using other hubs. None the less, the applicant calls in question that conclusion, stating that the Italian decrees at issue were objectively justified because they were aimed at giving effect to the new use of Linate airport and restricting its operation to one route only, namely the Milan-Rome connection. In that connection the Italian Government observes that the Milan-Rome route essentially responds to the need for business journeys, the majority of which provide for a same-day return journey. It insists, therefore, that that route is the most appropriate one for serving Linate airport, at the same time as ensuring that the air link remains competitive in relation to the rail link. According to the applicant, if the Commission had taken the above matters into account it would not have concluded that there is indirect discrimination.

49 — See above at paragraph 32 of my Opinion.

the case-file and, in particular, from the statistics concerning travellers in 1997[50] and the measures proposed by the Italian authorities for restricting possibilities for transit in Rome-Fiumicino airport,[51] that at the time when the contested decision was adopted, the supply of passengers was an actual fact and, in any event, remained practicable. Consequently, the applicant's first allegation must be rejected as unfounded.

76. In the second of the allegations referring to paragraphs 29 to 46 of the reasoning underlying the contested decision, the applicant submits that the Commission erred in appraising the consequences of transferring traffic to Malpensa against the background of the present situation and not with a view to the future. In the applicant's view, in the new situation typified by the full exploitation of Malpensa from an intercontinental point of view, the connection from Linate to the Fiumicino hub will not in practice confer any competitive advantage on Alitalia. In that connection, the Italian Government emphasises that a provision may not be deemed to entail indirect discrimination unless it is fully proven to be capable of favouring or harming a person.

77. That second allegation concerns the first stage of proof of indirect discrimination, that is to say determination of whether there is *de facto* discrimination and whether that is a necessary consequence of the provisions at issue or is a random occurrence.

78. Essentially I consider that the applicant's submission that the Commission erred in its appraisal of the consequences of the transfer of traffic to Malpensa in light of the present situation and not with a view to the future is unfounded.

79. There is no doubt that indirect discrimination is dynamic and relative in nature which is due to the fact that, owing to the mutability of the conditions under which the contested rules may be applied, their effects may vary in practice (discrimination which did not exist may emerge or such discrimination may cease to subsist). As has already been stated, that means that regard must be had not only to the effects of the provisions at issue at a given moment in time (snapshot view of indirect discrimination) but also that there must be an analysis

50 — It is worth noting that at paragraph 20 of the reply the applicant acknowledges that 85% of the passengers stopping off at Fiumicino were passengers on international flights.

51 — See letter dated 15 July 1998 from Minister Burlando in Annex 5 to the application.

of the long-term stability of those effects so as to prevent the likelihood of the concurrence of random factors not in principle attributable to those provisions. [52] None the less, that analysis of the long-term stability of the practical effects of the provisions at issue cannot result in regard being had to a purely future situation whose occurrence, though uncertain, is anticipated and which is not founded with immediate certainty in the actual circumstances prevailing at the time when the existence of indirect discrimination is reviewed. That would run counter to the rule under which the legality of a legal act is as a matter of principle to be assessed in light of the factual and legal circumstances obtaining at the time of its adoption. [53]

80. What is more, a close study of the reasoning of the contested decision shows that, as regards both two Alitalia hubs and the comparison of the possibility of access to Linate and Malpensa airports, the Commission correctly based its analysis on the existing situation, going on to examine the prospects and likelihood of a change in that situation. [54] In the context of that delicate appraisal, it established, finally, that determination of indirect discrimination must be confined to particular time frames, [55] which is the correct way to deal with and interpret the dynamic nature of that kind of discrimination in the present case.

81. In that connection the finding of indirect discrimination was not based on mere conjecture or a small degree of likelihood but on a sufficient degree of probability

52 — See above at paragraph 45 of my Opinion.

53 — See, for instance, judgment in Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7.

54 — See paragraph 35 of the contested decision: 'It is true that the increasing availability of direct services from Malpensa may reduce the incentive for passengers to take indirect services. However, all the evidence indicates that Alitalia's operations are and will continue to be split between two hubs: Rome-Fiumicino and Milan-Malpensa. This was one of the tenets of Alitalia's restructuring plan as notified by Italy to the Commission under the rules on State aid (...).' See also paragraph 44 of the contested decision: 'Given the existing differences between Linate airport and Malpensa airport with regard to access conditions, the Commission is of the opinion that these airports will not be comparable from the point of view of their attractiveness until the level of access infrastructures to Malpensa offsets the geographic location of this airport as compared to Linate airport.'

55 — See paragraph 45 of the contested decision: 'In view of the foregoing and taking into account the competitive situation between Alitalia and the other Community air carriers, the criteria set out in Decree No 46-T, by permitting only Alitalia to serve its Rome-Fiumicino hub from Linate airport while other Community air carriers will be obliged to serve their respective hubs from Malpensa airport, will in fact afford Alitalia a competitive advantage. *This competitive advantage will exist as long as Malpensa airport does not enjoy a level of access infrastructures such as to overcome the present situation which leads to consumer resistance to use Malpensa airport*' (emphasis added).

based on information available to the Commission.

82. None of the matters referred to in the reply as errors of assessment as to the facts [56] appears to concern the matters relevant to a finding of indirect discrimination. In fact, it may not be inferred from any of the matters relied on by the applicant that Alitalia would not use Fiumicino as a second, or even supplementary connecting airport. In particular, whilst it mentions the drastic reduction in intra-European flights served exclusively by the Rome-Fiumicino hub, at no point in its reasoning does the applicant, when presenting the timetable of the flights in question, state that those flights have been discontinued. Conversely, it appears from elements of the file, such as, for example, the rationalisation programme [57] and Alitalia's advertising messages, [58] and without there being any need to have recourse to matters subsequent to the contested decision, [59] that that hub continues to be operational and may be fed from Malpensa airport. Moreover, as the Commission rightly states in its rejoinder, the number of flights served and the corresponding importance of a hub are not in themselves relevant factors. The mere existence of an additional hub in Fiumicino gives rise to a finding of indirect discrimination. Nor, finally, may any significance be attached to the scale of the consequences of that discrimination. Even discrimination of minor significance is prohibited by Community law. [60]

83. In any event it cannot be maintained that indirect discrimination must be fully proven in the first stage of the logical process of establishing proof. As I have already stated, direct proof of indirect discrimination is not always readily obtainable and, in any event, cannot result in absolute terms in a finding of *de jure* discrimination, either by having recourse to the lessons of common experience or to

56 — In the reply the applicant states that a 'manifest error' is not a prerequisite of annulment of the contested decision but that it is sufficient to show that the Commission erred in its appraisal of the facts. It considers, then, that such errors are to be encountered in the submissions put forward by the Commission in the defence pleadings, particularly in regard to Alitalia's twin hubs.

57 — See Commission Decision 97/789/EC of 15 July 1997 concerning the recapitalisation of the company Alitalia (OJ 1997 L 322, p. 44) in Annex 2 to the defence pleadings.

58 — See Annex 3 to the defence pleadings.

59 — The Commission states that, although they have no bearing formally on the assessment of the lawfulness of the contested decision, all the subsequent information confirms the continued use by Alitalia of the dual hub.

60 — See judgments in Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 21 and Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 8.

statistical evidence. For that reason, in a secondary stage complementing the procedure for proving indirect discrimination it is necessary to inquire as to the objectivity of the provisions at issue, which also gives rise to application of the principle of proportionality. [61]

84. In light of the foregoing I consider that the second allegation raised in the fourth plea of nullity must be rejected as unfounded.

85. Finally, as regards the third allegation raised by the applicant, to the effect that the contested decision did not observe the principle of proportionality in regard to the prohibitive measures imposed, [62] the Commission correctly observes that it is not bound, under Article 8(3) of Regulation No 2408/92, to give preference to measures which are less onerous for the national authorities concerned. As is apparent from the file and is not challenged in argument, [63] once the Commission had informed the Italian authorities about the problems caused by the decrees at issue, consulted with the competent consultative committee and, generally, taken all requisite steps (exchange of letters, meetings etc.) for the matter to be ventilated and the rights of the defence to be exercised, the sole competence left to it, subsequently, was to adjudge whether the decrees at issue were lawful and to decide 'whether the Member State may continue to apply the measure.' [64] Consequently, it was not competent to modify the national measures by substituting itself for the national authorities. Conversely, it is for those authorities to adopt the requisite measures in order to comply with the contested decision, which they did by issuing the decree of 9 October 1998. [65] Moreover, whatever may be the duty of loyal collaboration under Article 5 of the EC Treaty (now Article 10 EC), it cannot be deemed to alter the abovementioned express allocation of competences as between Member States and Commission and to transfer to the latter the initiative and responsibility for adopting the appropriate measures.

86. It follows from the foregoing that the fourth plea of nullity must also be rejected as ill-founded.

61 — See above at paragraph 32 of my Opinion.

62 — In actual fact, the applicant maintains that, if the Commission had doubts and was not certain whether the degree to which maintenance at Linate of the Rome flight would confer a competitive advantage on Alitalia, it should have communicated those doubts to the Italian authorities and, in any event, ought to have opted for less stringent measures as far as the Italian Government is concerned as regards observance of the prohibition of discrimination under Article 8(1) of Regulation No 2408/92. The applicant recalls that it had proposed technical measures in order to deal with the situation, which, however, were not accepted by the Commission.

63 — See paragraph 16 et seq. of the contested decision and see above, at paragraph 14 of my Opinion.

64 — Article 8(3) of Regulation No 2408/92.

65 — Annex 5 to the defence pleadings.

V — Conclusion

87. Accordingly, I propose that the Court should

(1) dismiss the Italian Republic's application as unfounded;

(2) order the Italian Republic to pay the costs.