JUDGMENT OF THE COURT (Grand Chamber)

24 April 2007 *

In Case C-523/04,

ACTION for failure to fulfil obligations under Article 226 EC, brought on 23 December 2004,

Commission of the European Communities, represented by M. Huttunen and W. Wils, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster and M. de Grave, acting as Agents,

defendant,

* Language of the case: Dutch.

supported by:

French Republic, represented by G. de Bergues and A. Hare, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Lenaerts, P. Kūris, E. Juhász and J. Klučka, Presidents of Chambers, J.N. Cunha Rodrigues (Rapporteur), K. Schiemann, J. Makarczyk, U. Lõhmus, E. Levits and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that by contracting or maintaining in force, despite the renegotiation of the Air Transport Agreement concluded between the Kingdom of the Netherlands and the United States of America on 3 April 1957 (*Tractatenblad* 1957, No 53; ('the 1957 Agreement')), of international commitments towards the United States of America:

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

— concerning computerised reservation systems ('CRSs') used or offered for use on Netherlands territory, and

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

the Kingdom of the Netherlands has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC), Article 52 of the EC Treaty (now, after amendment, Article 43 EC), Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), and Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1), as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 (OJ 1993 L 278, p. 1).

2 By order of the President of the Court of 6 June 2005, the French Republic was granted leave to intervene in support of the Kingdom of the Netherlands.

Legal context

3 Article 1 of Regulation No 2299/89 provides:

'This Regulation shall apply to computerised reservation systems [(CRSs)] when offered for use and/or used in the territory of the Community for the distribution and sale of air transport products irrespective of:

— the status or nationality of the system vendor,

— the source of the information used or the location of the relevant central data processing unit,

— the geographical location of the air transport product concerned.'

4 However, Article 7(1) and (2) of that regulation provide:

'1. The obligations of a system vendor under Articles 3 to 6 shall not apply in respect of a parent carrier of a third country to the extent that its CRS does not conform with this Regulation or does not offer Community air carriers equivalent treatment to that provided under this Regulation.

2. The obligations of parent and participating carriers under Article 8 shall not apply in respect of a CRS controlled by air carriers of a third country to the extent that a parent or participating carrier is not accorded equivalent treatment in that country to that provided under this Regulation and under Commission Regulation (EEC) No 2672/88.'

5 According to Article 1(1) of Regulation No 2409/92, that regulation concerns the criteria and procedures to be applied for the establishment of fares and rates on air services for carriage wholly within the Community.

6 Article 1(2) and (3) of the same regulation read as follows:

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

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

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

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

7 Article 12 of Regulation No 2409/92 provides:

'This Regulation shall enter into force on 1 January 1993.'

Background to the dispute

The 1957 Agreement

8 On 3 April 1957, the Kingdom of the Netherlands and the United States concluded the 1957 Agreement.

9 That Agreement was added to by a protocol of 31 March 1978 (*Tractatenblad* 1978, No 55; 'the 1978 Protocol'), and amended by an exchange of notes on 13 October and 22 December 1987 (*Tractatenblad* 1988, No 12), by an exchange of notes of 29 January and 13 March 1992 (*Tractatenblad* 1992, No 63) and by an exchange of notes of 14 October 1992 (*Tractatenblad* 1992, No 177; 'the Exchange of Notes of October 1992').

10 The 1978 Protocol was amended by a protocol of 11 June 1986 (*Tractatenblad* 1986, No 88) and by the Exchange of Notes of October 1992.

11 The Exchange of Notes of October 1992 amended several provisions of the 1957 Agreement, particularly Article 1 (definitions), Article 2 (allocation of rights), Article 3 (designation), Article 4 (ownership and control of airlines), Article 6 (security), Article 7 (customs duties and user charges), Article 8 (fair competition), Article 13 (dispute settlement), Article 16 (termination), and also the schedule to the Agreement containing the table of air routes. In addition, a number of amendments were made to the 1978 Protocol.

12 By contrast, the Exchange of Notes of October 1992 did not amend the provisions of the 1957 Agreement concerning air fares and rates or CRSs.

13 That Exchange of Notes provided that it was to apply provisionally from the date on which it was concluded, namely 14 October 1992. The Netherlands Parliament having ratified that exchange of notes on 26 April 1993, it entered into force on 11 May 1993 (*Tractatenblad* 1993, Nos 84 and 85).

The 'open skies' cases and their consequences

14 Before commencing the present proceedings against the Kingdom of the Netherlands, the Commission brought proceedings for failure to fulfil obligations against eight other Member States which had concluded air transport agreements with the United States.

15 The Commission sent each of those Member States a letter of formal notice between June 1995 and May 1996 and a reasoned opinion between March and April 1998, and brought an action against them on 18 December 1998. The Kingdom of the Netherlands intervened in support of the defendant Member State in each of those cases. The Court gave its ruling in those cases (known as 'the *open skies* cases') on 5 November 2002 by judgments in Case C-466/98 *Commission* v *United Kingdom* [2002] ECR I-9427, Case C-467/98 *Commission* v *Denmark* [2002] ECR I-9519, Case C-468/98 *Commission* v *Sweden* [2002] ECR I-9575, Case C-469/98 *Commission* v *Finland* [2002] ECR I-9627, Case C-471/98 *Commission* v *Belgium* [2002] ECR I-9681, Case C-472/98 *Commission* v *Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, and Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855.

16 In the seven latter judgments (the action against the United Kingdom of Great Britain and Northern Ireland concerned a separate situation), the Court held that, by entering into or maintaining in force, despite the renegotiation of existing agreements, international commitments towards the United States concerning air

fares and rates charged by carriers designated by the United States on intra-Community routes, concerning CRSs offered for use or used in the territory of the respective defendant Member State, and by recognising the United States as having the right to withdraw, suspend or limit traffic rights in cases where air carriers designated by the defendant Member State were not owned by the latter or its nationals, the defendant Member States had failed to fulfil their obligations under Articles 5 and 52 of the Treaty and under Regulations Nos 2409/92 and 2299/89, as amended by Regulation No 3089/93.

17 Following those judgments, the Commission wrote to the Kingdom of the Netherlands on 25 November 2002, 30 July 2004 and 10 March 2005 requesting, first, that it not pursue bilateral negotiations with the United States, and, secondly, that it terminate the 1957 Agreement.

Pre-litigation procedure and forms of order sought

18 Referring to the Exchange of Notes of October 1992, the Commission sent the Kingdom of the Netherlands a letter of formal notice on 19 January 1999, to which the latter replied by letter of 1 June 1999.

19 On 24 October 2000, the Commission served a reasoned opinion on the Kingdom of the Netherlands, requesting it to take the necessary compliance measures within two months following service. The Kingdom of the Netherlands replied to the reasoned opinion by letter of 23 February 2001.

20 The Commission brought the present action on 23 December 2004.

The plea of inadmissibility alleging excessive duration of the pre-litigation procedure

Arguments of the parties

21 The Kingdom of the Netherlands emphasises the very long duration of the pre-litigation procedure in this case. It argues that the Commission allowed more than six years to elapse between the Exchange of Notes of October 1992 and the sending of the letter of formal notice (January 1999), and allowed more than four years to elapse between the sending of the reasoned opinion (October 2000) and the bringing of the present action (December 2004). The Commission thereby placed the Kingdom of the Netherlands in such an unfavourable position that it lost its right to bring the latter before the Court in this matter.

22 Although the Commission brought proceedings for failure to fulfil obligations against eight other Member States in 1995 in the '*open skies*' cases, it did not challenge the Exchange of Notes of October 1992. By waiting more than six years before sending the Kingdom of the Netherlands a letter of formal notice, the Commission gave rise to a legitimate expectation on the part of the Netherlands Government that there had not been a breach of Community rules.

23 The Commission did not comply with the obligation to take action within a reasonable time, which is allied to the principle of sound administration and flows from the principle of legal certainty.

24 Supported on this point by the French Government, the Kingdom of the Netherlands argues that the 1957 Agreement, as amended, gave legal certainty to the carriers concerned, who thereby derived access to the American market. It contends that, in the meantime, the Commission approved the alliance between KLM Royal Dutch Airlines ('KLM') and Northwest Airlines, and that the United States takes the view that the commitments contained in that agreement were conditions for the granting of the antitrust immunity necessary for that alliance. Termination of the 1957 Agreement would mean the immediate withdrawal of that antitrust immunity by the American authorities, and would make it impossible to obtain such an immunity for the cooperative arrangement between KLM and Air France (already approved by the Commission). The damage due to withdrawal of that antitrust immunity would run into millions of euros.

25 The Commission replies that, in accordance with consistent case-law, it is not required to comply with fixed deadlines when applying Article 226 EC.

26 Moreover, the fact that the Commission brought proceedings for failure to fulfil obligations against the Netherlands later than it did against the eight other Member States did not disadvantage the Netherlands, but rather the contrary. Compared with the eight other Member States, the Kingdom of the Netherlands had the advantage of extra time to avoid the bringing of an action by revoking the Exchange of Notes of October 1992.

Findings of the Court

27 It is true that, in some circumstances, excessive duration of the pre-litigation procedure provided for by Article 226 EC is capable of making it more difficult for the Member State in question to refute the Commission's arguments and thus of infringing the rights of the defence. In this case, however, the Netherlands Government has not proved that the unusual duration of the procedure has had any effect on the manner in which it has organised its defence (see, in that regard, Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraphs 15 and 16, and *Commission* v *Austria*, paragraph 36).

28 Furthermore, it must be pointed out that the procedure for a declaration of a failure on the part of a Member State to fulfil its obligations is based on the objective finding that a Member State has failed to fulfil its obligations under Community law and that the principle of protection of legitimate expectations cannot, in a case such as the present, be relied on by a Member State in order to preclude an objective finding of a failure on its part to fulfil its obligations under the EC Treaty or secondary legislation, since to admit that justification would run counter to the aim pursued by the procedure under Article 226 EC (*Commission* v *Austria*, paragraph 38).

29 The fact that termination of the 1957 Agreement might entail the withdrawal of antitrust immunity by the American authorities and any damage that might thereby arise are irrelevant as regards the admissibility of this action. This action, based on Article 226 EC, seeks only a declaration that Community law has been infringed as a result of commitments entered into between the Kingdom of the Netherlands and the United States.

30 This objection must therefore be dismissed.

The argument concerning developments after the reasoned opinion

Arguments of the parties

31 The Kingdom of the Netherlands, supported by the French Government, argues that the Commission brought the present action without taking sufficient account of developments which took place after the reasoned opinion. On 5 June 2003, after the delivery of the judgments in the *'open skies'* cases, the Council of the European Union conferred two mandates upon the Commission to negotiate air transport agreements with the United States and other non-member States within the framework of Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries (OJ 2004 L 157, p. 7). On several occasions, the Commission requested Member States to refrain from bilateral negotiations on air transport so as not to compromise the Community negotiations in progress.

32 If the Court were to uphold the present action, the Kingdom of the Netherlands would be obliged to annul the provisions held to be contrary to Community law.

That would place the Netherlands in an impossible position. By negotiating such an annulment with the United States, the Kingdom of the Netherlands would be interfering with the Community negotiations in progress.

33 The Kingdom of the Netherlands further argues, supported by the French Government, that in the current proceedings the Commission has not taken into account either the two negotiating mandates conferred by the Council on the Commission in June 2003, or Regulation No 847/2004. Thus there was no assessment of the considerable damage which a termination of the bilateral agreements on air transport could cause to airlines.

34 The principle of loyal cooperation between the Community institutions and the Member States, recognised in Article 5 of the Treaty, applies reciprocally, so that the Commission is itself required to cooperate in preserving the efficacy of Community law. There would be no loyal cooperation if the Commission were effectively to prevent the Kingdom of the Netherlands from complying with its Community obligations. The Commission infringed Article 5 of the Treaty by bringing the present action when the Member States and the Council have given it the necessary instruments to bring transatlantic air transport into conformity with Community law.

35 Termination of the 1957 Agreement would create a legal vacuum which would be prejudicial to the interests of the Kingdom of the Netherlands and of other Member States. Even if flights remained possible on the basis of the principle of courtesy, as

the Commission suggests, application of that principle would no longer allow Community carriers to enjoy the legal and economic certainty guaranteed by the existence of an agreement such as that in the present case. Approval of their aeronautical programmes would have to be renewed each season and would become uncertain. The validation or rejection of their operating conditions would involve an additional administrative burden and would expose Community carriers to the rejection of certain flights by the authorities of the United States.

36 The Commission replies that, in its letters to the Kingdom of the Netherlands of 25 November 2002, 30 July 2004 and 10 March 2005, its request to that Member State was not to enter into negotiations with the United States, but to use the termination clauses contained in the 1957 Agreement. That would not place the Kingdom of the Netherlands in an unsustainable position.

37 Moreover, the Commission argues, the fear that termination of that agreement would create a legal void is without foundation. If a new agreement were not concluded between the Community and the United States, flights would remain possible on the basis of the principle of courtesy.

Findings of the Court

38 Apart from the considerations set out in paragraph 29 of this judgment, it should be noted that the provisions of Article 226 EC are to be applied without the

Commission being required to comply with a fixed time-limit. In this case, the Commission has explained that it decided to wait for the *'open skies'* judgments delivered by the Court in 2002, and the reactions of the Netherlands Government to those judgments, before bringing the present action. In so doing, the Commission did not exercise its discretion under Article 226 EC in a manner contrary to the Treaty.

39 According to consistent case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, in particular, Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 32, and case-law cited therein).

40 In this case, the time-limit set in the reasoned opinion expired on 24 December 2000, so that the developments relied on by the Kingdom of the Netherlands are irrelevant to the present dispute.

41 That argument must therefore be dismissed.

Merits

The need to rule on the existence of a new agreement following the changes made by the Exchange of Notes of October 1992

Arguments of the parties

42 According to the Commission, the changes made by the Exchange of Notes of October 1992 radically altered the nature of the 1957 Agreement, transforming it into a totally new agreement of the '*open skies*' type, namely an agreement which had to comply with several criteria defined by the Government of the United States, such as free access to all routes, the granting of unlimited route and traffic rights, the determination of prices according to a 'double disapproval' system for air routes between the parties to the agreement, and the possibility of code-sharing. Those changes had the effect of creating a closer framework of cooperation between the United States of America and the Kingdom of the Netherlands, entailing new and significant international commitments for the latter. Those changes provide proof of a renegotiation of the 1957 Agreement in its entirety. In such a case, Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law.

43 The Kingdom of the Netherlands denies that the Exchange of Notes of October 1992 constitutes a new agreement. It argues that the 1957 Agreement has remained intact

as such. The provisions which were added consolidated elements that were present in the initial agreement. The adaptations of October 1992 were the culmination of the liberalisation initiated several years earlier for the benefit of airlines of the two contracting countries. The 1957 Agreement had contained the essential elements of an '*open skies*'-type agreement even before 1992, so that the Exchange of Notes of October 1992 did not have the effect of transforming it into a new agreement of that type.

44 The Kingdom of the Netherlands argues that, pre-dating 1 January 1958, the 1957 Agreement was covered by the first paragraph of Article 307 EC, according to which the EC Treaty does not affect the obligation on the Member State concerned to respect the rights which non-member States derive from an agreement concluded before the entry into force of the EEC Treaty. In its submission, the same applies to subsequent secondary legislation; the mere existence of that legislation does not have the effect of requiring a Member State to terminate commitments towards non-member States.

Findings of the Court

45 The Court notes that the 1957 Agreement did not originally contain any provision on CRSs. The Exchange of Notes of 29 January and 13 March 1992 added an annex to that agreement concerning the principles of non-discrimination and competition in the context of CRSs. The Exchange of Notes of October 1992 made no amendment to that annex.

46 Similarly, the provisions of the 1957 Agreement concerning air fares and rates, namely Article 11, result from the Exchange of Notes of 29 January and 13 March 1992, the Exchange of Notes of October 1992 containing no provisions on the matter.

47 It is true that, in its application, the Commission acknowledges that the Exchange of Notes of October 1992 made no alteration to the provisions on CRSs and air fares and rates appearing in the 1957 Agreement, as amended, prior to October 1992.

48 In addition, as the Advocate General has noted in point 136 of his Opinion, the Exchange of Notes of October 1992 expresses the intention of the contracting parties not to replace the 1957 Agreement but only to amend some of its provisions, albeit important ones.

49 It is clear from the file that the amendments made in October 1992 to the 1957 Agreement, described in paragraph 11 of this judgment, had the effect of totally liberalising air transport between the United States and the Kingdom of the Netherlands by ensuring free access to all routes between all points situated within those two States, without limitation of capacity or frequency, without restriction as to intermediate points and those situated behind or beyond ('behind, between and beyond rights') and with all desired combinations of aircraft ('change of gauge'). That total freedom has been complemented by provisions concerning opportunities for the airlines concerned to conclude code-sharing agreements and by provisions furthering competition.

50 It follows that the amendments made in October 1992 to the 1957 Agreement have had the effect of creating the framework of a more intensive cooperation between the United States and the Kingdom of the Netherlands, which entails new and significant international commitments for the latter.

51 Moreover, the amendments made in October 1992 indicate a renegotiation of the 1957 Agreement in its entirety. Whilst some provisions of that agreement were not formally modified by those amendments or were subject only to marginal changes in drafting, the commitments arising from those provisions were none the less confirmed during the renegotiation. In such a case, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law.

52 Furthermore it must be regarded as beyond dispute that the amendments made in October 1992 to the 1957 Agreement as a whole affect the scope of certain of the provisions which were not formally amended by those amendments, or were amended only in a limited way.

53 It follows that all the international commitments challenged in this action must be assessed in relation to the provisions of Community law cited by the Commission in support of this action (see, to that effect, *Commission* v *Denmark*, paragraphs 36 to 42; *Commission* v *Sweden*, paragraphs 34 to 40; *Commission* v *Finland*, paragraphs 36 to 42; *Commission* v *Belgium*, paragraphs 47 to 53; *Commission* v *Luxembourg*, paragraphs 42 to 48, and *Commission* v *Austria*, paragraphs 46 to 52).

54 It follows from that analysis that the argument of the Netherlands Government based on the first paragraph of Article 307 EC is unfounded.

The failure to fulfil obligations arising from infringement of the external competence of the Community

Arguments of the parties

55 The Commission argues that whenever, in order to implement a common policy envisaged by the EC Treaty, the Community has taken measures establishing common rules in whatever form, Member States are no longer entitled to contract with non-member States obligations which affect those rules or alter their scope. In that regard, the Commission accuses the Kingdom of the Netherlands of infringing the exclusive external competence of the Community by undertaking commitments towards the United States concerning, first, air fares and rates charged by carriers designated by the United States of America on intra-community routes, and, second, CRSs used or offered for use on Netherlands territory.

56 Concerning air fares and rates, the Commission argues in its application that, from the entry into force of Regulation No 2409/92, the Kingdom of the Netherlands could no longer contract on its own or maintain international commitments concerning air fares and rates charged by carriers of non-member States on intra-Community routes. Despite that, Article 11 of the 1957 Agreement, as amended by the Exchange of Notes of 29 January and 13 March 1992 and by Article 6 of the 1978 Protocol, contained such a commitment. Moreover, when the Exchange of Notes of October 1992 was concluded, the Kingdom of the Netherlands maintained that provision. That Member State therefore infringed the exclusive external competence conferred on the Community by Article 1(3) of Regulation No 2409/92.

57 Concerning CRSs, the Commission states that the Kingdom of the Netherlands maintained the annex to the 1957 Agreement concerning the principles of CRSs at the time of the renegotiation of that agreement in October 1992. By so doing, the Kingdom of the Netherlands infringed the exclusive external competence enjoyed by the Community under Regulation No 2299/89.

58 The Kingdom of the Netherlands argues that, as the law stands at present, Member States retain the competence to conclude bilateral agreements for as long as the Commission has not been granted an express mandate. It could be otherwise only in cases where Community rules might be affected by the bilateral obligations of a Member State, which is not the case here.

59 Even if it were accepted that the Commission may derive exclusive external competence by reason of the adoption of an internal Community regulation, such competence could come into being only after the entry into force of that regulation. Since Regulation No 2409/92 did not come into force until 1 January 1993, it could not affect the Kingdom of the Netherlands in October 1992.

60 In its reply, the Commission relies by analogy on Case C-129/96 *Inter-Environment Wallonie* [1997] ECR I-7411, paragraph 45, in which the Court held that, during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. The Commission notes in that regard that the Netherlands Parliament ratified the Exchange of Notes of October 1992 on 26 April 1993, that is to say after 1 January 1993, the date on which Regulation No 2409/92 came into force.

61 To that argument, the Kingdom of the Netherlands, supported on this point by the French Government, replies that to claim for the first time in the reply, as does the Commission, that the exclusive external competence of the Community comes into being at the time of the adoption of Regulation No 2409/92, rather than at the time of its entry into force, constitutes a new plea tending to change the subject-matter of the dispute and the introduction of which is prohibited by Article 42(2) of the Rules of Procedure. In any event, the judgment in *Inter-Environnement Wallonie* is not relevant in this case, firstly because this case concerns a regulation and not a directive, and, secondly, because no provision of the 1957 Agreement is likely seriously to compromise the achievement of the result prescribed by Regulation No 2409/92. Finally, the ratification of the Exchange of Notes of October 1992 by the Netherlands Parliament is irrelevant because that Exchange of Notes had already been applied since 14 October 1992.

Findings of the Court

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

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

64 It follows that, since the entry into force of Regulation No 2409/92, the Kingdom of the Netherlands has no longer been entitled, despite the renegotiation of the 1957 Agreement, to enter on its own into or maintain in force international commitments concerning the fares and rates to be charged by carriers of non-member States on intra-Community routes.

65 A commitment of that type arises from Article 11 of the 1957 Agreement, as amended by the Exchange of Notes of 29 January and 13 March 1992 and by Article 6 of the 1978 Protocol. The Kingdom of the Netherlands has maintained that commitment despite the renegotiation of the 1957 Agreement which led to the Exchange of Notes of October 1992. By proceeding in that way, the Kingdom of the Netherlands has thus infringed the exclusive external competence of the Community which results from Article 1(3) of Regulation No 2409/92 (see, to that effect, *Commission* v *Denmark*, paragraphs 97 to 100; *Commission* v *Sweden*, paragraphs 93 to 96; *Commission* v *Finland*, paragraphs 98 to 101; *Commission* v *Belgium*, paragraphs 110 to 113; *Commission* v *Luxembourg*, paragraphs 103 to 106; *Commission* v *Austria*, paragraphs 112 to 115, and *Commission* v *Germany*, paragraphs 123 to 126).

66 That conclusion cannot be called into question by the argument of the Netherlands Government that the Exchange of Notes of October 1992 took place before the entry into force of Regulation No 2409/92. As the Advocate General has pointed out in points 153 to 158 of his Opinion, even if that Exchange of Notes was provisionally applicable as from 14 October 1992, the agreement between the Kingdom of the Netherlands and the United States was not definitively concluded until after its ratification by the Netherlands Parliament on 26 April 1993. That date is after the entry into force of Regulation No 2409/92.

67 Concerning, secondly, CRSs, the Commission claims that the Court should declare that the Kingdom of the Netherlands has failed to fulfil its obligations under Regulation No 2299/89, as amended by Regulation No 3089/93.

68 Regulation No 3089/93 was adopted on 29 October 1993 and came into force, pursuant to Article 2(1) thereof, on 11 December 1993.

69 Whether it be a matter of the adoption of that regulation or of its entry into force, both those dates are after the ratification of the Exchange of Notes of October 1992. It follows that exclusive external competence of the Community, contended for by the Commission, could not result from Regulation No 3089/93.

70 The Court must therefore assess the claim concerning CRSs by reference to Regulation No 2299/89 only, without taking account of Regulation No 3089/93.

71 It follows from Articles 1 and 7 of Regulation No 2299/89 that, subject to reciprocity, that regulation also applies to nationals of non-member States, where they offer for use or use a CRS on Community territory.

72 By the effect of that regulation, the Community acquired exclusive competence to agree with non-member States the obligations relating to CRSs offered for use or used on its territory.

73 It is not in dispute that, by the Exchange of Notes of 29 January and 13 March 1992, the Kingdom of the Netherlands and the United States of America added to the 1957 Agreement an annex concerning the principles relating to CRSs, including those applying to CRSs offered for use or used on Netherlands territory. The Kingdom of the Netherlands maintained that annex in force despite the renegotiation of the 1957 Agreement which led to the Exchange of Notes of October 1992. By acting in that way, that Member State infringed the exclusive external competence of the Community arising from Regulation No 2299/89 (see, to that effect, *Commission* v *Denmark*, paragraphs 102 to 104; *Commission* v *Sweden*, paragraphs 98 to 100; *Commission* v *Finland*, paragraphs 103 to 105; *Commission* v *Belgium*, paragraphs 115 to 117; *Commission* v *Luxembourg*, paragraphs 108 to 110; *Commission* v *Austria*, paragraphs 117 to 119, and *Commission* v *Germany*, paragraphs 128 to 130).

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

75 In the area of external relations, the Court has held that the Community's tasks and the objectives of the EC Treaty would be compromised if Member States were able to enter into international commitments containing provisions capable of affecting rules adopted by the Community or of altering their scope.

76 It follows from the foregoing considerations that, by entering into or maintaining in force, despite the renegotiation of the 1957 Agreement, international commitments concerning air fares and rates charged by carriers designated by the United States on intra-Community routes and concerning CRSs offered for use or used on Netherlands territory, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 5 of the Treaty and under Regulations Nos 2409/92 and 2299/89 (see, to that effect, *Commission* v *Denmark*, paragraphs 110 to 112; *Commission* v *Sweden*, paragraphs 106 to 108; *Commission* v *Finland*, paragraphs 111 to 113; *Commission* v *Belgium*, paragraphs 124 to 126; *Commission* v *Luxembourg*, paragraphs 116 to 118; *Commission* v *Austria*, paragraphs 124 to 126, and *Commission* v *Germany*, paragraphs 135 to 137).

Failure to fulfil obligations arising from infringement of Article 52 of the Treaty

Arguments of the parties

77 The Commission contends that, by the Exchange of Notes of October 1992, Article 4 of the 1957 Agreement concerning the ownership and control of airlines was entirely replaced.

78 The Commission argues that, under that Article 4, as amended ('the clause on the ownership and control of airlines'), airlines of Member States other than the Kingdom of the Netherlands may always be excluded from the application of the 1957 Agreement, whereas that agreement applies automatically to Netherlands airlines. Airlines of those Member States thus suffer discrimination, in that they do not enjoy the same treatment as nationals in the Netherlands, in breach of Article 52 of the Treaty.

79 The Netherlands Government replies that, contrary to what the Commission argues, the Exchange of Notes of October 1992 does not entirely replace Article 4 of the 1957 Agreement but merely clarifies some of its terms. The substance of that Article 4 remained unchanged. In that regard, the Exchange of Notes of October 1992 does not represent a new agreement, and the 1957 Agreement is protected by the first paragraph of Article 307 EC.

Findings of the Court

80 Article 4 of the 1957 Agreement, in its initial version, provided:

'Each contracting party reserves the right to withhold or revoke the privilege of exercising the rights provided for in Article 3 of this Agreement from an airline designated by the other contracting party in the event that it is not satisfied that substantial ownership and effective control of such airline are vested in nationals of the other contracting party ...'

81 The Exchange of Notes of October 1992 amended the beginning of that article as follows, while leaving the remainder unchanged:

'Each Contracting Party reserves the right to withhold, suspend, limit, impose conditions, or revoke the privilege of exercising the rights provided for in this Agreement ...'

82 It is obvious that Article 4 of the 1957 Agreement has not been entirely replaced by virtue of the Exchange of Notes of October 1992, as the Commission alleges.

83 The Court nevertheless finds, as the Advocate General has pointed out in point 170 of his Opinion, that even if, from a formal point of view, Article 4 of the 1957 Agreement was not greatly amended by the Exchange of Notes of October 1992, its content and scope were profoundly altered by that Exchange of Notes, the latter having necessarily had an impact on the scope of that article, following full liberalisation of fifth-freedom routes within the meaning of Article 1 of the International Air Transport Agreement (Chicago, 7 December 1944; 1953 UNTS 389).

84 It follows, first, that the clause on the ownership and control of airlines must be assessed having regard to the provisions of Community law which have been invoked, and, secondly, that the Netherlands Government's argument based on the first paragraph of Article 307 EC is unfounded.

85 As regards the applicability of Article 52 of the Treaty, it should be noted that that provision applies in the field of air transport and is intended in particular to apply to airlines established in a Member State which supply air transport services between a Member State and a non-member State.

86 In this case, the clause on the ownership and control of airlines permits the United States, inter alia, to withhold or revoke a concession or authorisation to an airline designated by the Kingdom of the Netherlands, but of which a substantial part of the ownership and effective control is not vested in that Member State or Netherlands nationals.

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

88 By contrast, the formulation of that clause shows that the United States is in principle obliged to grant the necessary concessions or authorisations to airlines of which a substantial part of the ownership and effective control is vested in the Kingdom of the Netherlands or Netherlands nationals ('Netherlands airlines').

89 It follows that Community airlines may always be excluded from the benefit of the 1957 Agreement, while that benefit is assured to Netherlands airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the Kingdom of the Netherlands, accords to its own nationals.

90 It follows that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty (see, to that effect, *Commission* v *Denmark*, paragraphs 122 to 124 and 128 to 133; *Commission* v *Sweden*, paragraphs 113 to 115 and 119 to 124; *Commission* v *Finland*, paragraphs 118 to 120 and 124 to 129; *Commission* v *Belgium*, paragraphs 131 to 133 and 137 to 142; *Commission* v *Luxembourg*, paragraphs 122 to 124 and 128 to 133; *Commission* v *Austria*, paragraphs 130 to 134 and 138 to 143, and *Commission* v *Germany*, paragraphs 144 to 146 and 150 to 156).

91 In those circumstances, it is apparent that the claim that the Kingdom of the Netherlands has failed to fulfil its obligations under Article 52 of the Treaty is well founded.

92 Having regard to the whole of those considerations, the Court must conclude that, by contracting or maintaining in force, despite the renegotiation of the 1957 Agreement, international commitments towards the United States:

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

— concerning CRSs used or offered for use on Netherlands territory, and

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

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

Costs

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

94 Pursuant to Article 69(4) of the Rules of Procedure, the French Republic must bear its own costs.

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

1. **By contracting or maintaining in force, despite the renegotiation of the Air Transport Agreement concluded between the Kingdom of the Netherlands and the United States of America on 3 April 1957, international commitments towards the United States of America:**

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

   — **concerning computerised reservations systems used or offered for use on Netherlands territory, and**

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

   the Kingdom of the Netherlands has failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC), Article 52 of the EC Treaty

(now, after amendment, Article 43 EC), and under Council Regulations (EEC) Nos 2409/92 of 23 July 1992 on fares and rates for air services and 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems.

2. **The Kingdom of the Netherlands is ordered to pay the costs.**

3. **The French Republic is ordered to bear its own costs.**

[Signatures]