necessary conclusions therefrom and in particular conclude that that action is automatically void pursuant to Article 85 (2).

5. While it is true that Articles 85 and 86 of the Treaty concern the conduct of undertakings and not laws or regulations of the Member States, none the less the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which would deprive those provisions of their effectiveness. Such would be the case, in particular, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce the effects thereof.

6. It is contrary to the obligations of the Member States under Article 5 of the EEC Treaty, in conjunction with Article 3 (f) and Article 85, in particular paragraph (1), of the EEC Treaty, to approve air tariffs and thus to reinforce the effects thereof, where, in the absence of any rules adopted by the Council in pursuance of Article 87, it has been found in accordance with the forms and procedure laid down in Article 88 or Article 89 (2) that those tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to Article 85.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 24 September 1985 *

Mr President,
Members of the Court,

A — 1. The central issue in the references for a preliminary ruling on which I give my opinion today is whether the competition rules in the EEC Treaty are applicable to the fixing of the tariffs for Community and international air travel.

That issue arose in criminal proceedings brought in France against directors of airlines, against the airlines themselves, against directors of travel agencies and against the travel agencies themselves. One of the airlines has its registered office outside the Community, namely Air Lanka, which is based in Sri Lanka.

The accused were charged with infringements of Articles L 330-3, R 330-9 and R 330-15 of the code de l'aviation civile [Civil Aviation Code] inasmuch as in 1981 they had sold air tickets at tariffs which had not been approved by the French Minister for Civil Aviation (in other words they had been undercutting the approved tariffs). The tickets were for the following routes: Paris-Amsterdam-Bangkok, Paris-London-San Francisco, Paris-London-New York, Paris-London-Miami, Paris-London-Hong Kong, Paris-London-Tokyo, London-Paris-Bombay and Paris-Colombo.

Under Article L 330-3 air transport may be provided only by undertakings approved by the Minister for Civil Aviation. Those undertakings must submit their tariffs to the Minister for approval.

* Translated from the German.

Article R 330-9 lays down further rules on the approval procedure. Its second paragraph provides that foreign undertakings are also covered by the rules. Its third paragraph provides that proposals may be submitted either by the airlines themselves or by a trade association recognized by the Minister. By virtue of its fourth paragraph proposed tariffs are to be deemed to be approved if the Minister raises no objection within one month. Under Article R 330-15 infringements against those provisions are punishable with a prison sentence of between 10 days and one month or a fine of FF 600 to FF 1 000 or both. [1]

The tribunal de police [Local Criminal Court], Paris, before which the proceedings were brought at first instance, found first that that above-mentioned provisions of the code de l'aviation civile applied only to airlines and did not include travel agencies and their directors among the classes of persons to which they applied. It went on to find that those national provisions required airlines to draw up tariffs for each individual route and submit them to the Minister for approval on pain of criminal penalties.

The national court then made the following comments, which I wish to reproduce in full because of their significance to the case:

'Those provisions, which call for a concerted practice between airlines, undoubtedly have as their effect the prevention, restriction or distortion of competition within the common market.

Those practices are therefore incompatible with Article 85 of the EEC Treaty.

Nor can Article 84 (2) of the EEC Treaty be raised as an objection to the immediate application of Article 85.

Article 84 concludes Part Two, Title IV of the EEC Treaty, which concerns the common transport policy, the organization of which, as regards air transport, is a matter left to be decided by the Council, [2] it being made clear that that provision applies exclusively to the Title at the end of which it appears.

Article 85 appears in Part Three, Title I, Chapter 1, of the EEC Treaty, which concerns the rules applying to competition between undertakings.

It follows that tariffs agreed upon between airlines and submitted for approval pursuant to a general agreement cannot be taken into consideration inasmuch as they are contrary to the Community rules.

However, there remains the problem of the validity of the French laws and decrees referred to in the prosecution (Articles L 330-3, R 330-9 and R 330-15 of the code de l'aviation civile in the light of the Community rules.

That question can be settled only by the Court of Justice of the European Economic Community.'

On those grounds the tribunal de police of Paris, by judgments of 2 March 1984, first acquitted the directors of the travel agencies and discharged the travel agencies themselves and secondly ruled that the criminal proceedings against the directors of the airlines and against the airlines themselves should be dealt with separately; it then submitted the file on the case to the Court of Justice of the 'European Economic

1 — The original text of those provisions is reproduced in the annex to this Opinion.

2 — Presumably a reference to the provision that the Council may by a special procedure decide whether, to what extent and by what procedure appropriate provisions may be laid down for air transport.

Community' for a preliminary ruling on the question 'whether Articles L 330-3, R 330-9 and R 330-15 of the code de l'aviation civile are in conformity with Community law'.

On 9 March 1984 the ministère public [Public Prosecutor's Department] appealed against those judgments to the cour d'appel [Court of Appeal] and asked it, *inter alia*, to decide upon the admissibility of the appeal immediately.

By order of 28 March 1984 the President of the Thirteenth Chamber of the cour d'appel of Paris held that there were no grounds for deciding upon the admissibility of the appeal immediately since that was not necessary in the interests of the proper administration of justice.

Whether the appeal proceedings before the cour d'appel have since been taken any further is not clear from the documents before this Court. According to the statements of Counsel for Mr Maillot at the oral proceedings of 9 July 1985, which were not contradicted, a number of criminal proceedings are at present stayed pending a ruling from the Court of Justice.

2. Before discussing the observations of the parties to these proceedings it is appropriate to begin by setting out the international legal framework within which both the airlines and the national authorities act in connection with the approval of air tariffs.[3]

European civil aviation is largely governed by legal rules which are applied worldwide. In that regard the European system of air transport law may be seen by and large as a part of the worldwide system of legal relations in matters of air transport. All the Member States of the European Economic Community are parties to the Convention on International Civil Aviation of 7 December 1944 (the Chicago Convention).[4] That Convention, which has since come to be applied almost universally, lays down the general legal principles governing international civil aviation, while Part II contains the provisions establishing the International Civil Aviation Organization (ICAO).

Article 1 contains what is surely the central principle:

'The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.'

Article 6 draws the following consequence from that fundamental rule:

'No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.'

On the basis of Article 6 of the Chicago Convention a large number of States have concluded bilateral air transport agreements on air services; according to the ICAO the network of air transport routes which has arisen as a result is now covered by some 1 700 agreements.

Such agreements usually concern the granting of the right to fly certain routes and ancillary rights to facilitate the provision of air services and also lay down

3 — See J. Erdmenger, Commentary on Article 84 of the EEC Treaty, Note 48 *et seq.*, in Groeben, Boeckh, Thiesing, Ehlermann, Kommentar zum EWG-Vertrag, Baden-Baden, 1983; L. Weber, Die Zivilluftfahrt im Europäischen Gemeinschaftsrecht, Berlin, Heidelberg, New York, 1981, p. 42 *et seq.*

4 — United Nations Treaty Series, Vol. 15, p. 296.

detailed rules with regard to the exercise of transport rights. The detailed rules relate in particular to capacity, the determination of tariffs, the designation of airlines and in many cases cooperation between airlines.[5]

For the purposes of these proceedings the tariff provisions are of particular relevance. They lay down the procedure for fixing the tariffs for the routes covered by the agreement. In the vast majority of cases this is expressly left to the airlines, usually with a further reference to the tariff agreements concluded under the auspices of the International Air Transport Association (IATA), an association under Canadian private law to which numerous airlines from a large number of States belong. Those tariff agreements are in each case subject to the approval of the governments of both Contracting States.

A number of European countries, among them six Member States of the European Communities including France, have agreed on a uniform procedure for dealing with those matters in the International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, signed at Paris on 10 July 1967.[6] The aim of that Agreement is to harmonize, improve and ensure the better working of the consultation procedure in tariff matters. The technique adopted for achieving that harmonization was to substitute the terms of the Agreement for the tariff provisions in all the bilateral agreements between the countries party to the Agreement.

5 — See for example the air transport agreement between France and the Federal Republic of Germany of 4 October 1955 (United Nations Treaty Series, Vol. 353, p. 203; Bundesgesetzblatt 1956 II, p. 1078).

6 — United Nations Treaty Series, Vol. 696, p. 31.

3. The five almost identical references for a preliminary ruling submitted by the tribunal de police have elicited observations from a number of parties, namely Mr Maillot, who was acquitted at first instance, the undertaking Nouvelles Frontières, which was also discharged, the airlines KLM and Air France, the Governments of the French Republic, the Italian Republic and the Kingdom of the Netherlands, the United Kingdom and the Commission of the European Communities. Those observations contain statements on the international legal framework and international practice with regard to the determination of air transport tariffs, the interpretation of French law by the tribunal de police and the state of progress of Community legislation in the air transport sector. The observations on the questions raised by the references for a preliminary ruling with regard to the relevant Community law address three main issues, namely whether the references for a preliminary ruling are admissible (or whether the Court of Justice has jurisdiction to rule upon them), whether the competition rules are applicable to the determination of air transport tariffs and what results follow if it is held that the competition rules are indeed applicable to that economic sector.

(a) *Admissibility of the references for a preliminary ruling*

The airlines *Air France* and *KLM*, the *Government of the French Republic*, and the *Government of the Italian Republic* take the view that the questions are inadmissible. The tribunal de police has stated that Article 85 of the EEC Treaty is applicable to the air transport sector and accordingly declared void under Article 85 (2) the tariff agreements on which the approved tariffs

were based. In the light of the grounds of the judgments making the reference the interpretation requested of the Court of Justice is not necessary to enable the tribunal de police to give judgment.

In the view of the *Government of the Italian Republic*, even taking into account the Court's practice of reformulating questions referred to it in order to give the national court a ruling on the interpretation of Community law that enables it to determine the dispute before it, it is impossible to find a question which would be admissible. The tribunal de police has not stated which Community rule it seeks to have interpreted for the purposes of its own subsequent decision. The references for a preliminary ruling admittedly mention the incompatibility of the concerted air tariffs with Article 85 of the EEC Treaty but they do not in any way identify the provisions of Community law with which the national provisions might be in conflict.

Both *Air France* and *KLM* take the view that on the basis of its interpretation of the law, the tribunal de police should have discharged all the accused. Any ruling made by the Court of Justice will be without any effect on the actual decision of the tribunal de police. That reasoning is confirmed by the judgment of the Court of Justice in the *Foglia* case.[7] In that case the Court of Justice ruled that its duty was not to deliver advisory opinions on general or hypothetical questions but to assist in the administration of justice in the Member States. Therefore, it stated, it did not have jurisdiction to reply to questions of interpretation submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which did not correspond to an objective requirement inherent in the resolution of the dispute.

The airlines add that the question submitted is based on a misinterpretation of French law because the tariff coordination between airlines is required by the relevant international law and not by French law.

They point out that the tribunal de police has not specified the provisions of Community law in the light of which it asks the Court of Justice to examine the provisions of French law to which it refers but merely speaks of compatibility with 'Community law'. That expression is so imprecise that even taking account of the grounds of the judgment making the reference the Court of Justice cannot reformulate the question in such a way as to bring it within the terms of Article 177 and thereby within its own jurisdiction.

Similarly, the *Commission of the European Communities* prefaces its observations by stating that the question is inadmissible as framed by the tribunal de police. In proceedings under Article 177 of the EEC Treaty, the Court of Justice may not rule upon the compatibility of the provisions of a national law with the Treaty. Nevertheless, the Commission then cites the established practice of the Court of Justice in such cases, which is to reformulate the question submitted to it in order to give the national court a ruling on the interpretation of Community law that enables it to assess such compatibility. Accordingly, the Commission suggests that the question should be reformulated as follows:

'Must the EEC Treaty be interpreted as prohibiting national provisions of a Member State relating to the determination of air

7 — Judgment of 16 December 1981 in Case 244/80 *Pasquale Foglia* v *Mariella Novello* [1981] ECR 3045, at p. 3062 *et seq.*

transport tariffs where those provisions require the airlines concerned to coordinate their tariffs in advance or where compliance with such coordinated tariffs is enforced by means of a procedure for the grant of approvals by the public authorities together with criminal penalties in the event of failure to apply the approved tariffs?'

A similar view of the reference for a preliminary ruling made by the tribunal de police is taken by the travel agency *Nouvelles Frontières.* It states that the reference concerns the question whether the EEC Treaty permits a Member State, in the context of air transport, to lay down a compulsory procedure for approvals which itself requires a concerted practice as regards the services provided and their price, in particular where that requirement contributes to a distortion of competition between Member States.

(b) *Applicability of the competition rules to air transport*

The undertaking *Nouvelles Frontières,* Mr Maillot, the Netherlands Government, the United Kingdom and the Commission of the European Communities take the view that the competition rules of the EEC Treaty are applicable to the air transport sector, while the airlines Air France and KLM, Italy and the Italian and French Governments take the opposite view.

Nouvelles Frontières considers that the competition rules are also applicable to air transport. Although Regulation No 17 on the application of Articles 85 and 86 [8] is not applicable to transport by virtue of Regulation No 141 [9] and the *direct competence of the Commission* was restored by Regulation No 1017/68 [10] only for transport by rail, road or inland waterway, it is clear from the judgment of the Court of Justice in the case of the *Commission* v *French Republic* [11] — the *Code du Travail Maritime* case — that Article 84 (2) does not exclude sea and air transport from the general rules of the EEC Treaty; according to Nouvelles Frontières those general rules include the competition rules. That principle, it argues, is confirmed by the judgment in *Commission* v *Belgium,* [12] in which it was held that aid to transport was subject to the general system of the Treaty concerning aid granted by the States and the controls and procedures laid down therein.

The *Netherlands Government* also finds support for the view that the competition rules are applicable to the transport sector in the *Code du Travail Maritime* case cited above. The general provisions of the Treaty include in particular the competition rules contained in Articles 85 to 90, which are applicable to air transport even without any further legislation by the Council. However, because the implementing provisions required under Article 87 of the EEC Treaty have not yet been adopted in the field of air transport, it is for the national authorities under the supervision of the Commission, pursuant to Articles 88 and 89 of the EEC Treaty, to ensure that the airlines comply with the competition rules.

The Netherlands Government concludes its observations by drawing attention to one particularity of the reference in Case 213/84 which is that an airline having its registered

8 — Regulation No 17 of the Council — First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87).

9 — Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17 (Official Journal, English Special Edition 1959-1962, p. 291).

10 — Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (Official Journal, English Special Edition 1968 (I), p. 302).

11 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359.

12 — Judgment of 12 October 1978 in Case 156/77 *Commission* v *Kingdom of Belgium* [1978] ECR 1881.

office outside the Community is involved. It raises the question whether the general Treaty provisions on air transport apply in the same way to airlines of non-member countries as to airlines with their registered office in the Community.

The *United Kingdom* also takes the view that Article 84 (2) does not constitute a bar to the application of Article 85 of the EEC Treaty in the field of transport. In its view, the general rules of the Treaty referred to by the Court in the *Code du Travail Maritime* case can include the competition rules in the EEC Treaty.

The *Commission* shares that view. It states that Articles 85 and 86 of the EEC Treaty are unquestionably applicable to the air transport sector because they form part of the fundamental rules referred to by the Court of Justice in the *Code du Travail Maritime* case cited above.

The airlines *Air France* and *KLM* begin by pointing out that the air transport sector is excluded from the scope of Regulation No 17 by Regulation No 141 and that until now that position has remained unchanged despite numerous proposals put forward by the Commission. Nor, they state, does the *Code du Travail Maritime* judgment support the conclusion that the Court of Justice wished to make the transport sector unreservedly subject to the general provisions of the Treaty. Furthermore, the competition rules are contained in Part Three of the EEC Treaty ('Policy of the Community') and not in Part Two concerning the foundations of the Community which is the only part containing general rules.

The *French Government* is also of the view that the solution adopted by the Court with regard to the provisions in Part Two of the EEC Treaty in its *Code du Travail Maritime* judgment cannot be transposed to the provisions on competition, which are in Part Three. In view of the fact that Article 78 of the EEC Treaty, which provides that any measures taken within the framework of the Treaty in respect of transport rates and conditions must take account of the economic circumstances of carriers, has never been made applicable to airlines by a decision under Article 84 (2) of the EEC Treaty, it would be paradoxical to hold that stricter rules, like those laid down in Articles 85 and 86 of the EEC Treaty, were applicable without more to that sector.

(c) *Consequences if the competition rules are applicable to the transport sector*

The parties also differ as to what the consequences would be in these cases if the competition rules are held applicable to the transport sector.

The *French Government* points out first of all that the competition rules are addressed to undertakings and not the Member States. Articles 85 and 86 of the EEC Treaty confine themselves to defining and penalizing certain practices of undertakings and do not make it obligatory for the Member States to prohibit such practices. The Member States are merely required to refrain from adopting any measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty. The question whether the French provisions make it possible for undertakings to do so can only be answered in the negative. The fact that France, like the other Member States, permits tariff coordination between undertakings, cannot

constitute a breach of the competition rules in the EEC Treaty. Although Article 85 (1) of the Treaty prohibits, in particular, price-fixing agreements between undertakings, Article 85 (3) provides for the possibility of exemption from that general prohibition. Because the detailed rules for the application of that paragraph provided for by Article 87 (2) (b) have not yet been laid down, it is for the Member States, by virtue of Article 88, to supervise the application of the competition rules. For that reason France was entitled to maintain in force its provisions for the approval of air tariffs without being obliged to prohibit agreements between air transport undertakings, provided that the criteria contained in Article 85 (3) were fulfilled.

France points out, moreover, that the Commission itself has not found it necessary to make use of its supervisory powers under Article 89 of the EEC Treaty and take action against any infringements of Articles 85 and 86.

The *Italian Government* also takes the view that the Member States are empowered to authorize coordination between airlines under Article 88 of the EEC Treaty read in conjunction with Article 85 (3). It states that as Community law now stands no provision of the EEC Treaty prevents the Member States from exercising their powers to approve air tariffs even where those tariffs are coordinated between the airlines concerned. However, those powers must be exercised for the purposes for which they were granted and not, for instance, for exclusively protectionist purposes. In any event if the competition rules were applied immediately and without restriction to air transport that would cause considerable disruption, which would be to the detriment of the providers of the service and ultimately its users.

The *Netherlands Government* likewise takes the view that Article 88 of the EEC Treaty empowers the national authorities responsible for competition to rule on the permissibility of cartels and on the abuse of a dominant position in accordance with the law of their country and with the provisions of Article 85 (3) and Article 86 of the EEC Treaty. It further points out that tariff agreements should not be considered in isolation because other factors factors also play an important part. In that connection it refers, *inter alia*, to agreements concerning access to the market and carrying-capacity agreements. It states that it would scarcely be feasible to bring about a liberalization of air transport without recognizing that state of affairs. Whether the Member States might be failing in their Community obligations if they adopted provisions permitting undertakings to act in breach of Articles 85 and 86 of the Treaty is a question that may be left open. In its view a provision requiring tariffs to be approved does not in itself constitute a measure compelling private undertakings to disregard their obligations under Articles 85 and 86 of the Treaty.

The airlines *KLM* and *Air France* state that although Articles 3, 5, 85 and 86 of the EEC Treaty impose certain obligations upon the Member States, it is necessary for those obligations to be given a sufficiently specific content. That, however, is not the case in the air transport sector. In that regard KLM and Air France refer to the judgment of the Court of Justice in *Leclerc* v *Au Blé Vert*.[13] In that case the Court of Justice held that purely national systems and practices in the

13 — Judgment of 10 January 1985 in Case 229/83 *Association des Centres distributeurs Édouard Leclerc and Others v Au Blé Vert SARL and Others* [1985] ECR 1.

book trade had not yet been made subject to a Community competition policy with which the Member States were required to comply by virtue of their duty to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. It followed, in the Court's view that as Community law stood Member States' obligations under Article 5 of the EEC Treaty in conjunction with Article 3 (f) and Article 85 were not specific enough to preclude them from enacting legislation on competition in the retail prices of books. According to Air France and KLM, that means that not even an indirect constraint on the Member States is to be inferred from Articles 85 and 86 of the EEC Treaty if their obligations are not specific enough, as is the case in particular with regard to competition in the air transport sector. Community law in this sector is not only unclear, it has scarcely developed at all, and at all events there is no discernible policy.

The *United Kingdom* emphasizes first that a national system requiring approvals is not by itself incompatible with the Treaty provisions. In its view, that is so even where previously agreed tariffs are approved. An incompatibility arises only if the national system requires the airlines to coordinate their tariffs. In such a case a Member State could not include the special provisions for public undertakings contained in Article 90 of the EEC Treaty since the non-application of the competition rules is not necessary to enable the airlines to perform their assigned tasks. Procedurally it is for the Member States, by virtue of Article 88, to ensure compliance with the competition rules. Although Article 88 does not specify which national authorities are competent for the purpose, it may be assumed that either the authorities responsible for competition or the aeronautical authorities are meant. Those authorities are in a position, when granting approvals for air tariffs, to examine whether the provisions of Articles 85 and 86 have been complied with and, where appropriate, whether tariff agreements between airlines qualify for exemption under Article 85 (3). Although the national courts may not themselves grant an exemption under Article 85 (3), they may review the grant or refusal of an exemption. Nevertheless an exemption under Article 85 (3) cannot be granted by implication but must take the form of a reasoned decision. If that were not the case, it would be impossible to ascertain with sufficient certainty whether the requirements of Article 85 (3) were in fact fulfilled.

Nevertheless, in the United Kingdom's view, those principles cannot be applied with retroactive effect because it has not hitherto been clear who is to grant exemptions under Article 85 (3) of the EEC Treaty. Air tariffs which have already been approved should therefore be regarded as provisionally valid; that view is also supported by the fact that the Commission has not thus far exercised its supervisory powers under Article 89 (2). Recognizing that the competition rules have full effect retroactively would indeed have disadvantages; on the other hand, it would be unacceptable nearly 30 years after the entry into force of the EEC Treaty for this sector to continue to be excluded from the scope of the competition rules.

The *Commission* also stresses that Article 85 and 86 of the EEC Treaty are primarily directed at undertakings. Nevertheless, it

states, the Court has held that the Member States may not adopt measures whose purpose or effect is to incite or compel undertakings to act in breach of Article 85 or Article 86 of the Treaty. The implementation of the competition rules in the air transport sector is still a matter for the national authorities and the Commission by virtue of Articles 88 and 89 of the Treaty. In appropriate cases the national courts have jurisdiction to review the compatibility of an agreement or concerted practice with the competition rules. The principles laid down in the judgment in the *De Geus* case [14] with regard to the provisional validity of agreements during the transitional period before the entry into force of Regulation No 17 cannot be transposed to the case of air transport because the circumstances of that judgment — an agreement concluded before the entry into force of the EEC Treaty, a duty to notify under Article 5 of Regulation No 17, and the existence of the regulation at the time of the proceedings — are not present in the context of air transport.

Assuming that the national courts may apply Article 85 of the EEC Treaty to the air transport sector, in particular, in the case of flights between Member States, it must then be examined whether an agreement or concerted practice relating to the fixing of tariffs may qualify for exemption under Article 85 (3). Although a tariff agreement will inevitably restrict competition, it can lead to an improvement in the conditions of transport. An exemption cannot be granted if the effect of the tariff agreements is to prevent the undertakings concerned or other undertakings from proposing or applying other tariffs independently. Where that is not the case the national authorities may grant an exemption pursuant to Article 88 of the EEC Treaty.

In view of the fact that French law gives a very broad discretion to the national aeronautical authorities, the whole question turns on the way in which those authorities exercise that discretion. Thus it should be examined whether the authorities approved only tariffs agreed between the undertakings before being submitted for approval. If that is not the case there can be no doubt as to the compatibility of the national law providing for the approval of air tariffs with the EEC Treaty.

(d) *A separate issue: flights involving non-member countries*

The United Kingdom and the Commission submit additional argument on the particular question of flights to non-member countries. The *United Kingdom* first mentions the question whether tariff agreements for flights involving non-member countries are in fact capable of affecting trade within the Community. It then points to the difficulty of applying the Community competition rules to such flights in view of the fact that they are often governed by international law prior to the Treaties which is recognized by Article 234 of the EEC Treaty.

The *Commission*, however, takes the view that tariff agreements for flights involving non-member countries may well affect trade between Member States. It admits that such an effect on intra-Community trade will be difficult to establish. In many cases it will not be possible to apply the Community competition rules because of bilateral or multilateral agreements. Under Article 234 of the EEC Treaty the rights and obligations arising from agreements concluded with non-member countries by Member

14 — Judgment of 6 April 1962 in Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd* v *Robert Bosch and Another* [1962] ECR 45.

States before the entry into force of the EEC Treaty are not affected by its provisions. None the less, by virtue of the second paragraph of Article 234, the Member States are required to take all appropriate steps to eliminate any incompatibilities with the EEC Treaty which have been established. Where that has not been done Articles 85 and 86 of the Treaty cannot be applied to any tariff agreements covered by them. The Commission has not taken any steps to induce the Member States to take action under Article 234 of the Treaty.

The airlines *Air France* amd *KLM* also refer to the second paragraph of Article 234 of the EEC Treaty and emphasize that as long as the obligations of the Member States in the sphere of competition and aviation remain unclear, the Member States are under no obligation either to adopt measures under the second paragraph of Article 234.

The *French Government*, the *Italian Government* and the *Netherlands Government* have stated in reply to questions put to them by the Court of Justice that the question of the compatibility of prior international agreements with the EEC Treaty has not arisen and that they have not found it necessary to revise their relevant international obligations in this field because of any incompatibility with the EEC Treaty.

The *United Kingdom* has replied to the Court that it is uncertain whether and to what extent the international agreements concluded by the United Kingdom before its accession to the Community are incompatible with the EEC Treaty. Should agreements be found to be incompatible, it would be necessary to re-negotiate them with the non-member countries concerned.

However, the United Kingdom has already taken steps to minimize the scope for any conflict between such agreements and the EEC Treaty. For example it has notified the members of the European Civil Aviation Conference, whether European Community Member States or non-member countries, that it will no longer require airlines to consult other airlines before filing tariffs for approval.

(e) *Suggestions for the ruling to be given by the Court of Justice*

Suggestions for the reply to be given by the Court of Justice to the question referred to it by the tribunal de police of Paris have been submitted only by the airlines KLM and Air France and by the Commission of the European Communities. Their proposed answers are as follows:

Air France and KLM:

'The Court of Justice does not have jurisdiction to rule upon the question submitted to it for a preliminary ruling by judgments of the tribunal de police of Paris of 2 March 1984 because, read in conjunction with the grounds of those judgments, that question does not enable it to supply an interpretation of a rule of Community law which corresponds to an objective requirement inherent in the resolution of the proceedings pending before the tribunal de police; because that court's question is based on an apparent misinterpretation of the national law whose compatibility with Community law is to be examined by the Court of Justice; and finally because the wording of the question in any event does not enable the Court of Justice to establish what particular interpretation of Community law is requested of it.'

The Commission: [15]

'National provisions which, in prescribing the approval of air transport tariffs by the

15 — See in this regard the Commission's proposed version of the question, p. 1431.

relevant authority, require prior consultation between the airlines concerned with regard to the tariffs to be submitted for approval, contravene the provisions of the Treaty establishing the European Economic Community, particularly Article 5, or, if not, Article 90, read in conjunction with Articles 85 and 86, if such prior consultation is not eligible for an exemption under Article 85 (3).

Such incompatibility will exist in particular if prior consultation is laid down as a necessary precondition for the submission of proposed tariffs for approval or if the relevant authority exercises its discretion in approving tariffs in such a manner as to permit one or more airlines on the route concerned to abuse a dominant position or to give such an abuse the protection afforded by State sanction.

In so far as obligations arising out of air transport agreements between Member States and non-member countries covered by Article 234 of the EEC Treaty do not require otherwise, it is for the national courts to refuse to apply the national provisions which are hereby shown to be incompatible with the EEC Treaty.'

The other parties have not made any express proposals regarding the wording of the answer to be given.

B — Turning now to my own views on these references for a preliminary ruling, I must first of all point out that it is not the task of the Court of Justice to review the national court's interpretation of French law or its findings of fact. It is true that a number of the parties to these proceedings have indicated that they regard the interpretation of the French provisions by the tribunal de police of Paris as erroneous and also that its statements with regard to the tariff agreements between the airlines are incorrect. However, the Court of Justice cannot inquire into those issues because the findings of fact and legal assessments concerned are matters for the tribunal de police. Similiarly it is not the task of the Court of Justice to examine whether the agreements between the airlines are in fact covered by the prohibition in Article 85 (1) of the EEC Treaty. That applies in particular to the question whether such concertation affects trade between Member States, which may be difficult to establish, particularly where flights to non-member countries are involved.

On the contrary, in its decision the Court of Justice must proceed on the assumption that the facts found by the tribunal de police and that court's legal assessment of them are correct. Therefore I too shall proceed on that basis.

Furthermore, I do not propose to examine in detail the very long explanations submitted with regard to the existing proposals for legislation by the Council, in view of the fact that the Court of Justice is called upon to give its ruling on the basis of the law now in force without having regard to future legal developments. This applies *a fortiori* since the main proceedings are criminal proceedings and the question whether infringements of tariff agreements or government-approved tariffs are punishable can be determined only in accordance with the legal position at the material time and not on the basis of the law applicable at some future time even if those infringements might then possibly be punishable. An awareness of the regulations currently being envisaged may be helpful for the national court because the legislative proposals can give it some indication of the criteria to be applied to air tariff agreements, in particular for the purposes of Article 85 (3) of the EEC Treaty. For the

Court of Justice, however, which is here concerned with the basic question of the applicability of the competition rules to air transport, the legislation currently being considered by the Council is irrelevant.

1. *Admissibility of the references for a preliminary ruling (jurisdiction of the Court of Justice)*

A number of the parties to these proceedings have contested the admissibility of the references for a preliminary ruling or at least the jurisdiction of the Court of Justice to rule upon them. The contention that the references are inadmissible is based on three arguments: first, that in proceedings under Article 177 of the EEC Treaty the Court of Justice has no jurisdiction to rule upon the compatibility of national law with Community law; secondly, that the Court's ruling is not necessary to the determination of the dispute before the tribunal de police because the latter has already afirmed the applicability of the competition rules in the EEC Treaty to air tariff agreements; finally, that the tribunal de police's question is in such imprecise terms that it is not possible to ascertain by which provisions of Community law the national provisions are to be judged.

(a) The argument that the references are inadmissible because they concern the question of the compatibility of national law with Community law is not persuasive. It is certainly true that in proceedings under Article 177 the Court of Justice does not have jurisdiction to rule upon the compatibility of a national measure with the Treaty. Nevertheless it has been the consistent practice of the Court of Justice not to reject an order for reference as being inadmissible because of defects in the wording of a question. The Court held as long ago as 15 July 1964 in its judgment in *Costa* v *ENEL* [16] that it had power to extract from a question imperfectly formulated by the national court those questions which alone pertained to the interpretation of the Treaty; consequently a decision was to be given not upon the compatibility of a national provision with the Treaty but only upon the interpretation of the Treaty in so far as that was necessary in the light of the points of law stated by the national court. [17]

(b) There is greater merit in the objections that the questions referred to the Court of Justice for a preliminary ruling are not relevant to the decision in the main proceedings. The tribunal de police has in fact *declared* that the tariff agreements concluded by the airlines are void under Article 85 (2) and therefore legally irrelevant. None the less it raised the *question* of the compatibility with Community law of the national provisions on approvals and the penalties attached to them.

It has hitherto been the almost invariable practice of the Court of Justice to decline to inquire into the relevance of a reference for a preliminary ruling to the decision in the main proceedings. In the judgment in *Costa* v *ENEL* cited above, the Court stated that Article 177 of the EEC Treaty is based upon a clear separation of functions between national courts and the Court of Justice and that it cannot empower the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation.

Nevertheless the doubts expressed with regard to the admissibility of the references for a preliminary ruling are based on statements made by the Court of Justice in its two judgments in *Foglia* v *Novello*. [18] In

16 — Judgment of 15 July 1964 in Case 6/64 *Flaminio Costa* v *ENEL* [1964] ECR 585.

17 — Ibid, at p. 593.

18 — Judgment of 11 March 1980 in Case 104/79 *Pasquale Foglia* v *Mariella Novello* [1980] ECR 745; judgment of 16 December 1981 in Case 244/80 *Pasquale Foglia* v *Mariella Novello* [1981] ECR 3045.

the first of those judgments the Court of Justice in fact held that it had no jurisdiction to give a ruling on the questions asked by the national court because in its view there was no genuine dispute before the national court, but only an 'expedient' of an 'artificial nature'. In the second case the Court of Justice further emphasized that whilst, according to the intended rôle of Article 177, an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and of law involved in the main action, was a matter for the national court, it was nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case had been referred to it by the national court. The Court of Justice pointed out in arriving at that finding that the duty assigned to it by Article 177 was not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. Accordingly, the Court stated that it did not have jurisdiction to reply to questions of interpretation which were submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which did not correspond to an objective requirement inherent in the resolution of the dispute.

If one were to consider those statements in isolation one might perhaps be disposed to conclude that the questions put by the tribunal de police are not relevant to its decision and therefore that the Court of Justice lacks jurisdiction to give a ruling in this case. But it must be stressed that the two judgments in *Foglia* v *Novello* concerned a particuarly 'exceptional' case,[19] in so far as a question was raised before an Italian court on the compatibility with Community law of a French legislative provision, both parties to the action were agreed on the answer, and despite that they had failed to submit the issues at stake for determination by the competent French court. In view of the exceptional nature of the underlying facts it would surely not be justified to draw from those judgments far-reaching conclusions and infer that the Court of Justice has shown a more restrictive tendency in its approach to references for preliminary rulings. Furthermore I would take the view that criminal proceedings can hardly be described as an expedient of an artificial nature.

Moreover it seems to me that the (admittedly very concise) reasoning of the tribunal de police is not necessarily contradictory. Although it first declares on its own authority that the tariff agreements between the airlines are void under Article 85 (2) of the EEC Treaty, it then raises the question of the compatibility of the French legislative provision with Community law. I do not think it automatically follows that because the tariff agreements have been held to be void the national penal provisions must necessarily be inapplicable. A penalty is laid down not for failure to apply the *agreed* tariffs but for failure to apply the tariffs *approved* by the competent minister. I cannot here go into the minutiae of the French penal legislation, but in my view it is not impossible that the question of the

19 — See U. Everling, Das Zusammenwirken des Gerichtshofes der Europäischen Gemeinschaften und der nationalen Gerichte im Vorabentscheidungsverfahren nach Artikel 177 EWGV (forthcoming).

validity of the tariff agreements under civil law and that of the validity of the penal provision may be answered differently, for instance if national law attaches a special significance to the fact of approval, as remedying defects in a legal act, or if the existence of an offence is wholly independent of the validity in civil law of one of the constituents of the offence. Whether or not that is the case is not for me to judge. That assessment of national law is a matter for the tribunal de police. However, it is clear to me that the question put by that court is not manifestly irrelevant to its final decision. It is therefore for the tribunal de police to judge for itself whether a preliminary ruling on its question is necessary to enable it to give judgment.

(c) In order to come to a definitive reformulation of the question submitted by the tribunal de police, it is further necessary to establish which provisions of Community law it seeks to have interpreted. The question which it has submitted is obviously very general in so far as it asks whether the French provisions are in accordance with Community law. However, in my opinion the aim of the question can be precisely circumscribed.

Apart from Article 84 (2), these references for a preliminary ruling are exclusively concerned with the competition rules in the EEC Treaty. Article 85 is twice referred to in the grounds of the judgments making the reference and it is pointed out that that article contains rules applying to competition between undertakings.

Moreover Article 84 (2), which lays down special rules for air transport in the context of the transport policy, is referred to merely for the purpose of stating that it does not operate as a bar to the applicability of the competition rules to air transport.

Further evidence that the tribunal de police can have contemplated only the competition rules in the EEC Treaty when it framed the question is to be found in the following facts. So far as may be ascertained from the documents which the tribunal de police has forwarded to the Court of Justice the question of the compatibility of the French provisions with Community law was raised in the main proceedings only in Case 211/84 on behalf of two accused who were subsequently discharged, René Chadoutaud and the Wagons Lits undertaking. Similarly, the only references to provisions of Community law in their pleadings in those proceedings concern the competition rules. The question of the compatibility of the French legal provisions with other provisions of Community law did not arise.

I therefore conclude that the question put by the tribunal de police must be interpreted as asking for a clarification of the incidence of the competition rules in the EEC Treaty on the French procedure concerning the approval of air tariffs. I accordingly propose that the Court of Justice should reformulate the question referred to it and base its ruling on the specific wording suggested by the Commission, which is as follows:

'Must the EEC Treaty be interpreted as prohibiting national provisions of a Member State relating to the determination of air transport tariffs where those provisions require the airlines concerned to coordinate their tariffs in advance or where compliance with such coordinated tariffs is enforced by means of a procedure for the grant of approvals by the public authorities together with criminal penalties in the event of failure to apply the approved tariffs?'

2. *Application of the competition rules to air transport*

The applicability of the competition rules to air transport as Community law now stands was questioned on two grounds. First, its application was said to be excluded by Article 84 (2) of the EEC Treaty, which provides for a special decision by the Council on provisions for sea and air transport. Secondly, Regulation No 141 was said to exclude not only the application of Regulation No 17 but also the application of Articles 85 and 86 of the EEC Treaty generally to the air transport sector.

(a) Article 84 of the EEC Treaty reads as follows:

'(1) The provisions of this Title shall apply to transport by rail, road and inland waterway.

(2) The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.'

The legal effect of Article 84 was initially disputed. There was doubt as to whether it excluded sea and air transport *solely* from the scope of Title IV on *transport* or whether it had the much more sweeping effect of excluding those forms of transport from the terms of the *EEC Treaty as a whole.*

In its judgment in the *Code du Travail Maritime* case (cited above), the Court of Justice has already rejected the view that only the provisions of the Title relating to transport and not the other provisions of the EEC Treaty are applicable to transport because there is no common market in the transport sector but only a common transport *policy.* The Court has pointed out that Article 74 refers to the objectives of the Treaty and thus to Articles 2 and 3 of the EEC Treaty, for the attainment of which the fundamental provisions applicable to the economic sphere as a whole are of prime importance. Far from involving a departure from those fundamental rules, therefore, the object of the rules relating to the common transport policy is precisely to implement them and to complement them by means of common action. Consequently, the said general rules must be applied in so far as they may possibly serve to achieve those objectives. [20]

The Court has further pointed out that Article 61 (1), by expressly providing that freedom to provide services in the field of transport 'shall be governed by the provisions of the Title relating to transport', confirms that the general rules of the Treaty must be applied in so far as they are not excluded. Furthermore, it states, Article 84 (2) provides that as regards sea transport the Council may decide whether, to what extent and by what procedure appropriate provisions may be laid down. Far from excluding the application of the Treaty to sea transport, it provides only that the special provisions of the Title relating to transport shall not automatically apply to it. Under Article 84 (2), therefore, sea transport and air transport, so long as the Council has not decided otherwise, are excluded from the rules of Title IV of Part Two of the Treaty relating to the common transport policy, but they remain, on the same basis as the other modes of transport, subject to the general rules of the Treaty.

20 — Cited above, note 11; paragraph 26 of the decision.

Following that judgment, which related to the freedom of movement of workers in the field of maritime transport, the question of the applicability of the general rules of the Treaty to sea and air transport might well have been thought to be settled. That, however, is not the case, as may be seen notably from the observations of the parties in these proceedings. Admittedly, the focus of the discussion has altered. The question now at issue is what is meant by the 'general rules' of the Treaty. In the judgment cited the Court expressly addressed itself only to Title I (free movement of goods) and Title II (free movement of persons, services and capital) of Part Two of the Treaty on the foundations of the Community. From that the inference has now been drawn that the common rules laid down in Part Three of the Treaty are not applicable to air transport.

In reply to those arguments it may be pointed out first that the Court had no reason to express its views on other parts of the Treaty in its Code du Travail Maritime judgment. Furthermore, in using the term 'general rules' the Court did not refer to any legal concept to be found in the Treaty. My view is that the Court's reference to 'general rules' embraced all the provisions of the Treaty other than the 'special provisions' of Title IV of Part Two relating to transport. This view receives additional support from the opinion of Advocate General Reischl in the same case. On the basis of an analysis of Article 61 (1) and Article 77 of the EEC Treaty he arrives at the following answer to the question of which provisions are applicable to transport:

The fact that Article 61 (1) of the EEC Treaty provides that freedom to provide services in the field of transport is to be governed by the provisions of the Title relating to transport makes it clear that the Chapter on services is not applicable to transport. Such a special provision would not have been necessary, however, if the general provisions of the Treaty did not apply to transport anyway.

Mr Reischl also discusses Article 77, a provision in the Title 'transport', in which it is provided that aids are compatible with the Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service. He states that if this is compared with Article 42 (according to which the provisions of the Chapter relating to rules on competition are to apply to production of and trade in agricultural products only to the extent determined by the Council) and if the wording of Article 77 is borne in mind, which obviously implies the application of Articles 92, 93 and 94, the conclusion must be drawn that the object of Article 77 is to exclude the application of the rules of the Treaty on competition only as regards certain aids in the transport sector. That too points clearly to the implicit assumption in the Treaty that the general provisions, which include the rules on competition and in particular those relating to aid, apply to transport.

He also points out that the Council has acted on the assumption that the competition rules are applicable to the transport sector. The fact that in Regulation No 141 exempting transport from the application of Regulation No 17, Article 1 makes Regulation No 17 inapplicable to transport generally, while Article 3 provides that Article 1 is to remain in force, as regards transport by rail, road and inland waterway, until 31 December 1965, must imply that

Article 1 also covers sea transport, and — I would add — air transport. He goes on to state that that too presupposes that the general provisions of the Treaty apply equally to that sector. If it were not so, it would appear incomprehensible that the Council should have found it necessary to lay down an exception simply for transport, based moreover only on Article 87 of the Treaty, and not Article 84 (2).

All those considerations bring me to the view that the Court's reference to 'general rules' was intended only to be contrasted with the 'special provisions' on transport.

In conclusion it may be stated that the entire Treaty, in so far as it is relevant, is, with the exception of the 'special provisions of the Title relating to transport', applicable to air transport. It thus follows that, to use the Court's words, the application of Article 85 *et seq.* of the EEC Treaty to the transport sector is not optional but obligatory for the Member States.

(b) I would reject the argument that the transport sector as a whole is exempt from the competition rules because Regulation No 17 is inapplicable to air transport and the Council has not yet adopted implementing provisions on the application of the competition rules to air transport despite the fact that the Commission has submitted to it proposals to that effect.[21] By virtue of Article 87 of the EEC Treaty the Council is to adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. Article 87 (2) (c) provides that the provisions mentioned are to be designed in particular 'to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86'.

The Council is therefore empowered to make more detailed provision for the application of the competition rules *inter alia* to air transport, but not to make them inapplicable.

The only consequence, therefore, of the fact that the Council has not adopted the 'appropriate regulations or directives' in this sector is that the Commission does not at present have the means of investigating or punishing infringements of Articles 85 and 86 of the Treaty in air transport as such. That does not mean, however, that the competition rules are wholly inapplicable but only that the Member States, rather than the Commission, are primarily responsible for ensuring that Article 85 *et seq.* of the EEC Treaty are complied with. After all, Article 88 of the Treaty provides that until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in the Member States are to rule on the permissibility of agreements, decisions and concerted practices and on abuses of a dominant position within the common market. The provisions of Articles 85 and 86 of the Treaty are, therefore, not suspended; the Member States have merely retained the competence and the obligation to ensure compliance with them.

Air transport is therefore subject to transitional rules like those which applied to all economic sectors before the entry into force of Regulation No 17.

21 — For example, the Proposal for a Council Regulation laying down the procedure for the rules on competition applying to undertakings in the air transport sector (Official Journal 1982, C 317, p. 3).

(c) I may deal briefly with the view that the special rules contained in Article 90 (2) exempt the airlines from the requirements of the competition rules in the Treaty.

Article 90 of the Treaty reads as follows:

'(1) In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

(2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

(3) The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.'

The article therefore begins by establishing the principle that the competition rules are applicable to public undertakings, which may include airlines. However, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition only in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Whether that means that Article 90 (2) of the Treaty allows the airlines to be given special treatment is a question which can be left open because it has been established in the decisions of the Court that as Community law now stands that Treaty provision cannot 'create individual rights which the national courts must protect'.[22]

Should the Court nevertheless wish to decide the question of whether Article 90 (2) of the EEC Treaty is applicable to the air tariff agreements in this case, then the following would need to be said. In order for it to be established that that provision applies to this case, it is necessary for it to be *shown*[23] that compliance with the Treaty provisions would prevent the undertakings concerned from carrying out their tasks. It is therefore necessary for the provision to be 'interpreted strictly'.[24] Before a departure from the Treaty rules can be sought, it is necessary for the procedures laid down by the Treaty to be exhausted, including the procedure for an exemption under Article 85 (3). Only if no other procedure provided for by the Treaty enables the conflicting interests to be reconciled can Article 90 (2) come into play.[25]

The United Kingdom denies that those conditions are met in the case of the air

22 — See the judgment of 14 July 1971 in Case 10/71 *Ministère public of Luxembourg* v *M. Hein, née Muller, and Others* [1971] ECR 723, at p. 730; a suggestion to the contrary in the judgment of 27 March 1974 in Case 127/73 *Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs* v *SV SABAM and NV Fonior* [1974] ECR 313, at p. 318, appears to have been overruled by the judgment of 30 April 1974 in Case 155/73 *Giuseppe Sacchi* [1974] ECR 409 and the judgment of 10 March 1983 in Case 172/82 *Syndicat national des fabricants raffineurs d'huile de graissage and Others* v *Groupement d'intérêt économique 'Inter-Huiles' and Others* [1983] ECR 555, at p. 567.

23 — Case 155/73, *Sacchi*, cited above, at paragraph 15 of the decision.

24 — See Opinion of Advocate General Roemer in Case 82/71 *Pubblico Ministero della Repubblica Italiana* v *SAIL* [1972] ECR 119, at p. 146.

25 — For the developments in the academic discussion, see I. Pernice, Note 53 to Article 90 of the EEC Treaty, in Grabitz, Kommentar zum EWG-Vertrag, Munich, 1983.

tariff agreements and I agree that it is extremely doubtful. Since even coordinated tariffs may be exempted from the prohibition on cartels under Article 85 (3) of the Treaty, I am unable to see how the application of Article 85 to the fixing of air tariffs can be *shown to be incompatible* with the tasks assigned to the airlines. The development of air transport on domestic routes in the United States of America, on North Atlantic routes and in flights between the Netherlands and the United Kingdom even make it appear questionable whether air transport as a whole would be in any way hindered by increased competition, which would in any case be insufficient to justify the application of Article 90 (2) of the Treaty.

(d) If then it is established that the competition rules in the Treaty are applicable to air transport and hence to the tariff agreements between the airlines, it will also be seen that those agreements cannot be justified by the fact that they are presupposed or even made obligatory by national legislation. Article 85 of the Treaty applies in terms to agreements between undertakings and decisions by associations of undertakings. As the Court decided in its judgment in Bureau national interprofessionnel du cognac,[26] 'the legal framework within which such agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition and in particular Article 85 of the Treaty are concerned.'

26 — Judgment of 30 January 1985 in Case 123/83 *Bureau national interprofessionnel du cognac* v *Guy Clair* [1985] ECR 391.

3. *Consequences of the applicability of the competition rules to the air transport sector*

I now turn to a consideration of the question of the effects on the rights and obligations of the Member States of the applicability of the competition rules to the air transport sector. As we have already seen, the objective laid down in Article 3 (f) of the Treaty, together with Article 85 (1), requires that the following should be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions. In addition it has been established that those provisions also apply to the transport sector, including air transport.

Those provisions concern primarily only the conduct of undertakings and not laws or regulations adopted by the Member States. None the less, as the Court has stated in a line of decisions which I think may now be regarded as 'established', Member States are obliged by the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of the existing or future measures in implementation thereof; nor may they introduce or maintain in force measures, even in the form of laws or regulations, which may render ineffective the

competition rules applicable to undertakings. [27]

Applied to these references for a preliminary ruling, the second paragraph of Article 5 of the Treaty therefore requires the Member States not to adopt or maintain in force any measures which might enable the airlines to escape from the constraints imposed by the competition rules in the Treaty, or, more specifically, to coordinate their flight tariffs, in so far as the conditions for an exemption under Article 85 (3) are not met.

If we now turn to the relevant provisions of the French code de l'aviation civile it will first be observed that they do not even mention, still less prescribe, tariff agreements. The only possible reference is in the third paragraph of Article R 330-9, which provides that tariff proposals may be submitted either directly by the undertaking itself or through a trade association recognized by the Minister.

Although that provision does not lay down either a right or an obligation to conclude tariff agreements it does nevertheless make it possible to submit tariff proposals which may have been coordinated within a trade association.

A definitive assessment of those provisions of the French legislation cannot, therefore, be made solely on the basis of their wording. In order to appreciate their full significance it is consequently necessary to examine them in the light of the provisions of the international agreements, which generally provide for tariff agreements, of the actual conduct of the airlines and of the practical application of the provisions by the national approving authorities. However, the Court of Justice may not carry out an inquiry into those various aspects in the context of proceedings for a preliminary ruling under Article 177 of the Treaty; such an inquiry is for the national court.

As was stated in the judgments making the reference and in the explanations of parties before the Court of Justice, the tribunal de police considers it to be established that tariff agreements are being applied and that the practice of the French authorities in granting approvals has been not only to tolerate such agreements but effectively to encourage them. Whether or not that finding is correct, the Court of Justice must take it as the basis for its answer to the question submitted to it.

Nevertheless, a practice which consists in at least tolerating or encouraging such agreements need not necessarily be contrary to the competition rules in the Treaty since Article 85 (3) itself provides for the possibility of the prohibition in Article 85 (1) being declared inapplicable. In order to be exempted under that provision, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and must not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

It cannot be ruled out in advance that Article 85 (3) may be applicable to air tariff

27 — Judgment of 10 January 1985 in Case 229/83 *Association des Centres distributeurs Édouard Leclerc and Others* v *Au Blé Vert SARL and Others* [1985] ECR 1, at paragraph 14 of the decision; judgment of 29 January 1985 in Case 231/83 *Henri Cullet* v *Centre Leclerc Toulouse and Others* [1985] ECR 305, at paragraph 16 of the decision; judgment of 13 February 1969 in Case 14/68 *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1, at p. 14; judgment of 16 November 1977 in Case 13/77 *GB-INNO-BM* v *Vereniging van de Kleinhandelaars in Tabak* [1977] ECR 2115, at pp. 2144-2145.

agreements and that coordinated tariffs may therefore be exempted from the prohibition in Article 85 (1).

However, it must be borne in mind in this connection that under Article 85 (3) (b) an exemption cannot be granted if it is possible for competition to be eliminated in respect of a substantial part of the services in question. In this regard it is significant that competition is also restricted by another factor, namely that since Article 61 (1) of the Treaty provides that freedom to provide services in the field of transport is to be governed by the provisions of the Title relating to transport, but such provisions have not yet been laid down for air transport, in that field the freedom to provide services has not yet been realized. The access of airlines to the market continues, therefore, to be restricted. If price competition is eliminated as well, the extent of the remaining competition may be so limited that an exemption is out of the question.

Under Article 88 of the Treaty, it is for the Member States to grant any exemptions until the appropriate implementing provisions have been adopted by the Community. That provision refers in that regard to national rules of competence and procedure. It therefore falls upon the Member States to create the procedural and administrative framework for the application of the competition rules by their national authorities. As the Court has held,[28] those national authorities include courts especially entrusted with the task of applying domestic competition law or of ensuring the legality of its application by the administrative authorities.

28 — Judgment of 30 January 1974 in Case 127/73 *Belgische Radio en Televisie and Another* v *SV SABAM and Another* [1974] ECR 51, at p. 62 *et seq.*

Two consequences follow from those considerations:

In principle the Member States are at liberty to determine the competent national authorities under Article 88 of the Treaty. They may entrust the enforcement of the competition rules to the authorities responsible for competition, for instance, or alternatively to other authorities, for example — in the aviation field — the air transport authorities.

Since the national courts must review the legality of the way in which the administrative authorities apply the competition rules, they must also be in a position to review decisions on the exemption of tariff agreements under Article 85 (3) of the Treaty. That, however, presupposes, as has been pointed out in particular by the United Kingdom's representative, that the exemptions are granted in the form of express decisions containing a statement of reasons. In order for an effective judicial review of such administrative decisions to be possible, it is not sufficient for exemptions to be granted by implication. Thus, for instance, the mere fact that air tariffs have received government approval cannot be regarded as constituting an exemption under Article 85 (3) where there has been a tariff agreement but the approving authority has not expressly referred to the possibility of an exemption. That applies in particular in a case where, as here, proposed tariffs are deemed to be approved if the Minister does not make an objection within a period of one month (see Article R 330-9).

In such a case there is no valid declaration of an exemption under Article 85 (3) of the Treaty.

From these remarks it follows that the obligations of the Member States under the second paragraph of Article 5 of the Treaty in conjunction with Article 3 (f), Article 85 and Article 88 are sufficiently precise even as Community law now stands. It is therefore not necessary for those provisions to be rendered more specific by means of a common competition policy in the air transport sector before they can have effect.

That is the crucial difference between the aforementioned Case 229/83 (*Édouard Leclerc* v *Au Blé Vert*) where the Court of Justice was asked to rule upon *purely national* systems and practices in the book sector, and this case, which concerns agreements in *international/intra-Community* air transport. As regards the book sector, the Court of Justice held that, as Community law stood, there were no sufficiently precise obligations incumbent on the Member States because of the absence of a competition policy. Furthermore the provisions examined in Case 229/83 in fact did not require agreements between undertakings but were instead based on *unilateral* action by the publisher on which national measures conferred general validity. In this case, however, tariff *agreements* are presupposed or encouraged by the national rules.

Even though the Court of Justice did not actually express it as its own view in its judgment in Case 229/83 — and in its remarks on Article 36 of the EEC Treaty it distances itself somewhat from such a view [29] that decision is also characterized by a particularity which makes it inappropriate to transpose its cautions ruling uncritically to other economic areas, namely the fact that books are a cultural medium. In his Opinion, Advocate General Darmon expressly referred to that fact as distinguishing books from other economic goods. Furthermore, even the Court of Justice, in any event in its remarks on Article 85 of the Treaty, did not directly contradict that view, which at least goes to explain why there is not yet a Community competition *policy* for the book trade. By contrast, the services provided by airlines are purely economic services with no special cultural implications comparable to those that may exist for books.

4. *Provisional validity of 'pre-existing agreements'*

The United Kingdom has proposed that existing tariff agreements between airlines should be regarded as provisionally valid even though the competition rules are in principle applicable in this sector, in particular because it has hitherto been unclear who has competence to grant exemptions under Article 85 (3) of the Treaty. The principle of legal certainty requires that agreements already in existence should not be affected.

The Commission opposes that view. In particular it considers that the principles laid down by the Court in its judgment in the *De Geus* case (Case 13/61, cited above) cannot be applied here because of the special features of that case. The specific circumstances of the *De Geus* case — namely, agreements concluded before the entry into force of the EEC Treaty, the duty to notify prior agreements

29 — Paragraph 30 of the decision.

in accordance with Article 5 of Regulation No 17, which had come into force before the commencement of the proceedings — militate against a transposition to this case.

In the *De Geus* case, the Court confirmed that in principle Article 85 was applicable from the time of the entry into force of the Treaty. It stated that Articles 88 and 89 of the Treaty, in conferring powers on the national authorities and on the Commission respectively for the application of Article 85, presupposed that Article 85 was applicable from the time of the entry into force of the Treaty.

However, the Court's judgment went on to state that Articles 88 and 89 were not of such a nature as to ensure the complete and consistent application of Article 85. Article 88 envisaged a decision by the authorities of the Member States on the permissibility of agreements only where the latter were submitted for their approval within the framework of the laws relating to competition in their respective countries. Article 89, while conferring on the Commission a general power of surveillance and control, enabled it only to take note of possible violations of Articles 85 and 86 without giving it the power to grant declarations under Article 85 (3). Neither of those two articles, moreover, contained transitional provisions dealing with agreements existing at the time when the Treaty came into force. In general it would be contrary to the general principle of legal certainty to render agreements automatically void before it was even possible to tell which were the agreements to which Article 85 as a whole applied.

Undoubtedly it may be difficult to determine whether agreements are valid when agreed tariffs have been approved by the national authorities without there having been any express exemption under Article 85 (3) of the Treaty. This is not, however, a question which the Court need answer because it was not submitted to it. In fact the tribunal de police has already considered the validity of existing agreements and held that they were void. The question at issue here is whether the failure to comply with air tariffs which have been given official approval but are based on tariff agreements contrary to Community law should be punishable as an offence.

At this point it is worth stressing once again that the proceedings which led to this reference for a preliminary ruling are criminal proceedings. Without wishing to enter into a detailed examination of the general principles of criminal law, I would state that the principle of legal certainty in this field requires that the validity of penal provisions should be subject to strict criteria. It may still be appropriate, for reasons of legal certainty, to regard agreements contrary to Community law as provisionally valid under civil law, but it cannot be permissible for compliance with agreements contravening Community law to be made obligatory by means of criminal penalties, even when the agreements are enforced indirectly, as in this case, in the sense that agreements prohibited by Community law form the basis for tariffs approved by the national authorities and thereby placed under the protection of the criminal law. In such a case it is the duty of the courts to take up the defence of the citizen.

The opposite view would not only mean that Member States might permit private undertakings to escape from the constraints of the competition rules in the EEC Treaty. Not only would the competition rules applying to undertakings be deprived of

practical effect but it would be the provision of criminal penalties that actually ensured the effectiveness of tariff agreements prohibited by Community law.

This all confirms the conclusion that at least in the *criminal* field, provisions must be held to be inapplicable if they lay down penalties for failure to observe tariffs which are themselves incompatible with the provisions of Article 85 of the Treaty. I may leave open the question whether I would propose a different answer to the Court of Justice in a case concerned merely with the validity of such agreements in *civil law*, for example, on the basis of the principles formulated by the Court in the *second Defrenne* case,[30] because that question has not arisen in the context of these proceedings.

5. *The special case of airlines from non-member countries*

The Netherlands Government has further indicated that the case of an airline registered in a non-member country, such as Air Lanka, which is the subject of the proceedings in Case 213/84, may require different treatment.

If the tariffs officially approved in that case were also based on tariff agreements, the answer to that particular question is already to be found in the Court's case-law, in particular the judgment of 25 November 1971 in the *Béguelin Import* case,[31] on the applicability of Article 85 of the EEC Treaty to an exclusive distribution agreement one of the signatories to which was registered in a non-member country; in that case the Court stated as follows:

'To be incompatible with the common market and prohibited under Article 85, an agreement must be one which may affect trade between Member States and have as its object or effect an impediment to competition within the common market. The fact that one of the undertakings which are parties to the agreement is situate in a third country does not prevent application of that provision since the agreement is operative on the territory of the common market.'

Advocate General Mayras expressed a similar view in his opinion in *ICI* v Commission,[32] in which he concluded after an extensive review of comparative law that the Commission had the power to impose fines for infringements of Article 85 even where the undertakings concerned had their registered offices outside the Community.

Furthermore, according to the judgment of the Court in *Tepea* v *Commission*,[33] the fact that one of the parties to an agreement is resident in a non-member country does not preclude the application of Article 85 of the Treaty provided only that the agreement is operative on the territory of the Common market, although such an agreement falls within the prohibition in Article 85 if it has an appreciable effect on trade between Member States.

30 — Judgment of 8 April 1976 in Case 43/75 *Gabrielle Defrenne* v *Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, at p. 480.

31 — Judgment of 25 November 1971 in Case 22/71 *Béguelin Import Co. and Others* v *S.A.G.L. Import Export and Others* [1971] ECR 949, at p. 959 *et seq.*

32 — Opinion of 2 May 1972 in Cases 48, 49 and 51 to 57/69 *Imperial Chemical Industries Ltd and Others* v *Commission* [1972] ECR 619, p. 665 *et seq.*

33 — Judgment of 20 June 1978 in Case 28/77 *Tepea BV* v *Commission* [1978] ECR 1391, at p. 1416.

The conclusion to be drawn is, therefore, that tariff agreements to which airlines registered outside the Community are parties are covered by the prohibition in Article 85 of the Treaty if those agreements have appreciable effects on Community territory.

6. *A special issue: flights to non-member countries*

There remains a separate problem which arises from the fact that air transport is governed by a system of bilateral and multilateral international agreements which often provide for or even require tariff agreements between the airlines. In so far as the international agreements in this case were concluded between the Member States before the entry into force of the EEC Treaty, those agreements were superseded by the entry into force of the EEC Treaty. Thus the Court of Justice held in an early case, *Commission* v *Italy*,[34] that in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force.

However, the legal position is different in the case of international agreements concluded with non-member States before the entry into force of the EEC Treaty because according to general principles of international law the Member States of the Community were not able to absolve themselves from their obligations towards non-member countries by concluding the EEC Treaties. The first paragraph of Article 234 of the Treaty therefore reflects a general principle of international law by providing that:

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

This concession to the rights of non-member States does not, however, conclude the matter. The second paragraph of Article 234 of the Treaty imposes the following obligation on the Member States of the Community:

'To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.'

What conclusions are to be drawn from those provisions for the purposes of these proceedings?

In the first place it must be stated that in the case of agreements concluded before the entry into force of the EEC Treaty — or, in the case of the newer Member States, before their accession to the EEC[35] — the rights of non-member countries and the obligations of Member States continue to exist even if they are not compatible with the EEC Treaty (see Case 10/61, *supra*).

If such 'pre-existing agreements' do apply to the air services at issue before the tribunal de police of Paris, that court will first need to examine whether the 'rights of non-member countries' or 'duties of the Member State' extend to the upholding or furthering of air tariff agreements or indeed to the imposition of criminal penalties for infringements of national measures fixing tariffs in accordance with such agreements.

34 — Judgment of 27 February 1962 in Case 10/61 *Commission of the European Economic Community* v *Government of the Italian Republic* [1962] ECR 1, at p. 10.

35 — See Article 5 of the Act of Accession of 22 January 1972 for Denmark, Ireland and the United Kingdom and Article 5 of the Act of Accession of 28 May 1979 for Greece.

But even if that is so, the second paragraph of Article 234 of the Treaty requires the matter to be taken further. That paragraph puts the Member States under a legal obligation to eliminate incompatibilities with the EEC Treaty. It requires the Member States to take all appropriate steps (and I would emphasize that these are steps permissible under international law) to eliminate any incompatibilities that are found to exist. Those appropriate steps include for instance the opening of negotiations with a view to amending an international air transport agreement or if necessary denunciation of the agreement [36] if the non-member country is not prepared to amend the agreement.

If the tribunal de police concludes that 'pre-existing agreements' provide for tariff agreements and their enforcement by means of criminal penalties, it will further have to examine whether the Member State in question has fulfilled its obligations under Article 234 of the Treaty. It is true that the second paragraph of that article does not require the Member States to *bring about* the removal of incompatibilities between pre-existing agreements and the EEC Treaty — this may prove not to be legally possible if the non-member country is not prepared to amend the agreement and if renunciation is also not possible — but it is obliged to '*take all appropriate steps*' to bring about an amendment.

Only if it is established that the Member State has tried without success to amend the pre-existing agreements can that the Member State be held to have retained its powers to impose penalties on operators who fail to comply with air tariff agreements which are prohibited by Community law and the air tariffs officially approved on the basis of those agreements.

In that connection it will also be relevant that the French Government has stated in reply to a question put to it by the Court of Justice that the question of the compatibility of its international obligations with the EEC Treaty has not arisen as far as it is concerned.

In general the scope of the derogation contained in the first paragraph of Article 234 of the EEC Treaty should not be very wide 27 years after the entry into force of the Treaty if the Member States have taken the steps required of them by the second paragraph of Article 234. If, however, they have not fulfilled their obligations under that paragraph they cannot rely upon their omission, which is contrary to Community law, in order to impose penalties on operators who themselves have not been prepared to submit to air tariff agreements contrary to Community law and consequential measures of the national approving authorities.

That result does not in any way cast doubt on the validity of the pre-existing agreements in international law but would merely limit their enforceability at the national level and hence within the Community as a whole. That may indeed give rise to a liability under international law on the part of a Member State which has done nothing to eliminate incompatibilities between its treaty obligations.

36 — For example, the agreements cited as examples in footnotes 5 and 6 above, that concluded on 4 October 1955 between France and the Federal Republic of Germany and the International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services of 10 July 1967, lay down a period of notice for denunciation of 12 months.

C — In conclusion I propose that the Court of Justice should answer the question submitted to it by the tribunal de police of Paris as follows:

National provisions which prescribe official approval for air tariffs and require or permit coordination of such tariffs between the airlines concerned prior to submission for approval are contrary to the Treaty establishing the European Economic Community, in particular the second paragraph of Article 5 in conjunction with Article 3 (f) and Article 85 — and, where appropriate, Article 90 — in so far as such prior coordination has not been exempted from the prohibition on cartels under Article 85 (3).

It is for the national court to ensure that such provisions are not applied. It should apply them only if obligations arising under air transport agreements between Member States and non-member countries covered by Article 234 of the EEC Treaty require the Member State concerned to act in a manner contrary to Community law and if that Member State has not hitherto found it possible to bring its agreement with a non-member country into conformity with Community law or denounce the agreement.

ANNEX

Extract from the French code de l'aviation civile

Article L 330-3

Le transport des passagers ne peut être effectué que par des entreprises agrées à cet effet par le ministre chargé de l'aviation civile.

Ces entreprises doivent soumettre à son approbation préalable:

(i) Leurs programmes généraux d'achat et de location de matériel volant;

(ii) Leurs programmes d'exploitation comportant en particulier l'indication des types de matériel normalement utilisés sur chacun des services de passagers prévus dans ces programmes.

Les tarifs sont soumis à l'homologation du ministre chargé de l'aviation civile.

Ne sont pas soumis aux obligations du présent article les transports d'au plus six passagers effectués à l'aide d'aéronefs dont le poids est inférieur à un maximum fixé par arrêté du ministre chargé de l'aviation civile.

Article R 330-9

(Décret n° 76-711 du 23 juillet 1976, article 1er)

Les entreprises agréées doivent présenter au ministre chargé de l'aviation civile, en vue de l'homologation de leurs tarifs, des propositions détaillées par ligne et, à l'intérieur de chaque ligne, par classe. Ces propositions doivent préciser également les conditions générales de transport ainsi que les réductions de tarifs que ces entreprises envisagent d'appliquer au cours de certaines périodes, ou au profit de certaines catégories de passagers.

Ces dispositions s'appliquent également aux entreprises étrangères de transport aérien autorisées à embarquer ou débarquer des passagers par un vol régulier ou non régulier sur le territoire de la République française, sauf en ce qui concerne les transports prévus au dernier alinéa de l'article L 330-3.

Les propositions peuvent être présentées soit par les entreprices directement, soit par l'intermédiaire d'une association professionnelle agréée par le ministre.

A l'expiration d'un délai de un mois à compter de la réception des propositions, les tarifs sont considérés comme homologués si le ministre n'a pas fait connaître son opposition.

Article R 330-15

(Décret n° 73-331 du 14 mars 1973, article 1er)

Sans préjudice de l'application des autres sanctions prévues par la législation en vigueur, et en particulier de celles qui sont édictées par l'article L 330-4, sera punie d'un emprisonnement de dix jours à un mois et d'une amende de 600 à 1 000 FF ou de l'une de ces deux peines seulement, toute personne qui aura contrevenu aux prescriptions des articles L 330-1, L 330-2 ou L 330-3, et notamment:

(1) Aura exercé une activité de transport aérien sans avoir obtenu l'autorisation prévue à l'article L 330-1 ou sans avoir respecté les conditions ou limitations qui lui avaient été imposées dans ladite autorisation;

(2) Aura, contrairement à l'article L 330-3, omis de soumettre à l'homologation les tarifs qu'elle pratique ou pratiqué des tarifs différents de ceux qui avaient été homologués.

(Décret no 80-170 du 18 février 1980, article 2.) 'Sera punie de la même peine, sans préjudice de l'application des autres sanctions prévues par les conventions internationales ou par la législation en vigeur, toute personne qui aura contrevenu aux prescriptions des articles R 330-3, R 330-7 (alinéa 2), R 330-9 (alinéa 2), R 330-11 ou des règlements pris en application de l'article R 330-4.'

En cas de récidive, la peine d'emprisonnement pourra être portée à deux mois et celle d'amende à 2 000 FF.