OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 16 November 2006 [1]

I — Introduction

1. On 5 November 2002, in proceedings brought by the Commission under Article 169 of the EC Treaty (now Article 226 EC), the Court delivered eight judgments against Austria, [2] Belgium, [3] Denmark, [4] Finland, [5] Germany, [6] Luxembourg, [7] United Kingdom [8] and Sweden [9] respectively, in which it held that, by negotiating, applying and/or keeping in force certain international commitments with the United States of America concerning air transport, those Member States had failed to fulfil their obligations under Article 5 of the EC Treaty (now Article 10 EC) and Article 52 of the EC Treaty (now, after amendment, Article 43 EC), and under Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services [10] and Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems, [11] as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 [12] (the 'judgments of 5 November 2002'). [13]

2. In the present proceedings, the Commission seeks from the Court a similar judgment against the Netherlands.

1 — Original language: Italian.
2 — Case C-475/98 [2002] ECR I-9797.
3 — Case C-471/98 [2002] ECR I-9681.
4 — Case C-467/98 [2002] ECR I-9519.
5 — Case C-469/98 [2002] ECR I-9627.
6 — Case C-476/98 [2002] ECR I-9855.
7 — Case C-472/98 [2002] ECR I-9741.
8 — Case C-466/98 [2002] ECR I-9427.
9 — Case C-468/98 [2002] ECR I-9575.
10 — OJ 1992 L 240, p. 15.
11 — OJ 1989 L 220, p. 1.
12 — OJ 1993 L 278, p. 1.
13 — In Case C-466/98 *Commission* v *United Kingdom*, the action was limited to infringement of Article 52 of the EC Treaty.

II — Legislative background

3. The charges made by the Commission against the Netherlands relate only to the infringements found by the Court in its judgments of 5 November 2002.

4. In addition to infringement of Articles 5 and 52 of the EC Treaty, the Commission alleges that the Netherlands failed to fulfil its obligations as a Member State under certain Council regulations adopted in the air transport sector. It is therefore necessary to give a brief account of the legislative background to the facts of the case.

5. With a view to the gradual establishment of the internal transport market, in 1987, 1990 and 1992 the Council adopted, on the basis of Article 84(2) of the EC Treaty (now Article 80(2) EC),[14] three legislative 'packages' designed to uphold the freedom to provide air transport services and, at the same time, the application of the Community competition rules in that sector.

6. Adopted as part of the 'third package', designed to achieve complete liberalisation of intra-Community air transport,[15] Regulation No 2409/92 defines the criteria and procedures to be observed in determining fares and rates for air transport services carried out entirely within the Community (Article 1(1)).

7. By virtue of Article 1(2)(a), the regulation does not apply to fares and rates for passengers and goods carried by non-Community air carriers, subject to the exceptions laid down in Article 1(3), which states that '[o]nly Community air carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products'. As will be shown more clearly below, in its judgments of 5 November 2002, the Court took the view, on the basis of a combined reading of those provisions, that Regulation No 2409/92, albeit indirectly but definitely, prohibited air carriers of non-

14 — It will be remembered that, under Article 80(1) EC, the provisions of Title V of the Treaty on transport are to apply only to transport by rail, road and inland waterways. Sea and air transport, on the other hand, are subject to special rules. Under Article 80(2), the Council may, by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be adopted in those sectors.

15 — In addition to Regulation No 2409/92, the third package included Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1) and Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8).

member countries operating in the Community from introducing new products or fares at lower rates than those existing for identical products and that, by following that course, the Community legislature had limited the freedom of those carriers to set fares and rates when operating on intra-Community routes under their fifth-freedom rights. Consequently, according to the Court, the Community has acquired, as far as necessary under Article 1(3) of Regulation No 2409/92, exclusive competence to enter into commitments with non-member countries relating to that limitation of the right of non-Community carriers to set fares and rates. [16]

8. By virtue of Article 12 thereof, Regulation No 2409/92 entered into force on 1 January 1993.

9. In addition to the measures contained in the abovementioned legislative packages, the Community legislature has adopted a number of regulations governing specific aspects of the air transport sector.

10. In particular, Regulation No 2299/89 establishes a code of conduct for computerised reservation systems. Under Article 1, it applies to computerised reservation systems ('CRSs'), which include air transport services, where they are made available and/or used within the territory of the Community regardless of the status or nationality of the system vendor, the source of the information used or the location of the relevant central data-processing unit and the geographical location of the airports between which air transport is carried out.

11. As will be seen below, in its judgments of 5 November 2002, the Court considered that, by virtue of Articles 1 and 7 of that regulation, it applies, subject to reciprocity, to nationals of non-member countries where they offer for use or use a CRS in Community territory and that, by the effect of that regulation, the Community thus acquired exclusive competence to contract with non-member countries the obligations relating to CRSs offered for use or used in its territory. [17]

16 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraph 124.

17 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraphs 128 and 129.

III — Background to the application and facts

A — *The bilateral agreement between the Netherlands and the United States of America*

12. Relations between the Netherlands and the United States of America regarding air transport are governed by a bilateral agreement initialled on 3 April 1957 ('the 1957 Agreement'). That agreement was subsequently amended and supplemented, first by an exchange of letters on 25 November 1969 and thereafter by three separate protocols in 1978, 1987 and 1991.

13. It appears from the file that, in 1992, the United States of America decided to propose to various European States that they conclude with it a bilateral open skies agreement. An agreement of that type should, on the one hand, facilitate alliances between United States and European carriers and, on the other, comply with various criteria laid down by the United States Government such as free access to all routes, the grant of unlimited route and traffic rights, determination of prices on the basis of a system known as 'double disapproval' for air routes between the contracting parties, and the possibility of 'code sharing'.

14. On 14 October 1992, the Netherlands and the United States of America exchanged notes concerning their consultations in Washington of 1 to 4 September 1992 ('the 1992 exchange of notes'), during which a consensus had been reached regarding the changes to be made to the text of the 1957 Agreement and to the 1978 Protocol.

15. In 1993 and 1994, the United States of America intensified its efforts to conclude bilateral air transport agreements, in accordance with its open skies policy, with the largest possible number of European States.

16. In a letter dated 17 November 1994, sent to the Member States, the Commission drew their attention to the possible negative impact of such bilateral agreements for the Community and took a position to the effect that agreements of that kind could affect the Community's internal rules. It added that the negotiation of such agreements could be conducted effectively and in a legally valid manner only at Community level.

B — *The Court's judgments of 5 November 2002*

17. It is appropriate briefly to set out the principles laid down by the Court in its judgments of 5 November 2002, which constitute the case-law relied on by the Commission in support of its application.

18. By eight separate applications, all lodged on 18 December 1998, the Commission commenced proceedings before the Court of Justice against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany. In its applications, under Article 169 of the EC Treaty, it alleged various infringements of Community law deriving from the conclusion by those States of bilateral agreements with the United States of America concerning air transport. In particular, the defendant States, with the exception of the United Kingdom, were accused of:

— having concluded with the United States of America, between 1995 and 1996, particularly liberal agreements on air transport ('open skies' agreements) in breach of the principles governing the division of external competences between the Community and the Member States;

— in the alternative, having infringed, as the case may be, the second paragraph of Article 234 of the EC Treaty (now the second paragraph of Article 307 EC) or Article 5 of the EC Treaty through failure to do everything possible to render fully compliant with Community law the agreements concluded with the United States of America prior to the entry into force of the EC Treaty or to the adoption of the Community legislation on air transport, and in particular the third legislative package.

19. All the defendant States were also accused of:

— having infringed Article 52 of the EC Treaty by inserting or maintaining in bilateral agreements with the United States of America a so-called 'nationality clause' which in practice allowed each party to withhold the rights provided for by those agreements from air carriers designated by the other contracting State but not owned or controlled by nationals of that State.

20. It should be remembered that the Netherlands intervened in all eight cases.

21. With regard to the first charge brought by the Commission against seven of the eight defendant Member States, concerning infringement of the external competence of the Community, the Court observed first of all that, although Article 80(2) EC may be used by the Council as a legal basis for conferring on the Community the power to conclude an international agreement in the field of air transport in a given case, it cannot be regarded as in itself establishing a Community competence in that field. [18]

22. Secondly, the Court pointed out that, in its Opinion 1/76, [19] it had stated that the competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that the participation of the Community in the international agreement is necessary for attaining one of the Community's objectives, and that it subsequently made it clear, in Opinion 1/94, [20] that such a case arises where internal competence may be effectively exercised only at the same time as the external competence, in other words when the conclusion of an international agreement is necessary in order to attain certain objectives of the Treaty that cannot be attained by establishing autonomous rules. However, the Court held that such circumstances were not present in the cases before it. [21]

23. Thirdly, the Court examined the possibility of recognising Community competence to conclude agreements with non-member countries in the air transport sector by virtue of the principles laid down in the *AETR* judgment. [22]

24. As will be remembered, in that judgment the Court held that each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-mem-

18 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraph 81.

19 — Opinion of the Court of 26 April 1977 [1977] ECR 741, paragraphs 3 and 4.

20 — Opinion of the Court of 15 November 1994 [1994] ECR I-5267, paragraph 89.

21 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraphs 82 and 83.

22 — Case 22/70 *Commission* v *Council* [1971] ECR 263.

ber countries affecting the whole sphere of application of the Community legal system. [23] According to the Court, those principles also applied in the cases before it because, if the Member States were free to enter into international commitments affecting the common rules adopted on the basis of Article 80(2) EC, that would jeopardise the attainment of the objective pursued by those rules and would thus prevent the Community from fulfilling its task in the defence of the common interest. [24]

25. The Court went on to examine whether the international commitments assumed by the defendant Member States could have an impact on the Community provisions adopted in relation to air transport and relied upon by the Commission. It concluded from its examination that that interference existed only with regard to the provisions of Regulations Nos 2409/92 and 2299/89 and that, as from the entry into force of those measures, the Member States could no longer enter into or keep in force, notwithstanding renegotiation of the agreements at issue, international commitments regarding, on the one hand, the rates and fares charged on intra-Community routes by carriers of non-member countries and, on the other hand, the CRSs offered or used within their respective national territories. [25]

26. Therefore, the Court declared that, by entering into or maintaining in force such commitments with the United States of America, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany had infringed the external competence of the Community.

27. As regards the Commission's second charge against all the defendant Member States, concerning alleged infringement of the provisions on the right of establishment, the Court held that the clauses in the contested agreements granting the United States of America the right to withdraw, suspend or limit traffic rights in cases in which the air carriers designated by each defendant Member State were not owned by that Member State or nationals of that State were contrary to Article 52 of the EC Treaty, in that they prevented Community airlines

23 — Paragraphs 16 to 18 and 22.

24 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraphs 105 and 106.

25 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraphs 114 to 137. As regards Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), which applies, subject to reciprocity, to air carriers of non-member countries, the Court took the view that although the Community has, since the entry into force of that regulation, enjoyed exclusive competence to conclude agreements in that area with non-member countries, in that case the Commission had not identified the international commitments entered into by the Member States concerned which were liable to affect that regulation.

established in those Member States, whose ownership and effective control was vested in a Member State other than that of their establishment or the nationals thereof, from benefiting from national treatment in the host Member State. [26]

28. Therefore, the Court held that, by including such clauses in the contested agreements, the eight defendant Member States had failed to fulfil their obligations under Article 52 of the EC Treaty.

C — Commission and Council initiatives following the Court's judgments of 5 November 2002

29. On 19 November 2002, the Commission published a communication on the consequences of the Court's judgments of 5 November 2002 for European air transport policy. [27] In that communication, the Commission examined the external relations of the Community in the air transport sector, set out the inferences which in its opinion should be drawn from the abovementioned judgments and set out the guidelines and principles underlying Community external policy in the sector in question. In particular, the Commission stated in paragraph 38 of that communication:

'In so far as other bilateral air services agreements cover the same issues as the "open skies" agreements in question, they too will not be in conformity with Community law. This not only applies to other agreements with the United States, which have not yet been the subject of Court proceedings, but for all bilateral air services agreements that contain a similar nationality clause or which have infringed Community exclusive external competence.'

30. It is clear from the file that, in parallel with the communication of 19 November 2002, the Commission sent all the Member States a letter calling on them to give effect to the denunciation clauses contained in their agreements with the United States of America. That letter was sent to the Netherlands on 25 November 2002. The Commission repeated its call for the agreement between the Netherlands and the United States of America to be denounced in two

26 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraphs 147 to 156.

27 — COM(2002) 649 final.

subsequent letters sent to the Netherlands Government on 30 July 2004 and 10 March 2005.

31. On 26 February 2003, the Commission adopted a new communication on relations between the Community and third countries in the field of air transport, [28] in which it reiterated the need to 'bring the relationship between the Member States and the United States into conformity with Community law'.

32. So that the judgments of 5 November 2002 could be given effect, an agreement was reached at the Council meeting of 5 and 6 June 2003 on the adoption of a package of measures concerning external Community aviation policy. That package included:

— a Council decision authorising the Commission to undertake negotiations with the United States of America in the air transport sector; [29]

— a Council decision authorising the Commission to open negotiations with non-member countries regarding the ownership and control of air carriers and other questions falling within the exclusive competence of the Community;

— a 'comprehensive approach' to a proposed regulation of the European Parliament and of the Council concerning the negotiation and application of agreements on air transport services concluded by the Member States with non-member countries.

33. The last measure was followed by the adoption of Regulation (EC) No 847/2004 of

28 — COM(2003) 94 final.

29 — Under the mandate conferred on it by the Council, the Commission set up in June 2003 the negotiations for the conclusion of an agreement on air transport between the European Community and the Member States, on the one hand, and the United States of America on the other. The text of the agreement was finalised by the Commission on 18 November 2005 and was debated at the Council meetings on 5 December 2005 and 27 March and 6 June 2006. The Council stated that there was unanimous satisfaction with the results of the negotiations conducted by the Commission in November 2005, but made conclusion of the agreement subject to the reform by the United States of America of the rules governing checks of United States airlines by foreign nationals (see http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/us_en.htm).

the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries. [30] Among the objectives pursued by that regulation, the 16th recital in its preamble refers specifically to 'the coordination of negotiations with third countries with a view to concluding air service agreements, the necessity to guarantee a harmonised approach in the implementation and application of those agreements and the verification of their compliance with Community law'. To that end, the regulation establishes a procedure for cooperation between the Member States and the Commission to be brought into operation, under Article 1(1), whenever a Member State decides to enter into negotiations with a third country concerning a new air service agreement or the modification of an existing air service agreement, its annexes or any other related bilateral or multilateral arrangement, the subject-matter of which falls partly within the competence of the Community. It should be noted that the second and third recitals to that regulation refer to the principles laid down by the Court in its judgments of 5 November 2002, whilst the fifth recital states that '[t]he cooperation procedure between Member States and the Commission established by this regulation should be without prejudice to the division of competences between the Community and Member States, in accordance with Community law as interpreted by the Court of Justice'.

30 — OJ 2004 L 157, p. 7.

IV — The pre-litigation procedure

34. On 19 January 1999, the Commission sent a letter of formal notice to the Netherlands Government in which it accused the Netherlands of infringing exclusive Community competence under the principles established by the Court in Opinion 1/76, infringement of Article 5 of the EC Treaty in conjunction with the secondary law provisions of Regulations Nos 2407/92, 2408/92, 2409/92 and 2299/89 and infringement of Article 52 of the EC Treaty. Those infringements derived, according to the Commission, from the conclusion in 1992 and the subsequent application of an open skies agreement with the United States of America.

35. On 1 June 1999, the Netherlands responded to the letter of formal notice and raised doubts as to the legality of the Commission's decision to commence Treaty-infringement proceedings concerning facts dating back more than six years and in relation to which no objection had been raised in the meantime, despite Treaty-infringement proceedings having been commenced in 1995 against eight other Member States in respect of similar facts. The Netherlands also took exception to the Commission's analysis as to the scope of the amendments made by the 1992 Protocol, the existence of exclusive Commission com-

petence in the air transport sector, the alleged infringement of Article 5 of the EC Treaty, as the contested amendments had been agreed before the entry into force of the legislative measures included in the third package, and as to the alleged infringement of Article 52 of the EC Treaty.

36. Dissatisfied with the replies received, on 24 October 2000 the Commission adopted a reasoned opinion in which it confirmed the charges made by it against the Netherlands Government in its letter of 19 January 1999. The Netherlands submitted its observations on the reasoned opinion on 23 February 2001, in turn confirming its position as set out in its letter of 1 June 1999.

V — Procedure and forms of order sought by the parties

37. On 20 January 2004, the Commission lodged the application which has given rise to the present proceedings.

38. By order of the President of the Court of 6 June 2005, France was granted leave to intervene in support of the Netherlands.

39. The Commission claims that the Court should declare that by entering into or keeping in force, notwithstanding the review of the agreement on air traffic of 3 April 1957 between the Kingdom of the Netherlands and the United States of America, international commitments

— concerning the fares and rates applied by the air carriers designated by the United States on intra-Community routes and computer reservation systems offered or in use in the Netherlands, and

— recognising the United States' right to withdraw, suspend or limit traffic rights in cases where the air carriers designated by the Netherlands are not owned by that Member State or nationals thereof,

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

40. The Netherlands contends that the Court should declare the application inadmissible and, in the alternative, unfounded.

41. France claims that the Court should dismiss the application.

VI — Legal analysis

A — *Admissibility*

1. Arguments of the parties

42. The Netherlands observes that more than six years elapsed between negotiation of the contested commitments and commencement of the proceedings under Article 226 EC by virtue of the letter of formal notice and that more than four years elapsed between the adoption of the reasoned opinion and the lodging of the application in these proceedings. The Netherlands also observes that, whilst the Commission commenced Treaty-infringement proceedings against eight other Member States as early as 1995, no measure was taken against it until January 1999, when the letter of formal notice was sent to it. By acting in that way, the Commission placed the Netherlands 'in such an unfavourable situation that it lost the right to apply to the Court' for a declaration establishing the infringements alleged in the present proceedings.

43. The defendant Member State contends, first, that the Commission's prolonged inaction, together with the fact that Treaty-infringement proceedings were commenced against eight other Member States regarding the agreements concluded by them, gave the Netherlands authorities a legitimate expectation as to the propriety of the Netherlands' situation, allowing them to believe that the Commission considered its position to differ from that of those States. That belief had been strengthened by the fact that, after delivery of the Court's judgments of 5 November 2002, the Commission waited more than two years before bringing proceedings against the Netherlands.

44. The Netherlands also claims that the operators concerned have legitimate expect-

ations, and observes in that connection that the commitments at issue allow Netherlands carriers access to United States routes, which would not be available if the Netherlands were required, following the Court's judgment, to change those commitments. In response to the Commission's argument that such access would nevertheless be ensured by virtue of the principle of courtesy, the Netherlands contends that that principle is not sufficient to guarantee the necessary stability of air traffic between the two countries.

45. The Netherlands Government also emphasises that the commitments at issue affect the grant by the United States authorities of anti-trust immunity for Netherlands carriers and that such immunity was one of the premisses for creating the alliance between KLM and Northwest Airlines which was approved by the Commission whilst the pre-litigation procedure was pending.

46. The Netherlands contends, secondly, that the discretion available to the Commission under Articles 211 EC and 226 EC cannot entitle the Commission to act in breach of the principles of sound administration and legal certainty, or the principle of sincere cooperation enshrined in Article 10 EC, as interpreted by the Court in its order in *Zwartveld and Others.* [31] By virtue of those principles, the Commission is required to observe reasonable time-limits.

47. Third, the Netherlands Government contends that the application is also inadmissible by virtue of the fact that the Commission took no account of developments between the Court's judgments of 5 November 2002 and, in particular, the grant to the Commission of a mandate to negotiate international air transport agreements with non-member countries and with the United States of America at the above-mentioned Council meeting of 5 and 6 June 2003, [32] the adoption of Regulation No 847/2004 and, more generally, the definition of the Community objectives in the air traffic sector, in pursuit of which the Netherlands moreover participated actively.

48. The Netherlands Government emphasises, finally, that any pronouncement by the Court establishing the infringements alleged by the Commission would place the Netherlands in an impossible situation, compelling it to negotiate a revision of the bilateral agreement with the United States of America and thereby to infringe the exclusive competence of the Community and to run the risk of undermining the objectives of negotiations under way at Community level. Reply-

31 — Order in Case C-2/88 Imm [1990] ECR I-3365, paragraph 17.

32 — See point 32 above.

ing to the Commission's argument that, in order to comply with a judgment of the Court upholding its application, it would be sufficient to denounce the agreement, the Netherlands contends that recourse to such action would, in the absence of an agreement at Community level, create an intolerable legal void which would be damaging to national operators in the sector.

49. The Commission claims, first, that according to its settled case-law the Court is not required, in proceedings under Article 226 EC, to observe any predefined time-limits and that the possibly excessive duration of the pre-litigation procedure may give rise to inadmissibility of the application only in cases where the Member State's rights of defence have been infringed. In this case, it maintains, the Netherlands has put forward no argument such as to show that the duration of that procedure had any impact on the exercise of its rights of defence.

50. Second, and purely for information purposes, the Commission observes in its reply that the reason for which it took action in 1995 against eight other Member States and not against the Netherlands lies in the fact that at that time an obstacle arose in its view from the fact that, in contrast to the other eight cases, the contested agreement had been concluded by the Netherlands before the entry into force of the measures included in the 'third package', albeit after their adoption. It had decided to take action against the Netherlands only after the delivery on 18 December 1997 of the judgment of the Court in *Inter-Environnement Wallonie*.[33] Moreover, it discovered only when preparing its reply that the Netherlands Parliament had ratified the agreement on 26 April 1993, that is to say after the entry into force of the 'third package'.

51. Third, the Commission claims that the fact that it commenced the pre-litigation procedure later than for the other eight Member States did not in any way disadvantage the Netherlands, which, rather, had more time available to enable it to comply with the Court's judgments of 5 November 2002. As regards the period that elapsed between the reasoned opinion and the commencement of the present proceedings, the Commission observes that it was awaiting the delivery of those judgments and that it clarified its position following those judgments in its communication of 19 November 2002 and, thereafter, in its letters to the Netherlands Government of 25 November 2002, 30 July 2004 and 10 March 2005. Moreover, in those letters the Commission had asked the Netherlands to comply with the Court's judgments by

33 — Case C-129/96 [1997] ECR I-7411.

denouncing the contested agreement, which would have excluded any possibility of renegotiation thereof. In the event of denunciation, the agreement would continue to apply for a further two years and, even if no agreement were concluded at Community level within that period, air traffic with the United States of America would continue to be safeguarded by virtue of the principle of courtesy.

2. Assessment

52. The Netherlands Government alleges that the application is inadmissible on the basis of infringement of the principles of the protection of legitimate expectations and legal certainty, because of the belatedness of the Commission's decision to take action against the Netherlands under Article 226 EC. Moreover, by not acting in a timely manner, the Commission infringed Article 5 of the EC Treaty which, by virtue of the Court's interpretation thereof in the above-mentioned *Zwartveld and Others* order, requires the Community institutions to act in accordance with the requirements of due cooperation with the Member States.

53. The Netherlands also criticises the Commission for the excessive duration of the pre-litigation procedure. In its view, the Commission is required, in exercising its powers under Article 226 EC, to act within a reasonable time. Such an obligation is a corollary of the principle of legal certainty and is an aspect of sound administration.

54. I should first point out that the Netherlands Government's arguments are not in any way new. As will be seen, since its earliest judgments in Treaty-infringement proceedings, the Court has had to examine criticisms whereby defendant Member States allege the inadmissibility of the action, complaining, first, of the belatedness of action by the Commission and, second, of the excessive duration of the pre-litigation procedure.

55. However, the present case is distinguished by certain peculiar features, such as, in particular, the fact that the Commission acted against eight other Member States in respect of similar infringements but deferred action against the Netherlands, the delivery of the Court's judgments establishing such infringements, the developments following those judgments, the politically sensitive nature of the proceedings commenced and concluded by the Commission and, not least, the importance of the economic interests at stake. Moreover, in

this case, the Commission's inertia was considerably more protracted than in other cases previously examined by the Court.

56. I think therefore that it is appropriate, in this Opinion, to examine in greater detail the central issue raised by the Netherlands Government in connection with its allegations of inadmissibility, namely whether it must be held in the context of infringement proceedings under Article 226 EC that the Commission is under an obligation to act within a reasonable period.

(a) Observations on the Community case-law concerning observance of a reasonable period

57. It must be noted at the outset that there is copious Community case-law applying the concept of a reasonable period.

58. For the purposes of this analysis, it need merely be observed that observance of a reasonable period has been seen by the Community judicature above all as a test for establishing a possible breach of certain general principles of Community law, such as, notably, the principle of the protection of legitimate expectations, the principle of legal certainty, the principle of protection of the rights of the defence and the right to due process, and as a criterion for examining whether action taken by the Community institutions and bodies is in conformity with the rule of sound administration. The Court of First Instance, since the *SCK and FNK* v *Commission* [34] judgment, and the Court of Justice, in the recent judgment in *Technische Unie* v *Commission*, [35] have held that observance by the Commission of a reasonable period in administrative procedures in the field of competition policy to a conclusion constitutes a general principle of Community law.

59. Regardless of its classification as a general principle of Community law or a mere component of principles that are classified as such, compliance with a reasonable time-limit is a requirement imposed on the Community administration as a basis for assessing the legitimacy of action taken by it. [36]

34 — Joined Cases T-213/95 and T-18/96 [1997] ECR II-1739, paragraph 56.

35 — Case C-113/04 P [2006] ECR I-8831, paragraph 40.

36 — On the basis of Article 41(1) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), the obligation of Community institutions and bodies to act within a reasonable time is a component of the right to good administration.

60. It should also be made clear that that rule does not merely provide a yardstick against which to measure the legality of the duration of an administrative procedure but more generally imposes on the institutions a time-limit for exercising the powers vested in them. In that sense, although not expressly referring to the concept of a reasonable period, the Court of Justice has on a number of occasions made it clear, as will be better illustrated below, that the principle of legal certainty means that an institution is not entitled to defer the exercise of its powers indefinitely.

61. That said, I shall now consider whether the Commission is also required to observe that rule when exercising its powers under Article 226 EC.

(b) The existence of an obligation on the Commission to observe a reasonable time-limit in proceedings under Article 226 EC

62. An examination of this point must not leave out of account the nature of the infringement procedure. The distinctive feature of such a procedure appears to reside essentially in the discretionary nature of the powers conferred on the Commission.

63. According to settled case-law of the Court of Justice, it is for the Commission to assess the appropriateness of initiating a procedure to establish an infringement and to decide in respect of what conduct or omission on the part of the Member State in question such a procedure must be commenced. [37] If, once the procedure has been initiated, the Member State concerned does not comply within the time-limit set by the Commission in the reasoned opinion, it is likewise the responsibility of the Commission to decide whether it is appropriate to bring the matter before the Court in order to establish the alleged infringement. The Commission's discretion, however, according to settled case-law, excludes the right of individuals to require the institution to initiate a procedure under Article 226 EC. [38] Having regard to that discretion, the Court of Justice, seised under Article 226 EC, has consistently declined to appraise the appropriateness of the action, where the issue of timeliness has been raised by the defendant Member State. [39]

64. In giving judgment on criticisms raised by defendant Member States concerning the belatedness of Commission proceedings or the excessive length of the pre-litigation phase, the Court has recognised that the Commission also enjoys discretion in decid-

37 — See, for example, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22.

38 — See Case 48/65 *Lütticke* v *Commission* [1966] ECR 19 and Case 247/87 *Star Fruit Company* v *Commission* [1989] ECR 291, paragraphs 11 and 12.

39 — See, for example, Case 26/69 *Commission* v *France* [1970] ECR 565, paragraph 10.

ing within what time-limit it should exercise its powers under Article 226 EC.

65. As early as the 1970s, the case-law of the Court laid stress on the discretion available to the Commission in deciding when to take action against a Member State regarded as being in default. In its judgment in *Commission* v *France*,[40] in which the Commission brought an action against the French Republic under Article 141 of the EAEC Treaty — a provision that has the same text as Article 226 EC — the Court, giving judgment on the objection of inadmissibility of the application raised by the French Government, which criticised the Commission for acting belatedly even though it had known of the contested conduct for some time, declared that the action under Article 141 of the EAEC Treaty 'does not have to be brought within a predetermined period, since, by reason of its nature and its purpose, this procedure involves a power on the part of the Commission to consider the most appropriate means and time-limits for the purposes of putting an end to any contraventions of the Treaty'.

66. That principle has been upheld in successive judgments in relation to Article 226 EC. In particular in *Commission* v *Belgium*,[41] the Commission criticised the Kingdom of Belgium for failing to fulfil its obligations under the Sixth Directive on harmonisation of the laws of the Member States on turnover tax. Under Article 27(5) of that directive, the defendant Member State had notified the Commission of the provisions at issue in 1977. The Commission indicated its objections concerning the compatibility of those provisions with the directive for the first time in 1979 and commenced infringement proceedings under Article 226 EC in 1981. Before the Court, the Belgian Government objected that the application was inadmissible because the Commission's delay in reacting had created legal uncertainty detrimental to its interests and that, in the absence of a time-limit in Article 27(5) of the Sixth Directive for raising objections against the legislation of a Member State of which notice had been duly given, the Commission was required to observe a reasonable time-limit. The defendant government asked the Court inter alia to apply to that case the principle upheld in the *Lorenz* judgment[42] in relation to the procedure under Article 93(3) of the EC Treaty (now Article 88(3) EC). The Court, having declared the *Lorenz* case irrelevant, in that it related to 'a procedure which in part derogates expressly from the procedure laid down in Article [226 EC]', held that that article was applicable but that 'the Commission [was] not obliged to act within a specific period'.[43]

40 — Case 7/71 [1971] ECR 1003.

41 — Case 324/82 [1984] ECR 1861.

42 — Case 120/73 [1973] ECR 1471.

43 — *Commission* v *Belgium* (cited in footnote 41), paragraph 12.

67. In *Commission* v *Netherlands*,[44] the Netherlands Government criticised the Commission for a series of delays in the pre-litigation procedure. In particular, the defendant government observed that the first charges made by the Commission concerning the facts of the case dated back to 1984, whereas the application to the Court was not lodged until five years had elapsed. The Commission's negligence, according to the Netherlands Government, entailed an infringement of the rights of the defence and had unacceptable financial consequences. Recalling the judgment given in *Commission* v *Belgium*, cited in the previous paragraph, the Court repeated that 'the rules of Article [226 EC] ... must be applied and the Commission is not obliged to act within a specific period'.[45]

68. That said, it is necessary to ask whether the discretionary nature of the Commission's powers under Article 226 EC, on the one hand, and, on the other, the lack of any predetermined time-limit within which the Commission is required to act really represent an obstacle to saying that the Commission is required to observe a reasonable time-limit also when exercising its powers under that article.

69. As regards, first, the discretionary nature of the Commission's powers, it should first be noted that the availability to the Commission of a greater or lesser degree of discretion in the context of proceedings other than Treaty-infringement proceedings has not prevented the Community judicature from concluding that the Commission is in any event required to act within a reasonable time by virtue of a rule of sound administration[46] or from upholding the prohibition on the Commission of indefinitely delaying the exercise of its powers in breach of the principle of legal certainty.[47]

70. Admittedly, infringement proceedings under Article 226 EC certainly display special features. Their purpose is to make an objective finding as to an infringement on the part of a Member State with a view to bringing it to an end, and the aim is not to impose a penalty.[48] Moreover, precisely because of the aims pursued by such proceedings and, among others, the considerations of a political nature which may arise at every stage of the proceedings, it is an instrument for the operation of which a degree of flexibility should be available.

44 — Case C-96/89 [1991] ECR I-2461.

45 — Ibid., paragraph 15.

46 — See, among others, Case C-282/95 *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraph 37; Case T-127/98 *UPS Europe* v *Commission* [1999] ECR II-2633, paragraph 37, in relation to consideration of complaints of infringements of competition rules; and Case T-17/96 *TFI* v *Commission* [1999] ECR II-3757, in relation to consideration of complaints of infringement of State aid rules.

47 — See, among others, Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 21; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 140 and 141; and *SCK and FNK* v *Commission*, paragraph 55.

48 — The discussion might perhaps be different if the procedure under Article 228 EC were at issue, but that falls outside the scope of the present case.

71. It seems to me, however, that such considerations and the broad discretion available to the Commission in those proceedings do not preclude an examination of the way in which it exercises its powers under that article, in particular, but I shall limit myself to the problems raised by the present case in relation to time-limits applicable to intervention by the Commission. [49]

72. Secondly, the fact that Article 226 EC does not confine the various stages of the procedure within predefined time-limits likewise does not seem to me to represent an obstacle to saying that, in principle, the Commission is under an obligation to act within a reasonable time-limit when exercising its powers under that article.

73. In that connection, it should first be pointed out that recognition of the existence of that obligation does not affect the question, to be analysed below, of the consequences of a possible breach of that obligation. In that regard, suffice it to note that a failure to observe a reasonable time-limit does not necessarily produce the same consequences as a failure to observe a prescription period or limitation period.

74. It should also be noted that, despite the fact that Article 226 EC does not expressly lay down any time-limit for the conduct of infringement proceedings, there is case-law to the effect that the Commission must be reasonable in the setting of time-limits for the Member State concerned to reply to the letter of formal notice or to comply with the reasoned opinion and, if appropriate, is required to grant such a State a reasonable period to prepare its defence. [50] Those obligations are clearly justified, first by the

49 — From this standpoint, it may also be remembered that the point has not been overlooked that the powers available to the Commission under Article 226 EC are designed to facilitate its fundamental role of guardian of the Treaty, which it enjoys under Article 211 EC, and that, therefore, although the Commission enjoys a degree of latitude regarding the timing of and the conditions for initiating the various phases of the procedure, the possibility cannot be excluded that, in principle, it has an obligation to act. To that effect, see the Opinion of Advocate General Trabucchi in Case 2/73 *Geddo* [1973] ECR 865, and, more recently, the Opinions of Advocate General Alber in Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, point 72, and Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, point 83. Moreover, over the years, the adoption by the Commission of internal procedures for the investigation of infringements has made it possible to ensure greater transparency in the way it acts. In 2001, under pressure from the European Ombudsman, the Commission gave a commitment to publish a consolidated version of the internal procedural rules it applies to relations with a complainant in the context of Treaty-infringement proceedings. Those rules are contained in the Commission notice to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (OJ 2002 C 166, p. 3). There is therefore a tendency towards progressive depoliticisation of the infringement procedure and towards proceduralisation of it, at least in cases where a complaint by an individual is at the origin of the Commission's action. Finally, it should be noted that on various occasions the European Ombudsman has examined the relevance of the reasons relied on by the Commission in closing the file on a complaint (see, for example, Decision 995/98/OV).

50 — Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 14; Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 20; Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraphs 34 and 51; and Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraphs 64 and 65.

objective pursued by Treaty-infringement proceedings, namely that of bringing the infringement to an end, and, secondly, by the requirement of allowing the Member State concerned effectively to exercise its rights of defence. With the same aim of upholding the rights of the defence, the Court, as will be seen, has affirmed its power to criticise excessive duration of the pre-litigation procedure.

75. Finally, it must be made clear that whilst it is true that the Community judicature has excluded, in general, the possibility of introducing limitation periods by means of its case-law on the premiss that '[i]n order to fulfil their function, limitation periods must be fixed in advance' and that '[t]he fixing of their duration and the detailed rules for their application come within the powers of the Community legislature', [51] the lack of a statutory limitation period has not prevented the Court of Justice and the Court of First Instance from basing on the principle of legal certainty the Commission's obligation to act within a reasonable period or not to delay the exercise of its powers indefinitely. [52]

76. In view of the foregoing considerations, I consider that the specific features of Article 226 EC proceedings are not such as to preclude an obligation of the Commission, in such proceedings, to ensure that it acts in accordance with the principle that a reasonable time-limit should be observed.

77. It should also be noted that the requirement of exercising control, limited though it may be, over the way in which the Commission uses the discretion vested in it in infringement proceedings, with particular reference to the identification of time-limits for the exercise of that discretion, derives, albeit together with confirmation of the Commission's discretion, from the same case-law of the Court of Justice cited in points 65 to 67 above.

78. Thus, for example, in its judgment in *Commission* v *France*, cited in point 65 above, in response to the French Government's complaint that the Commission had delayed commencing the procedure under Article 141 of the EAEC Treaty despite having been aware of the alleged infringements since 1965, the Court, after making it clear that the Commission was not required by that article to act within a predetermined time, observed nevertheless that the infringement at issue had come fully to light only in 1968, in other words a shorter time ago, and that as early as 1969 the Commission had taken certain action preparatory to the formal commencement of the procedure. [53]

51 — See *Geigy* v *Commission*, paragraph 21, and *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 139 (both cited in footnote 47).

52 — See, for example, *Lorenz* (cited in footnote 42), paragraph 4; *Geigy* v *Commission*, paragraph 21, and *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 140 (both cited in footnote 47); Joined Cases T-34/89 and T-67/89 *Costacurta* v *Commission* [1990] ECR II-93, paragraph 48; and Case T-107/92 *White* v *Commission* [1994] ECR-SC I-A-41, paragraph 46.

53 — Paragraphs 7 and 8.

79. The possibility of examining the Commission's exercise of its discretion was expressly recognised by Advocate General Roemer, [54] who, in his Opinion in the abovementioned case, observed that various considerations had prompted the Commission to decline to commence the infringement proceedings at an earlier stage and concluded that, in the light of those circumstances, it should be recognised that the Commission had exercised its powers properly and that the view that there had been an unlawful delay in initiating the procedure should be rejected. [55]

80. The requirement of justifying in each specific case, and not merely by statements of principle, the timing of action by the Commission is more clearly apparent from the judgments in *Commission* v *Belgium*, cited in point 66 above, and *Commission* v *Netherlands*, cited in point 67 above.

81. In the first case, after rejecting the Belgian Government's argument that the Commission was required in that case to observe a reasonable time-limit, the Court thus confirmed the Commission's discretion in deciding when to commence proceedings under Article 226 EC, observing that in 'exercising the discretion accorded to it by Article [226 EC], [the Commission] decided that it should postpone examining the compatibility of the Belgian measures in question until the directive was in force in all the Member States' and that, by acting in that way, the Commission 'did not exercise its discretion in a manner contrary to the Treaty'.

82. In the second judgment, the Court made it clear that, by 'decid[ing] to await the Court's judgment ... in the *Krohn* case, as well as the reactions of the Netherlands Government to that judgment before bringing this action ... the Commission has not exercised the discretion which it has under Article [226 EC] in a way that is contrary to the Treaty'. [56]

83. Finally, it must also be emphasised that, with particular reference to the duration of the pre-litigation phase of the procedure, the Court has made it clear that an excessive duration may amount to a defect which

54 — After defining the infringement proceedings provided for in Article 141 of the EAEC Treaty as a last resort available to the Commission in order to bring to an end the conduct of a Member State which it considers to be in breach of Community law, Advocate General Roemer observed that the need to protect the effectiveness of that procedure, and the consideration that recourse to that procedure necessarily affects the prestige of the Member State concerned, notwithstanding the objective nature of the finding of an infringement, militate in favour of excluding any automatic mechanism and of recognising that the Commission enjoys a discretion regarding both the appropriateness of taking action against a Member State by means of infringement proceedings and the time at which those proceedings should be initiated.

55 — Unofficial translation of the original German version of the Opinion. Advocate General Roemer refers in particular to the intention to try initially to achieve a negotiated solution, the initially limited effects of the infringement, the requirement of not aggravating, by bringing proceedings, the crisis which the Community experienced in 1965 and, finally, the fact that new provisions were in the process of being adopted in the sector in question.

56 — Paragraph 15.

renders Treaty-infringement proceedings inadmissible, making it clear, however, that 'such a conclusion is inevitable only where the conduct of the Commission has made it difficult to refute [the] arguments [relied on against the defendant Member State], thus infringing the rights of the defence'. [57]

84. At this point, it must be made clear, in so far as that it is already apparent from all the foregoing considerations, that observance of a reasonable time-limit is required not only as a measure of the legality of the duration of the pre-litigation procedure in proceedings under Article 226 EC but also as an obstacle to the belated exercise of the powers enjoyed by the Commission under that provision. In other words, the Commission's obligation to ensure the observance of a reasonable time-limit means, on the one hand, that it may not postpone indefinitely, after becoming aware of the alleged infringement, the exercise of the powers conferred on it by Article 226 EC and, on the other hand, that once the pre-litigation phase of the proceedings under that provision has been completed it must ensure that their duration satisfies the tests of reasonableness.

85. It is clear that the specific assessment of the reasonableness of the time that elapses varies according to whether it concerns the period before the commencement of the proceedings, marked by the sending of the letter of formal notice, or the duration thereof.

86. In the first case, it must be borne in mind that the Commission normally makes informal contact with the Member State concerned in order to obtain the information needed to clarify the factual and legal situation and to form an initial view regarding the actual existence and extent of the infringement of Community law and of the action to be taken in order to bring it to an end, including, possibly, the commencement of formal proceedings under Article 226 EC. In this first phase, regarding which account must be taken of the wide discretion enjoyed by the Commission in the exercise of its powers under Articles 211 EC and 226 EC, the latter must be allowed sufficient time to examine the possibility of reaching a negotiated settlement and conducting, with a view to such solution, the necessary negotiations with the Member State concerned. Moreover, the Commission must be allowed to set an order of priority for its action which takes account of the nature and gravity of the infringements and the extent of the effects thereof. In the light of those objectives, the application of flexible criteria is justified when the reasonableness of the time taken is assessed.

87. When it opens the procedure by sending a letter of formal notice, however, the

57 — See Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 14, and Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 76. In similar terms, see Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraph 25.

Commission has all the information needed to assess the conduct of the Member State concerned. The decision to send the Member State concerned a letter of formal notice presupposes that the Commission has classified such conduct as unlawful and considers it appropriate, in order to bring the infringement to an end, to have recourse to the instrument provided by Article 226 EC. The criteria for assessing the reasonableness of the time within which the various measures making up the procedure must be taken, until any decision is taken to seise the Court, therefore have to be more rigid.

88. It having been confirmed that the Commission is under an obligation to observe reasonable time-limits in Treaty-infringement proceedings as well, which both involves a limitation on the belated exercise of the powers it enjoys in that regard and constitutes a parameter for assessing the legality of the duration of the procedure, it is necessary to consider the consequences of any breach of that obligation.

(c) The consequences of failure to observe a reasonable time-limit in proceedings under Article 226 EC

89. Given that Article 226 EC provides an instrument whose purpose is to secure a judicial finding that Community law has been infringed, in my view there is, in principle, no possibility that unjustified delay on the part of the Commission in commencing the procedure after it has become aware of the alleged infringement or unreasonable protraction of that procedure, once commenced, could have the effect of depriving the Commission of the power to make an application to the Court with a view to securing such a finding. [58]

90. However, such an effect cannot be excluded a priori where the belated intervention of the Commission or the excessive duration of the procedure has had an irreversible impact on the exercise of the Member State's rights of defence. That conclusion seems to me to flow logically from the finding that the time the Commission takes to act may adversely affect the exercise of the rights of the defence and from the case-law which, on the basis of that finding, concedes that an application under Article 226 EC may be inadmissible where the excessive duration of the procedure has had an impact on the exercise of the defendant Member State's rights of defence. [59] Where the commencement of a new procedure does not allow that defect to be remedied, the Commission will de facto forfeit its right to make application to the Court to secure a finding of infringement of the Treaty.

58 — A different conclusion might be reached with regard to the procedure under Article 228 EC.

59 — Cited in point 83 above.

91. The fact that, as a matter of principle, the Commission's powers will not be extinguished as a result of belated action on its part or excessive duration of the procedure is all the more justified if it is borne in mind that the contentious phase of the proceedings under Article 226 EC is directed merely towards securing a declaratory judgment.

92. It must be borne in mind, however, that, although the Court is not authorised in such proceedings to order the defaulting Member State to bring the infringement to an end, that State is nevertheless required to comply with the judgment of the Court by adopting all the measures necessary to cause the contravention to cease and to recreate a situation that complies with the rules of Community law that have been infringed.

93. However, the possibility cannot be excluded that, in certain circumstances, the effluxion of time together with inertia on the part of the Commission may have the effect of limiting the latter's power to secure the adoption by the Member State concerned of the measures necessary to bring the infringement to an end, whilst at the same time, in principle, leaving unaffected its power to apply to the Court for a judgment establishing the infringement.

94. Such circumstances arose in *Commission* v *Ireland*.[60] The Commission had initiated two separate infringement procedures against Ireland concerning, first, infringement of the Sixth Value Added Tax Directive through failure to levy value added tax on tolls charged for the use of bridges and roads, and, in the second case, breach of the obligations deriving from the legislation on the system of Community own resources, through failure to make available to the Commission, as own resources deriving from value added tax, the amounts corresponding to the tax that should have been levied on the tolls in question, together with default interest.

95. After finding that the failure to levy tax on the tolls at issue constituted an infringement of the value added tax legislation, the Court considered the repercussions of prolonged inaction on the part of the Commission (more than seven years elapsed between notification of the reasoned opinion and lodgement of the application) on the extent of Ireland's obligation to pay, after the event, amounts due under the legislation on the Communities' own resources. In paragraph 71 of the judgment, the Court stated '[d]espite the absence of a limitation period for the recovery of VAT in either the Sixth Directive ... or in the legislation relating to the Communities' own resources, the fundamental requirement of legal certainty may have the effect of preventing the Commission from indefinitely delaying, in the course of a procedure for failure to fulfil obligations seeking the retrospective payment of own resources, the decision to bring proceedings'. Applying by analogy Article 9(2) of Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing

60 — Case C-358/97 [2000] ECR I-6301.

from value added tax, which excluded the possibility of rectifying the statements forwarded by the Member State indicating the amount of own resources deriving from the tax where four budgetary years had elapsed, the Court ruled that the Commission had no power to require retroactive payment of the amounts owed by Ireland for the budgetary years prior to 1994.

96. Whilst a failure to observe a reasonable time-limit cannot, in principle, have the effect of depriving the Commission of the power to prosecute an infringement on the part of a Member State and to apply to the Court for that purpose, the latter has stated, [61] with reference in particular to the duration of the pre-litigation procedure, that excessive prolongation of the procedure constitutes a procedural defect which may render the application inadmissible. [62] The Court nevertheless acknowledged such a possibility only in cases where the excessive duration of the procedure had affected the defendant Member State's rights of defence.

97. It would seem legitimate to query whether, regardless of any breach of the rights of defence of the Member State concerned, an application should not be declared inadmissible in particular cases where the Commission, after expiry of the period set for the Member State to comply with a reasoned opinion, does not apply to the Court within a reasonable period, which should be assessed having regard to all the circumstances of the case and the explanations given by the Commission, and also to the wide discretion enjoyed by the Commission in exercising the powers conferred on it by Articles 211 EC and 226 EC.

98. Even though that solution might appear excessively formalistic, it would meet the requirement of ensuring the usefulness of a possible future judgment establishing the infringement, so that the Court, which, according to settled case-law, is required to examine the situation as it existed at the end of the period set by the reasoned opinion, [63] does not have to give judgment with reference to a factual and legal situation which no longer obtains in view of the changes that have occurred with the passing of time.

99. In that connection, it must be borne in mind that the objective of the pre-litigation procedure is not only to provide the Member State concerned with an opportunity to defend itself by replying to the charges made against it by the Commission, but also, as has

61 — See point 83 above.

62 — Therefore leaving unaffected the possibility of bringing a further action in the event that the defect in question can be rectified.

63 — It will be remembered that, according to settled case-law, in giving judgment in proceedings under Article 226 EC, the Court may not take account of developments between the time of the reasoned opinion and the bringing of the action but must confine itself to examining the situation as it existed at the end of the period set in the reasoned opinion.

been repeated by the Court on numerous occasions, to define the subject-matter of future litigation before the Community judicature. Thus, to use the words of the Court, the proper conduct of the pre-litigation procedure 'constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter'. [64]

100. Where during the time that has elapsed between the expiry of the time-limit laid down in the reasoned opinion and the lodging of the action the legal and factual circumstances of the dispute, as defined in the reasoned opinion, have undergone changes, rendering essentially devoid of purpose a pronouncement by the Court that does not take account of such changes, we may ask ourselves whether the Court, having noted the changed circumstances and any unjustified inertia on the part of the Commission beyond what is a reasonable period, should not be entitled to declare the application inadmissible.

101. In such circumstances, the Commission would have the burden of issuing a further reasoned opinion, after which it could once again make application to the Court. Such a burden might appear appropriate to the objective of ensuring the proper commencement of the judicial phase of the proceedings under Article 226 EC and of making certain that any future judgment of the Court establishing an infringement is up to date and relevant.

102. I would point out, in that connection, that the Court has already inclined towards the solution suggested. In its judgment in *Commission* v *France*, cited in footnote 64 above, the Commission had commenced proceedings against France under Article 226 EC two-and-a-half years after the expiry of the term set in the reasoned opinion. During that period, France had adopted a number of 'significant measures in the relevant sphere'. [65] The debate between the parties before the Court focused essentially on the scope of those measures and whether they were appropriate for implementing the directive, which the French Government was accused of having transposed incorrectly. After making it clear that, according to settled case-law, such a discussion could clearly not be taken into consideration in the proceedings before the Court, the Court observed that '[w]here the relevant national provisions have fundamentally changed between the expiry of the period laid down for compliance with the reasoned opinion and the lodging of the application, that change in circumstances may render the judgment to be given by the Court otiose. In such situations, it may be preferable for the

64 — See the order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 17, and the judgments in Case C-392/99 *Commission* v *Portugal* [2003] ECR I-3373, paragraph 133, and Case C-177/03 *Commission* v *France* [2004] ECR I-1167, paragraph 20.

65 — Paragraph 18.

Commission not to bring an action but to issue a new reasoned opinion precisely identifying the complaints which it intends pursuing, having regard to the changed circumstances'.[66] It considered, however, that the circumstances of the case did not justify the application being declared inadmissible.[67]

103. It should also be noted that the requirement of applying to the Court within a reasonable period following expiry of the time-limit notified to the Member State to comply with the reasoned opinion, on pain of inadmissibility of the application, imposed on the Commission where it considers it appropriate to initiate the judicial phase of the proceedings, would not have any impact at all on the substance of the discretionary power enjoyed by it under Article 226 EC but would merely constitute a condition for the proper exercise of that power.

104. In such circumstances, the Commission would be required, where it considered it appropriate to do so, to initiate a new procedure or at least to issue a new reasoned opinion. When deciding whether to recommence the pre-litigation procedure, the Commission will be required to reassess the appropriateness of taking action and possibly to reformulate the charges made earlier against the Member State concerned in order to take account of the changed circumstances.

105. I shall now examine the criticisms made by the Netherlands Government in this case.

(d) The objection based on the Commission's delay in commencing proceedings

106. As regards, first, the criticism concerning the belatedness of the Commission's action, it follows from the considerations set out above that, even if that criticism were well founded, a finding to that effect would not, in the circumstances of the present case, be such as to affect the Commission's power to apply to the Court with a view to securing a judgment establishing the alleged infringement, contrary to the Netherlands Government's contention.

107. In the present case, to deny the Commission the possibility of taking action to confirm the alleged failure of the Netherlands to fulfil its obligations deriving from the division of competences between the Community and the Member States regarding the conclusion and application of international agreements on air transport, as defined by the Court in its judgments of 5 November 2002, would allow the Nether-

66 — Paragraph 21.
67 — Paragraph 22.

lands alone to keep in force international commitments which breached that sharing of competences, unjustifiably placing that Member State in a privileged position as compared with the other Member States, to the detriment of the uniform application of the principles laid down by the Court in those judgments.

108. As observed earlier, the Commission's powers could be extinguished where it was established that the delay — assuming it to be unjustified — on the part of the Commission in initiating the Article 226 EC procedure has irretrievably affected the ability of the defendant Member State to defend itself in those proceedings. However, in this case, the Netherlands has not expressly alleged breach of its rights of defence and, even if it were possible to infer such an allegation from the submissions made by that State, no evidence of such a breach has been produced.

109. As regards the question whether a possible finding of unjustified delay in initiating the Article 226 EC procedure would, in the event of the application being upheld, be such as to affect the Netherlands' obligation to comply with the Court's judgment establishing the infringement,[68] it must first of all be observed that that obligation would consist in eliminating the contested international commitments as regards the future. However, in view of the nature of that obligation, it cannot be considered that the time that has elapsed has had the effect of changing its scope.

110. The Netherlands also contends that, given the external competence of the Community regarding air transport recognised by the Court in its judgments of 5 November 2002 and in the light of the legislative developments following those judgments, it would no longer be authorised to open negotiations with the United States of America in order to change such clauses of the contested agreement as the Court might consider unlawful. It follows, according to the Netherlands, that the Commission's delay in taking action against it would make it impossible for it to comply with any judgment upholding the application.

111. I do not consider that argument to be persuasive. As emphasised by the Commission, the contested agreement provides for a procedure whereby the parties may denounce it. The Netherlands therefore, contrary to its contention, has available to

68 — See the considerations set out regarding the *Commission* v *Ireland* judgment (cited in point 94 above).

it a legal instrument which would enable it, if appropriate, to comply with a Court judgment against it.

112. As regards the argument put forward by the Netherlands, which is supported on that point by the French Government, to the effect that denunciation of the contested agreement would leave a legal void in relations with the United States of America concerning air transport, which would be harmful for national operators in the sector, it need merely be observed that, following the Court's judgments of 5 November 2002, the air carriers of the Member States against which the Commission took action nine years ago are exposed to the same negative consequences. In that regard, it seems to me that the passage of time has been favourable rather than detrimental to the Netherlands air carriers.

113. Incidentally, it should be noted that the arguments put forward on this point both by the Netherlands and by the French Government are clearly intended to raise the question, which is crucial as regards the interests of the Community carriers concerned, of the measures which the Member States which were held to have committed the infringements of Community law established by the Court in its judgments of 5 November 2002, and possibly also the Netherlands in the event of its being unsuccessful in these proceedings, are required to adopt in order to give effect to the principles laid down in those judgments. In that connection, it is easy to understand why the solution proposed by the Commission in the abovementioned letters of 25 November 2002, 30 July 2004 and 10 March 2005, according to which the only possible course is to denounce the agreements containing the illegal clauses — renegotiation thereof at national level having to be precluded as a result of the Community's exclusive competence —, is unanimously opposed by the Member States concerned. In fact, the legal void which recourse to that solution would produce, a void which, contrary to the Commission's contention, could not realistically be filled, even temporarily, by application of the principle of courtesy, is liable to have significant economic fallout for the Community carriers concerned, both because of loss of traffic rights on routes to and from the United States of America or uncertainty as to how long those rights would be maintained, and, as emphasised by the French and Netherlands Governments, because it would endanger the existing alliances between Community and United States carriers (KLM/Northwest and Skyteam alliances).

114. That said, as I have already observed, [69] it is not for the Court, in giving judgment on an application under Article 226 EC, to define the procedures by which the Member State concerned must comply with the

69 — See point 92 above.

judgment holding it to be in default,[70] although the Court may clarify the scope of that obligation.[71] It follows that, in the present case,[72] since the defendant Member State, in the event of the application being upheld, would not find it materially or legally impossible to comply with the judgment of the Court, it falls to that Member State and to the Commission, by virtue of the principle that Community institutions and Member States must cooperate sincerely with one another, to endeavour to find a solution to any problems raised by compliance with a judgment upholding the present application.[73]

(e) The objection based on the allegedly excessive duration of the infringement proceedings

115. With regard to the duration of the procedure, the Netherlands' objection relates only to the time that elapsed between the Commission's adoption of the reasoned opinion and the commencement of proceedings.

116. The reasoned opinion was adopted in October 2000 and the application was lodged in December 2004, so the period to be taken into account for the purposes of this analysis is almost four years.

117. It is apparent from the case-law that the reasonableness or otherwise of the duration of the administrative procedure must be assessed in the light of the circumstances of each individual case and, in particular, the context thereof, the various procedural steps taken by the Commission, the conduct of the parties in the course of the proceedings, the complexity of the case and the interests of the parties to the proceedings.[74]

118. In this case, I do not consider that the Commission can be criticised for having awaited the pronouncement of the Court on the applications lodged in 1998, which had essentially the same subject-matter as the application in this case.

70 — Any differences of opinion between the Commission and the Member State concerned as to the measures necessary for proper implementation of the Court's judgment could possibly be taken into consideration in proceedings under Article 228 EC.

71 — See *Commission* v *Ireland* (cited in point 94 above).

72 — The present case differs from those disposed of by the Court's judgments of 14 December 1999 in Case C-170/98 *Commission* v *Belgium* [1999] ECR I-5493 and of 4 July 2000 in Case C-62/98 *Commission* v *Portugal* [2000] ECR I-5171, in which the Commission complained, in its applications, of failure to denounce the agreement, therefore bringing before the Court the question of the existence of an obligation to that effect attaching to the defendant Member States.

73 — If the Court should decide to take a position on this point, it seems to me however to be reasonable to consider that when, as in this case if the application is upheld, the conflict with the provisions of Community law affects only some of the clauses of an international agreement, denunciation thereof should be considered necessary only if it is not possible to remove or amend those clauses. In the present case, the Commission should therefore authorise the defendant Member State to renegotiate the contested clauses in order to render them compatible with the relevant Community provisions and it is only if such a result cannot be attained that denunciation of the entire agreement should be called for.

74 — See *SCK and FNK* v *Commission* (cited in point 58 above), paragraph 57, and, analogously, with regard to the duration of Court proceedings, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 29.

119. However, the Commission waited a further two years after delivery of the judgments of 5 November 2002 before lodging its application in this case. It is therefore necessary to consider whether that period may be considered unreasonable, having regard to all the relevant circumstances of the case.

120. In that regard, it must be observed as a preliminary point that the applications lodged by the Commission in 1998, the outcome of which was entirely unexpected, as demonstrated moreover by the fact that they were only partially upheld by the Court, raised for the first time the question of the sharing of external competences between the Community and the Member States regarding air transport. Moreover, as observed earlier, the judgments of 5 November 2002 raised the delicate question of the measures to be adopted in order to fill the possible legal void created by the removal of the international commitments entered into by the Member States concerned in violation of the exclusive external competence of the Community.

121. Thus, following delivery of those judgments, there was a debate in the Council as to how the principles established by the Court should be correctly applied, a debate which, as has been noted, led to the adoption during the Council meeting of 5 and 6 June 2003 of a legislative package designed, among other things, to give the Commission a mandate to negotiate with the United States of America an international agreement on air transport.

122. It must also be remembered that, two weeks after the judgments of 5 November 2002 were delivered, the Commission adopted its communication of 19 November 2002, referred to above, in which it took a position on the inferences to be drawn from those judgments regarding the agreements not directly contemplated by them, and that, on 25 November 2002, it sent the Netherlands a letter calling on it to denounce the contested agreement.

123. In those circumstances, the Commission cannot in my opinion be criticised for having waited, before lodging its application in these proceedings, for the outcome of the political debate which arose following the judgments of 5 November 2002. Nor can it be criticised for having granted the Netherlands the time needed to comply with those judgments, in particular if it is remembered that, according to the Commission, that would necessarily have involved denunciation of the commitments entered into by that Member State with the United States of America, a measure which, as moreover has been emphasised by the Netherlands Government itself, would have had significant repercussions on relations between the two countries in the air transport sector, in particular, on the interests of the Netherlands airlines.

124. It follows that the Commission cannot be charged with having exceeded a reasonable period by letting four years elapse after the adoption of the reasoned opinion before lodging the application in the present proceedings.

125. The Netherlands' objection to that effect must therefore, in my view, be rejected as unfounded.

3. Conclusion concerning admissibility

126. In the light of the foregoing considerations, it is my view that the objection of inadmissibility raised by the Netherlands Government must be rejected and the application must be declared admissible.

B — *Substance*

1. Infringement of the Community's exclusive external competence

127. As mentioned in point 25 above, in its judgments of 5 November 2002 the Court stated that, by virtue of Article 1(3) of Regulation No 2409/92 and of Articles 1 and 7 of Regulation No 2299/89, the Community acquired exclusive competence to assume vis-à-vis non-member countries international commitments relating, first, to exercise of the freedom of non-Community carriers to set rates and fares on intra-Community routes and, second, to CRSs offered or used within the territory of the Community.

128. According to the Court, as from the entry into force of those measures, the Member States were no longer entitled to enter into international commitments of that kind or maintain them in force, notwithstanding the renegotiation of the agreements at issue.

129. In the present case, the Commission has asked the Court to declare that the international commitments assumed by the Netherlands vis-à-vis the United States in relation to rates and fares charged by United

States carriers on intra-Community routes and CRSs offered or used within the territory of that Member State were entered into in breach of the Community's exclusive external competence.

130. It is therefore necessary to consider whether, by its exchange of notes with the United States of America in 1992, the Netherlands infringed the Community's exclusive competence regarding the freedom of carriers of non-member countries to set fares and rates on intra-Community routes and regarding CRSs offered or used within Community territory, as upheld in the Court's judgments of 5 November 2002.

(a) The question whether a new agreement came into being

131. The Commission maintains that the amendments made by the 1992 exchange of notes to the text of the 1957 Agreement radically changed the nature of the latter, converting it into an open skies agreement. In other words, according to the Commission the 1992 exchange of notes gave rise to a new agreement superseding that of 1957.

132. The Netherlands Government replies that even before the amendments made by the 1992 exchange of notes the 1957 Agreement contained certain essential elements of an open skies agreement and that the amendments made in 1992 represented the last stage in the process of liberalisation of air transport between the two countries, already commenced by the changes made to the 1957 Agreement in 1978 and 1991. In particular, the 1992 exchange of notes was intended to ensure full access for Netherlands carriers to the United States market, thereby eliminating the imbalance in favour of United States carriers created by the earlier amendments made to the 1957 Agreement. The latter agreement, however, remains in force and is covered by the first paragraph of Article 307 EC, by virtue of which '[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, 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'.

133. Notwithstanding the scant information provided by the parties in this regard, it seems to me to be sufficiently clear from the file that the provisions on CRSs were introduced in 1991 [75] and were not subsequently modified in the 1992 exchange of notes.

75 — See Annex C to the Memorandum of Consultations of 15 November 1991, annexed to the application.

134. Similarly, the provisions on fares and rates, which establish tariff freedom for carriers of both contracting parties and set up a system of 'double disapproval', were negotiated in 1991,[76] whereas no provision in that connection appears in the 1992 exchange of notes.

135. Moreover, in paragraph 29 of the application, the Commission itself recognises that the 1992 negotiations, despite having radically changed the 1957 Agreement, as previously amended, left unchanged the provisions on fares and rates and CRSs.[77]

136. In those circumstances — given the unconvincing nature of the Commission's argument that the changes made to the 1957 Agreement by the 1992 negotiations gave rise to a new agreement, in so far as that view conflicts with the wish expressed by the contracting parties, from which it appears that they did not intend to replace the previous agreement but only to amend certain, albeit important, provisions — it seems legitimate to ask whether, quite apart from the defence argument based on Article 307 EC, a specific case can be made for infringement of the Community's exclusive competence, as alleged by the Commission in these proceedings with reference to the clauses on rates and fares, since that competence, based on Regulation No 2409/92, arose after the insertion of those clauses in the contested agreements, which, as seen earlier, date back to 1991.

137. That said, I see no need to dwell on this point, since the approach taken by the Court in its judgments of 5 November 2002 allows us to circumvent the obstacle represented by the assumption of certain of the contested international commitments on a date earlier than the creation of the Community external competence alleged to have been infringed.

138. In that connection, it must be borne in mind that in those judgments the Court held that its examination of the merits of the Commission's main claim did not require it to take a position on the question discussed by the parties as to whether the changes had the effect of converting the pre-existing agreements into new agreements.

76 — See Annex D to the Memorandum of Consultations of 15 November 1991.

77 — From that point of view, the present case is comparable, in many respects, to the facts examined by the Court in Case C-471/98 *Commission* v *Belgium*. In that case too, the original agreement of 1946 between the Kingdom of Belgium and the United States of America had been amended on several occasions with a view to achieving progressive liberalisation of air traffic between the two countries. To that end, a new agreement was concluded in 1980. In particular, so far as is relevant here, the provisions on tariff freedom for United States carriers on intra-Community routes and CRSs had been introduced before the 1994 agreements objected to in the proceedings brought by the Commission. See paragraphs 23 to 27 of the judgment in Case C-471/98.

139. In fact, according to the Court, the amendments at issue had had the effect of totally liberalising air transport between the United States of America and each Member State concerned by ensuring free access to all routes between all points situated within those two States, without limitation of capacity or frequency, without restriction as to intermediate points and those situated behind or beyond ('behind, between and beyond rights') and with all desired combinations of aircraft ('change of gauge').

140. The result was that the contested changes had set the context for closer cooperation between the United States of America and the Member States concerned, giving rise to new and important international obligations for the latter.

141. The Court also considered that those amendments evinced a renegotiation of the pre-existing agreements in their entirety. It followed, according to the Court, that even where certain provisions of those agreements had not been formally amended or had undergone only minor editorial changes, the commitments deriving from those provisions nevertheless had to be regarded as confirmed in the course of such renegotiation. Referring to the judgments of 4 July 2000 in *Commission* v *Portugal*, [78] the Court made it clear that, '[i]n such a case, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law'. [79]

142. The Court considered, finally, that the contested changes, made to the pre-existing agreements seen as a whole, had an impact on the scope of the provisions that had not been formally amended or had been amended to only a modest extent.

143. The Court concluded that all the international agreements called in question in the Commission's principal claim had to be assessed in the light of the provisions of Community law on which the Commission relied in support of its claim. [80]

144. I do not consider that there is anything in the file to preclude taking in this case the approach set out above, since the elements

78 — Case C-62/98 [2000] ECR I-5171 and Case C-84/98 [2000] ECR I-5215.

79 — Case C-471/98 *Commission* v *Belgium*, paragraph 50.

80 — See Case C-471/98 *Commission* v *Belgium*, paragraphs 44 to 53.

mentioned in point 139 above are also to be found in the present case.

145. Finally, it must be noted that that approach renders irrelevant the argument which the Netherlands Government bases on the first paragraph of Article 307 EC. [81]

(b) The fact that the 1992 exchange of notes preceded the entry into force of Regulation No 2409/92

146. The present case raises a different and additional problem that did not arise in the circumstances examined by the Court in the cases disposed of by the judgments of 5 November 2002.

147. Both the negotiations between the Netherlands and the United States of America which were carried out in Washington from 1 to 4 September 1992 and the exchange of notes of 14 October 1992 which formalised the results of those negotiations took place before the entry into force, on 1 January 1993, of Regulation No 2409/92, even though they came after its adoption on 23 July 1992.

148. Relying on that circumstance, the Netherlands Government, supported by the French Government as intervener, considers that it cannot be charged with any infringement of the external competence of the Community, since the latter came into being only with the entry into force of the domestic Community legislation, which, in this case, postdated the assumption of the international commitments at issue.

149. In reply, the Commission refers to the judgment in *Inter-Environnement Wallonie*, cited in point 50 above, in which, the Court made it clear that, whilst the Member States are not required to adopt the measures prescribed by a Community directive before expiry of the term for its transposition, it follows from the combined provisions of the second paragraph of Article 10 EC and the third paragraph of Article 249 EC that, during that period, they must refrain from adopting provisions which might seriously undermine the result prescribed by the said directive. [82] According to the Commission, the principle laid down by the Court in the

81 — Moreover, it must be noted in that regard that the protection given by the first paragraph of Article 307 EC for international agreements concluded by Member States before the entry into force of the Treaty does not extend to amendments to such agreements made after the entry into force of the Treaty. To that effect, see Case C-476/98 *Commission* v *Germany*, paragraph 69.

82 — Paragraph 45.

Inter-Environnement Wallonie judgment is applicable by analogy to the present case, in which the contested agreement was negotiated and concluded after the adoption of Regulation No 2409/92 and during the period at the end of which it was to enter into force.

150. I do not consider it necessary, in this case, to give a view on the merits of the argument put forward by the Commission or, consequently, on their admissibility, which is challenged by both the defendant government and the intervener. Nor does it seem appropriate, for determination of this case, to examine more generally the question whether a Member State may, without infringing the principle of sincere cooperation laid down in Article 10 EC, conclude international agreements in breach of a Community exclusive external competence acquired through the adoption of internal common rules, even though such rules, not yet having entered into force, do not formally bind the Member States.

151. In its reply, the Commission, without being contradicted on that point by the Netherlands Government, observes that the exchange of notes of 14 October 1992 was ratified by the Netherlands Parliament on 26 April 1993, that is to say after the entry into force on 1 January 1993 of Regulation No 2409/92.

152. The Netherlands Government responds on that point that the date of ratification of the exchange of notes is irrelevant in this case because that exchange was applied as from 14 October 1992.

153. It should be remembered that where an international agreement, even if concluded in simplified form, such as an exchange of notes, expressly provided for in Article 13 of the Vienna Convention on the Law of Treaties, [83] is submitted to one or more parties for ratification, the moment at which it becomes binding is that of reciprocal notification (or notification only by those contracting States which are required to do so) of due ratification (or exchange of the instruments of ratification). Now, since the coinciding of the definitive wishes of the contracting parties marks the inception of the validity of the agreement, or its entry into force, where for one or more contracting parties prior ratification of the agreement is necessary, the entry into force thereof is consequently subject to notification of due ratification to the other parties.

154. Article 25 of the Vienna Convention provides, however, for the contracting parties to arrange for provisional application of an agreement. In particular, that article provides that '[a] treaty or a part of a treaty is applied

83 — Adopted on 23 May 1969.

provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed'.

155. It is clear from the file that the contested agreement was applied provisionally as from the exchange of notes on 14 October 1992, pending completion by the Netherlands of the necessary formalities for its ratification. The last paragraph of the note sent on 14 October 1992 by the Netherlands Ministry of Foreign Affairs to the United States Embassy in The Hague, the text of which is reproduced in the extract from the *Tractatenblad* annexed by the defendant government to its rejoinder, is worded as follows:

'I propose that if the foregoing proposal is acceptable to the Government of the United States of America, ... this note and your note in reply indicating such acceptance shall constitute an agreement between our two governments, which shall enter into force upon an exchange of diplomatic notes following completion of all necessary internal procedures of the Government of the Kingdom of the Netherlands. Pending entry into force, the terms of this agreement shall be applied provisionally from the date of your note in reply.'

156. In turn, the last paragraph of the note sent in reply on 14 October 1992 by the United States Embassy in the Hague to the Netherlands Ministry of Foreign Affairs is worded as follows:

'I have the honour to inform Your Excellency, on behalf of the Government of the United States of America, that it accepts the above proposal of the Government of the Kingdom of the Netherlands and to confirm that Your Excellency's note and this reply shall constitute an agreement between our two governments, the terms of which shall be applied provisionally from the date of this note and which shall enter into force upon a subsequent exchange of notes following the completion of all necessary internal procedures of the Government of the Kingdom of the Netherlands.'

157. In those circumstances, it must be considered that the perfecting of the contested agreement, that is to say the coinciding of the definitive wishes of the two contracting parties, and the consequent entry into force thereof, occurred only upon an exchange of diplomatic notes subsequent to ratification of the agreement by the Netherlands Parliament, on 26 April 1993, and therefore on a date necessarily later than the entry into force of Regulation No 2409/92 on 1 January 1993.

158. It follows that, on the date on which the Netherlands definitively entered into the

international commitments at issue, which derived from the exchange of notes of 14 October 1992, the provisions of Regulation No 2409/92 which, according to the findings in the judgments of 5 November 2002, gave rise to the creation of exclusive Community external competence regarding tariff freedom for air carriers of non-member countries on intra-Community routes had already entered into force.

159. The Netherlands Government's argument that the Community's exclusive external competence deriving from the adoption of Regulation No 2409/92 cannot be relied on in this case to contest the legality of the international commitments at issue is therefore without foundation in so far as it is based on a misinterpretation of the facts.

160. I consider, finally, that it is appropriate to make it clear that that analysis, although based on a point raised by the Commission only in its reply, does not flow from premisses which modify the subject-matter of the dispute, as defined in the originating application, nor is it based on new criticisms raised out of time in breach of Article 42(2) of the Rules of Procedure of the Court of Justice. In fact, in its submissions in the originating application, the Commission asks the Court to declare that, by negotiating or maintaining in force the contested commitments, the Netherlands has failed to fulfil its obligations under certain provisions of Community law. Importance is attached, in the analysis set out above, to the date of ratification of the commitments at issue merely to facilitate determination of the moment at which those commitments must be regarded as having become definitively binding on the defendant Member State.

161. Having regard to all the foregoing considerations, I am of the opinion that there is no obstacle to a finding being made in this case that the defendant Member State has infringed the provisions of Regulations Nos 2409/92 and 2299/89, along the lines already set out by the Court in its judgments of 5 November 2002.

2. Infringement of Article 52 of the EC Treaty

162. As stated in points 27 and 28 above, in its judgments of 5 November 2002 the Court declared that, by entering into international commitments with the United States of America recognising the United States of America as having the right to withdraw, suspend or limit traffic rights in cases where air carriers designated by the Member States are not owned by the latter or their nationals, those Member States had failed to fulfil their

obligations under Article 52 of the EC Treaty.

163. In those judgments, the Court first of all made it clear that Article 52 of the EC Treaty applies to air transport and in particular can be applied to airlines established in a Member State which provide air transport services between a Member State and a non-member country.

164. The Court went on to point out that, under that provision, freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58 of the EC Treaty (now the second paragraph of Article 48 EC), under the conditions laid down for its own nationals by the legislation of the Member State in which establishment is effected and that therefore Articles 52 and 58 of the EC Treaty guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State.

165. It then observed that the clauses on the ownership and control of airlines in the contested agreements — permitting in particular the United States of America to withdraw, suspend or limit the operating authorisations or technical permissions of an airline designated by the Member States concerned but of which a substantial part of the ownership and effective control is not vested in those Member States or their nationals — were capable of adversely affecting airlines established in the Member States in question of which a substantial part of the ownership and effective control is vested either in a Member State other than that of its establishment or in nationals of such a Member State. Such airlines might therefore be excluded from the benefit of the air transport agreements between the defendant Member States and the United States of America, while that benefit is assured to airlines of those Member States.

166. The Court therefore concluded that those clauses were contrary to Article 52 of the EC Treaty since they allowed discrimination between airlines of the contracting Member State and those of the other Member States by preventing the latter, when established in the contracting Member State, from benefiting from the treatment which the host Member State accords to its own nationals. [84]

167. In the present case, the Commission asks the Court to find that the Netherlands has committed the same infringement.

84 — See, for example, Case C-476/98 *Commission* v *Germany*, paragraphs 144 to 156.

168. It is clear from the file that the clause on the ownership and control of airlines, included in the bilateral agreement between the Netherlands and the United States of America, was modified by the 1992 exchange of notes. The Commission claims that that clause was substantially rewritten, whereas the Netherlands Government contends that the amendments were merely editorial.

169. In that regard, reference need merely be made to the reasoning of the Court in its judgments of 5 November 2002, as set out above in points 138 to 143, to the effect that, following renegotiation of the pre-existing agreements, the clauses not amended or only marginally amended must be regarded as confirmed.

170. I refer on this point in particular to the Opinion of Advocate General Tizzano in the cases disposed of by the judgments of 5 November 2002, in which it was emphasised that even if, from a formal point of view, the clauses on ownership and control had not been amended by the contested agreements, their content and their scope were nevertheless profoundly changed by those agreements, the latter having necessarily had an impact, following full liberalisation of fifth-freedom routes, on their field of application. [85]

171. On the basis of the findings of the Court in its judgments of 5 November 2002, it must therefore, in my opinion, be concluded that there has been an infringement of Article 52 of the EC Treaty, as contended by the Commission.

C — *Costs*

172. Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In view of the conclusions reached concerning the failure of the Netherlands'

85 — See points 137 and 138.

submissions and the fact that the Commission has applied for costs, I consider that the Netherlands should be ordered to pay the costs.

173. France, which has intervened in these proceedings, should bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

VII — Conclusion

174. In view of all the foregoing considerations, I propose that the Court declare that:

— by entering into or maintaining in force, notwithstanding renegotiation of the air transport agreement of 3 April 1957 between the Kingdom of the Netherlands and the United States of America, international commitments with the United States of America

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

— concerning the computerised reservation systems offered or in use in the Netherlands, and

— whereby the right is conferred on the United States of America to withdraw, curtail or restrict transport rights where the air carriers designated by the Netherlands are not owned by the Netherlands or Netherlands nationals,

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

— the Kingdom of the Netherlands should be ordered to pay the costs;

— the French Republic should bear its own costs.