JUDGMENT OF THE COURT

12 March 2002 *

In Joined Cases C-27/00 and C-122/00,

REFERENCES to the Court under Article 234 EC by the High Court of Justice of England and Wales (Queen's Bench Division, Crown Office) (Case C-27/00) and the High Court (Ireland) (Case C-122/00) for preliminary rulings in the proceedings pending before those courts between

The Queen

and

Secretary of State for the Environment, Transport and the Regions,

ex parte

Omega Air Ltd (C-27/00),

* Language of the case: English.

and between

Omega Air Ltd,

Aero Engines Ireland Ltd,

Omega Aviation Services Ltd

and

Irish Aviation Authority (C-122/00),

on the validity of Article 2(2) of Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) (OJ 1999 L 115, p. 1, and L 120, p. 47),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, J.-P. Puissochet, M. Wathelet (Rapporteur), J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Omega Air Ltd (C-27/00), by D. Vaughan QC and A. Robertson, Barrister, instructed by M. Offer, Solicitor,

— Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd (C-122/00), by J. O'Reilly SC and A.M. Collins BL, instructed by C.A. Kelly, Solicitor,

— Irish Aviation Authority (C-122/00), by A. & L. Goodbody, Solicitors,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and R. Plender QC and M. Hoskins, Barrister,

— the Commission of the European Communities, by F. Benyon and E. White, acting as Agents,

— the Council of the European Union (C-122/00), by J.P. Jacqué, A. Lopes Sabino and A. Feeney, acting as Agents,

having regard to the Reports for the Hearing,

after hearing the oral observations of Omega Air Ltd (C-27/00), represented by D. Vaughan and A. Robertson; Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd (C-122/00), represented by J. O'Reilly and

A.M. Collins; Irish Aviation Authority (C-122/00), represented by B.J. Walsh, Solicitor; the United Kingdom Government, represented by J.E. Collins, R. Plender and M. Hoskins; the Council, represented by A. Lopes Sabino and A. Feeney; and the Commission, represented by F. Benyon and E. White, at the hearing on 26 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By order of 21 December 1999, received at the Court on 31 January 2000, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), referred to the Court for a preliminary ruling under Article 234 EC a question on the validity of Article 2(2) of Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) (OJ 1999 L 115, p. 1, and L 120, p. 47, hereinafter 'the Regulation').

2 By order of 21 March 2000, received at the Court on 23 March 2000, the High Court (Ireland) referred a question on essentially the same point.

3 The questions were raised in proceedings concerning civil aviation between Omega Air Ltd ('Omega') and the United Kingdom authorities (C-27/00) and between Omega, Aero Engines Ireland Ltd and Omega Aviation Services Ltd, undertakings which trade in and maintain aeroplanes, and the Irish authorities (C-122/00). The questions are directed essentially to whether Article 2(2) of the Regulation infringes the duty to state reasons under Article 253 EC, the general principle of proportionality, the principle of equality and non-discrimination, and the Agreement on Technical Barriers to Trade (ATBT), in that it prohibits the registration and operation of civil subsonic jet aeroplanes which have been recertificated after being re-engined with engines with a by-pass ratio of less than 3, even though the aeroplanes comply with the requirements of volume I, Part II, Chapter 3 of Annex 16 to the Chicago Convention of 7 December 1944 on International Civil Aviation ('the Chicago Convention').

4 For a proper understanding of the questions referred, an explanation of the concept of 'by-pass ratio' and a summary of the development of the relevant legislation are appropriate.

By-pass ratio

5 Noise emissions from jet engines are caused in particular by the noise generated outside the engine when the exhaust jet(s) mix with the atmosphere (exhaust noise).

6 With the invention of the turbofan engine, low-pressure air is not used in the combustion process. It flows through a separate duct and is expelled at low speed through the propulsive nozzle — while the hot gases are expelled at high

speed — so as to provide a substantial part of the total thrust of the engine. The overall average jet velocity (the combination of gas and air expelled) is reduced, thereby reducing the exhaust noise.

7 The by-pass ratio measures the ratio between the mass of cold 'by-pass' air which does not pass through the combustion and turbine sectors and the mass of air which is mixed with the fuel and burnt in the 'core engine'.

8 In the first turbofan engines, the proportion of the total air flow made up by the by-pass air did not exceed half the total air used (by-pass ratio of 1 or less).

9 Thanks to further technical progress, it has been possible to increase the by-pass ratio over the years, enabling a substantial reduction in noise and fuel consumption.

International and Community legal background

The Chicago Convention, Annex 16 thereto, and the resolutions of the ICAO

10 The Chicago Convention, which has been ratified by all the Member States of the Community, although the Community is not itself a party to it, established the International Civil Aviation Organisation (ICAO). Under Article 44 of the

Chicago Convention, the role of the ICAO is to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.

11 Following a resolution adopted by the ICAO Assembly in 1972, the ICAO established an action programme regarding the environment. Guidelines for the control of aircraft engine emissions were published in 1977.

12 The relevant provisions for the purposes of the disputes in the main proceedings are contained in Annex 16 to the Chicago Convention, entitled 'International Standards and Recommended Practices — Environmental Protection'.

13 Annex 16 contains two volumes, Volume I on aircraft noise and Volume II on aircraft engine emissions.

14 Volume I is divided into five parts. Part I sets out definitions, Part II describes the procedures for aircraft noise certification, Parts III, IV and V concern procedures for noise measurement, assessment and abatement. Part II is itself subdivided into several chapters, specifying the noise standards and certification procedures applicable to different categories of aircraft.

15 Chapter 2 of Part II sets out the noise certification conditions and procedures for subsonic jet aeroplanes in respect of which the application for a certificate of airworthiness for the prototype was accepted before 6 October 1977. Chapter 3

of Part II (hereinafter 'Chapter 3') sets out the stricter conditions applicable to subsonic jet aeroplanes in respect of which the application for a certificate of airworthiness for the prototype was accepted on or after that date.

16 Chapter 3 establishes an overall method for calculating the noise emissions of aeroplanes. This is done by measuring the cumulative noise made by an aeroplane, measured from take-off, sideline and landing positions, that being the noise perceived by people living near airports. Aircraft noise is expressed for noise certification purposes in terms of the 'effective perceived noise level' (EPNL) measured in 'effective perceived noise decibels' (EPNdB). This scale is weighted towards the frequencies which the human ear is most sensitive to.

17 The total of the certification measurements taken from those positions gives an indiction of the aeroplane's overall noise. A noise level produced at one or two measurement points above the maximum may be set off, within certain limits, by a lower noise level produced at another point or points.

18 Resolution A31-11 adopted by the ICAO Assembly allowed States to restrict the operation of aircraft referred to in Chapter 2 which did not meet the Chapter 3 standards. However, they were urged first to consider in particular whether normal attrition of fleets or a non-addition rule (a rule prohibiting the re-registration of a particular type of aircraft) might be sufficient to provide the necessary protection (paragraph 1 of the Resolution).

19 States which imposed operating restrictions on such aircraft were urged to provide for a phasing-out period of not less than seven years from 1 April 1995, and not to restrict the operation of aircraft less than 25 years old, existing

wide-body aircraft or other aircraft fitted with engines with a high by-pass ratio before the end of the phasing-out period, namely 1 April 2002 (paragraph 2).

20 In any case, States were urged, if they introduced certification standards more stringent than those in Chapter 3 not to impose operating restrictions on aircraft which met the Chapter 3 standards (paragraph 4).

21 At the 32nd ICAO Assembly, held from 22 September to 22 October 1998, Resolution A32-8 confirmed Resolution A31-11 and set out, in accordance with that resolution, the aims and practices of the ICAO concerning environmental protection.

The Community legislation prior to the Regulation

22 Before the Regulation came into effect, the Community had adopted three directives imposing limits on aircraft noise emissions: Council Directive 80/51/EEC of 20 December 1979 on the limitation of noise emissions from subsonic aircraft (OJ 1980 L 18, p. 26), as amended in particular by Council Directive 83/206/EEC of 21 April 1983 (OJ 1983 L 117, p. 15); Council Directive 89/629/EEC of 4 December 1989 on the limitation of noise emission from civil subsonic jet aeroplanes (OJ 1989 L 363, p. 27); and Council Directive 92/14/EEC of 2 March 1992 on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988) (OJ 1992 L 76, p. 21), as amended by Council Directive 98/20/EC of 30 March 1998 (OJ 1998 L 107, p. 4). Only the latter two directives are of relevance for the main proceedings.

23 Directive 89/629 was the first stage in phasing out the operation of aeroplanes which did not meet Chapter 3 standards (seventh recital in the preamble). For this purpose it introduced the non-addition rule, under which only aircraft complying with the Chapter 3 standards could be the subject of a new registration in the civil aviation registers of the Member States.

24 However, as a derogation from that more stringent scheme, Articles 4(e) and 5 of Directive 86/629 provided that Member States were entitled to grant derogations from Article 2 of that directive, in particular for aeroplanes powered by engines with a by-pass ratio of 2 or more.

25 To the non-addition rule in Directive 86/629, Directive 92/14 added a non-operation rule, mitigated by the possibility of derogations *inter alia* on economic grounds.

26 The non-operation rule appeared in Article 2(1) of Directive 92/14, which reads as follows:

'Member States shall ensure that, as from 1 April 1995, civil subsonic jet aeroplanes fitted with engines having a by-pass ratio of less than two cannot operate at airports situated in their territory unless granted noise certification either:

(a) to the standards specified in Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988); or

(b) to the standards specified in Part II, Chapter 2, Volume 1 of Annex 16 to the aforesaid Convention, provided that they were first issued an individual certificate of airworthiness less than 25 years previously.'

27 Under Article 5(1) of Directive 92/14, Member States were required to exempt from Article 2(1) of the directive aeroplanes which could be altered to meet the Chapter 3 standards by using 'suitable conversion equipment' (the procedure known as 'hushkitting').

28 Under Article 2(2) of Directive 92/14, all civil subsonic jet aeroplanes operating from airports in the territory of the Member States have, in principle, to comply with the Chapter 3 standards as from 1 April 2002, subject to certain derogations which were subsequently amended by Directive 98/20. However, under Article 7(1) of Directive 92/14, as amended by Directive 98/20, subject to the approval of the competent authority of a Member State, airlines could not be required under Article 2(1) to deregister aeroplanes which did not meet the Chapter 3 standards at an annual rate of more than 10% of the total civil subsonic jet fleet of a Community air carrier.

29 In view of the worsening noise and environmental situation at Community airports, the Council adopted the Regulation.

The Regulation

30 Recital 1 in the preamble to the Regulation states that 'one of the key objectives of the common transport policy is sustainable mobility', which requires 'a global

approach which aims at ensuring both the effective functioning of the Community's transport systems and the protection of the environment'. According to recital 4, 'the growth in air transport activities at Community airports is increasingly subject to environmental constraints' and 'the operation of less noisy aeroplanes at these airports can contribute to a better use of available airport capacity'.

31 According to Article 1 of the Regulation:

'The objective of this Regulation is to lay down rules to prevent deteriorations in the overall noise impact in the Community of recertificated civil subsonic jet aeroplanes while at the same time limiting other environmental damage.'

32 The principal provisions of the Regulation are Articles 2(2) and 3. Article 3 prohibits the registration and operation of 'recertificated civil subsonic jet aeroplanes'. This term is defined in Article 2(2) of the Regulation as follows:

'a civil subsonic jet aeroplane initially certificated to Chapter 2 or equivalent standards, or initially not noise-certificated which has been modified to meet Chapter 3 standards either directly through technical measures or indirectly through operational restrictions; civil subsonic jet aeroplanes which initially could only be dual-certificated to the standards of Chapter 3 by means of weight restrictions, have to be considered as recertificated aeroplanes; civil subsonic jet aeroplanes which have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio of three or more are not to be considered as recertificated aeroplanes'.

33 That definition of a 'recertificated civil subsonic jet aeroplane' must be read in the light of recital 5 in the preamble to the Regulation, according to which 'older types of aeroplanes modified to improve their noise certification level have a noise performance which is significantly worse, mass for mass, than that of modern types of aeroplanes originally certificated to meet the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993);... such modifications prolong the life of an aeroplane that would normally have been retired;... such modifications tend to worsen the gaseous emissions performance and fuel burn of earlier technology aero engines;... aeroplanes may be re-engined to achieve a noise performance comparable to that of those originally certificated to meet Chapter 3 requirements'.

34 The Regulation was adopted in the context of a dispute with the United States of America. Since it was nevertheless desirable for the new aircraft noise and emission limitation measures to be taken at international level, the Council decided to delay application of the Regulation, as provided by Article 7, by one year in order to allow negotiations to be held. The dispute could not be resolved, and the Regulation entered into force on 4 May 2000.

The ATBT

35 The Agreement establishing the World Trade Organisation (WTO) was signed by the European Community and by each Member State and approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1). The Community is a party to all the trade agreements administered by the WTO, including the ATBT.

36 Article 2 of the ATBT provides:

'2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

2.3 Technical regulations shall not be maintained if the... changed... objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist..., Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical

regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.6 With a view to harmonising technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardising bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.'

The main proceedings and the questions referred to the Court

37 Omega trades in aircraft, principally Boeing 707s, and carries on related activities such as aircraft engine maintenance. In 1996 Omega announced a programme to

replace the engines in a number of Boeing 707s with Pratt & Whitney JT8D-219 engines which have a by-pass ratio of 1.74.

38 By the time the decision was taken to include in the proposals for a directive and a regulation (98/C 118/12, OJ 1998 C 118, p. 20, and 98/C 329/07, OJ 1998 C 329, p. 10) aeroplanes which had been re-engined with engines with a by-pass ratio less than 3, it was too late for Omega to change its plans. It considered that, despite its approaches to the Community institutions, its situation had not been taken into consideration, as the Regulation prevented the operation in the Community of the 're-engined' Boeing 707s even though they complied with the noise and gaseous emissions standards of Chapter 3.

39 Omega therefore brought proceedings against the authorities responsible for civil aviation in the United Kingdom and Ireland, with a view to having the Regulation declared inapplicable.

40 In Case C-27/00, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), considered that some of Omega's claims raised serious issues, and so decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 2(2) of Council Regulation (EC) No 925/1999 invalid in so far as it defines "recertificated civil subsonic jet aeroplanes" so that re-engined aeroplanes "with engines having a by-pass ratio of three or more" are not subject to prohibitions imposed by the Regulation but aeroplanes wholly re-engined with

engines having a by-pass ratio of less than three are subject to prohibitions, having regard in particular to:

(a) the duty to give reasons under Article 253 EC;

(b) the general principle of proportionality;

(c) such rights as private parties may derive from the General Agreement on Tariffs and Trade and/or the Agreement on Technical Barriers to Trade?'

41 For the same reasons, with respect to the claims brought by Omega and the other companies concerned by the 're-engining' programme, in Case C-122/00, the High Court (Ireland) also decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 2(2) of Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) invalid in so far as it defines "recertificated civil subsonic jet aeroplanes" as including "civil subsonic jet

aeroplanes" as defined at Article 2(1) thereof that have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio of less than three having regard in particular to:

(a) the duty to give reasons under Article 253 EC;

(b) the principle of equal treatment;

(c) the principle of proportionality;

(d) the compatibility of that provision with the Agreement establishing the World Trade Organisation and in particular the Agreement on Technical Barriers to Trade annexed thereto?'

42 By order of the President of the Court of 23 March 2001, Cases C-27/00 and C-122/00 were joined for the purposes of the oral procedure and the judgment.

The obligation to state reasons

43 Omega submits that the obligation to state reasons was not complied with. The introduction of the criterion of a by-pass ratio of 3 or more, which derived from a Coreper (Committee of Permanent Representatives) initiative, was not supported by any reasons in the preamble to the Regulation.

44 It argues that the obligation on the Council to state reasons was all the more onerous because the Regulation departed from the rules of the Chicago Convention and from all previous Community legislation on aircraft noise emissions.

45 Omega also observes that recital 5 in the preamble to the Regulation merely distinguishes between hushkitted aircraft and re-engined aircraft. The former are assessed unfavourably, but not the latter. In those circumstances, applying different treatment to the latter category of aeroplanes, as Article 2(2) of the Regulation does, amounts to a contradiction of recital 5.

46 On this point, it should be borne in mind that it is settled case-law that the statement of reasons required by Article 253 EC must be adapted to the nature of the act in question. It must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in such a way as to make the persons concerned aware of the reasons for the measure and to enable the Court to exercise its power of review. It follows from the case-law that it is not necessary for details of all relevant factual and legal aspects to be given. The question whether the statement of the grounds for an act meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, to that effect, Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 70, and Case C-352/96 *Italy* v *Council* [1998] ECR I-6937, paragraph 40).

47 The Court has also held that if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made (Case C-168/98 *Luxembourg* v *Parliament and Council* [2000] ECR I-9131, paragraph 62).

48 In the present case, the Regulation contains a consistent and adequate account of the general situation in which it was adopted and of the objectives pursued by the Community. Those are to reduce the principal environmental problems which result from air traffic, namely noise, gaseous emissions and fuel burn, as is apparent from recital 5 in the preamble and from Article 1 of the Regulation.

49 It is to achieve that threefold objective that the Regulation introduces stricter requirements than those of Chapter 3. Recital 5 states that the results of modifications to aircraft to make them comply with the Chapter 3 standards are less satisfactory than those achieved by modern aeroplanes.

50 Moreover, it can be seen from the Regulation as a whole that the Community legislature proceeded from the principle that new engines with a by-pass ratio of less than 3 have less satisfactory environmental characteristics than engines with a higher by-pass ratio or aircraft engines of entirely new design.

51 It would have been desirable to have given a more detailed explanation of the choice of by-pass ratio as the sole criterion and of its being fixed at 3. However, the statement of reasons in a regulation of general application cannot be required to specify the various facts, frequently very numerous and complex, on the basis of which the regulation was adopted, nor *a fortiori* to provide a more or less complete technical evaluation of those facts (see Case 87/78 *Welding* [1978] ECR 2457, paragraph 11). That is particularly the case where the relevant factual and technical elements are well known to the circles concerned.

52 As to the passage at the end of recital 5 in the preamble to the Regulation, where it is stated that 'aeroplanes may be re-engined to achieve a noise performance

comparable to that of those originally certificated to meet Chapter 3 requirements', there is no contradiction with Article 2(2) of the Regulation. It refers, as follows from the Commission's answers to the written questions put by the Court, to technologically advanced engines of recent manufacture, which generally have a by-pass ratio of 3 or more.

53 Accordingly, Article 2(2) of the Regulation does not appear to infringe the obligation to state reasons laid down in Article 253 EC.

The principle of proportionality

54 According to Omega, by-pass ratio is an inadequate criterion, in that the noise produced by an aeroplane may come from sources other than the engine. The airframe of an aeroplane should be taken into account.

55 Moreover, while an increase in by-pass ratio may reduce engine noise and fuel burn, increasing the amount of by-pass air requires a larger fan at the front of the engine. The larger the fan, the more noise it generates. That increase in noise partly offsets the gains made with the engine.

56 Further, the internationally accepted method of measuring aircraft noise, in accordance with the Chicago Convention, does not consist in setting limits for each factor contributing to that noise, but takes an overall approach to noise emissions.

57 Omega produces a table which states that the quietest aeroplane on landing is its re-engined Omega 707, although it has the lowest by-pass ratio. The noisiest aeroplane on landing is the Boeing 767-200, which nevertheless has a by-pass ratio of 4.8. The noisiest aeroplanes on take-off are the Omega 707 and the Boeing 767-200, which have the lowest and highest by-pass ratio respectively. Only with respect to sideline noise is the Omega 707 significantly noisier. However, Omega 707s comply with the Chapter 3 standards by a greater margin than the Airbus or Boeing aeroplanes, both of which have a by-pass ratio of over 3.

58 Omega submits that in any event alternative measures could have been taken which would have been economically less damaging for it.

59 In particular, fixing separate thresholds for noise, gaseous emissions and fuel burn would have been less restrictive than global regulation of aircraft engine construction. That approach would also correspond to the approach traditionally followed by Community law, the Chicago Convention and the WTO.

60 Omega also submits that the principle of proportionality was infringed because the Regulation departs from the Chicago Convention, the previous Community legislation and the law of the WTO and seriously harms its business activity without producing any corresponding benefit to the Community. It maintains that the Community legislature was not obliged to take urgent action and could have waited until definite scientific knowledge was available to assess the situation.

61 Moreover, according to Omega, emissions of hydrocarbons, carbon monoxide and oxides of nitrogen from its re-engined aeroplanes are lower than those from the engines of the Airbus A300-B4-203, a comparable aeroplane, and emissions

of hydrocarbons and oxides of nitrogen are even lower than those from all comparable aeroplanes. It says that even the fuel burn of Omega's re-engined Boeing 707 is over 40% more efficient than that of the Airbus A300-B4-203. Yet the latter has a by-pass ratio of 4.3.

62 On this point, it should be remembered that it is settled case-law that the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, in particular, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, Case C-180/96 *United Kingdom* v *Commission*, cited above, paragraph 96, and Case C-101/98 *UDL* [1999] ECR I-8841, paragraph 30).

63 It is also settled case-law, with respect to judicial review of the conditions mentioned in the preceding paragraph, that the Community legislature has wide legislative powers in the field of the common transport policy as regards the adoption of appropriate common rules (see, to that effect, in particular, Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 23).

64 In reviewing the exercise of such powers, the Court cannot substitute its own assessment for that of the Community legislature, but must confine itself to examining whether that latter assessment contains a manifest error or constitutes a misuse of powers or whether the authority in question clearly exceeded the bounds of its discretion (see, in particular, *SAM Schiffahrt and Stapf*, paragraph 24).

65 Moreover, the Court's case-law also shows that where, as in this case, implementation by the Council of a common policy requires it to assess a complex economic situation, its discretion is exercisable not only in relation to the nature and scope of the provisions which are to be adopted but also, to a certain extent, to the findings as to the basic facts, especially in the sense that it is free to base its assessment, if necessary, on findings of a general nature (see, in particular, *SAM Schiffahrt and Stapf*, paragraph 25).

66 In the present case, the Council did not exceed its margin of appreciation in taking the view that the criterion of a by-pass ratio of 3 or more could contribute to the objective of reducing the damage to the environment caused by air traffic in terms of noise, fuel burn and gaseous emissions.

67 Nor has Omega shown that the criterion relating to by-pass ratio was inappropriate.

68 Moreover, its assertions, which are in any case disputed by the United Kingdom Government, refer exclusively to a particular type of aeroplane, the projected re-engined Boeing 707s. These assertions are no more than forecasts, since those aeroplanes have not yet undergone certification tests, as the Advocate General has observed in point 76 of his Opinion.

69 The Commission, on the other hand, has produced general data on the development of noise pollution and fuel burn of aeroplanes over the three decades from the 1960s to the beginning of the 1990s. Those data show that the gradual increase in by-pass ratios during that period was accompanied by a

reduction of noise emissions by 20 to 25 EPNdB, which is equivalent to a four- to five-fold reduction in perceived noise nuisance, and to a reduction in fuel consumption per passenger on long-haul flights by over 50%, with a consequent reduction in gaseous emissions.

70 Moreover, the Community legislature has already in the past enacted other legislation based on the criterion that a higher by-pass ratio is an indication that the engine is less noisy. A by-pass ratio of 2 is used in Article 4(e) of Directive 89/629 (see paragraph 24 above) and Article 2(1) of Directive 92/14 (see paragraph 26 above) as an alternative to compliance with the Chapter 3 noise standards. That alternative is also suggested in Resolutions A31-11 and A32-8 of the ICAO Assembly recommending the Member States to introduce a derogation for aeroplanes with engines with a high by-pass ratio in the event of early application of the Chapter 3 thresholds (see paragraph 19 above).

71 Omega further submits that alternative measures could have been adopted which would have been economically less damaging for it, and that aircraft noise can come from sources other than the engines.

72 On this point, even if such measures could make a sufficient contribution to reducing environmental damage caused by air traffic, the Council could reasonably take into consideration that the application of separate criteria relating to the reduction of noise, fuel burn and gaseous emissions would have represented a highly complex operation which was not justified by the limited number of aeroplanes such as those re-engined by Omega. In the same way, it could reasonably consider that reference to a single technical criterion could remove the uncertainties which specific standards might allow to persist. Thus, for the problem of noise alone, if the take-off, landing and sideline figures had to be weighted, the question could also arise whether the differentiated influence of noise volumes ought not to be taken into account. For those reasons, the Council

did not commit a manifest error of assessment in its choice of criteria by taking account of the fact that the by-pass ratio appears more workable because it requires fewer tests and measurements, both in terms of design and control.

73 In those circumstances, it does not appear that the Council committed a manifest error of assessment by considering it necessary to authorise the re-engining of aeroplanes only using engines with a by-pass ratio of 3 or more.

74 Accordingly, it does not appear that Article 2(2) of the Regulation infringes the principle of proportionality.

The principle of non-discrimination

75 Omega submits, first, that the stated principal objective of the Regulation is to reduce the level of noise produced by the aeroplanes operated on the territory of the Community. By imposing restrictions on the use of re-engined aeroplanes with engines with a by-pass ratio less than 3 without imposing the same requirements on noisier aeroplanes whose engines have a by-pass ratio of 3 or more, the Regulation discriminates against the former.

76 Next, Article 2(2) of the Regulation, in referring not to the by-pass ratio of the engines in question, but to the time when the aeroplanes concerned were equipped with those engines, prevents the applicants in the main proceedings from using their aeroplanes. To discriminate between aeroplanes using identical engines on the basis of the date on which they were fitted with those engines has no objective justification.

77 Applying the criterion of a by-pass ratio of 3 or more also discriminates in favour of aircraft engine manufacturers in the European Union against those established in the United States and against aircraft owners whose aeroplanes have been re-engined with engines manufactured in the United States.

78 Finally, Omega criticises the fact that the Regulation treats re-engining with engines having a by-pass ratio less than 3 in the same way as modifying aeroplanes by means of hushkits.

79 On this point, it is settled case-law that the general principle of equality, which is one of the fundamental principles of Community law, requires that similar situations are not treated differently and different situations not treated alike unless such treatment is objectively justified (see, to that effect, *SAM Schiffahrt and Stapf*, paragraph 50, and Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39).

80 First, since there is a link between by-pass ratio and noise, there is an objective reason for treating aeroplanes re-engined with engines with a high by-pass ratio differently from aeroplanes re-engined with engines with a low by-pass ratio.

81 Second, the distinction between re-engined aeroplanes and aeroplanes designed from the outset to comply with the Chapter 3 standards is justified above all by concern to protect acquired rights. Manufacturers who have developed aeroplanes by reference to Chapter 3 standards and airlines which have bought such aeroplanes must, in principle, enjoy greater protection of their legitimate expectation of being able to operate them than manufacturers and owners of aeroplanes whose original construction did not comply with those standards.

82 Third, the evidence produced to the Court has not shown that any direct or indirect discrimination against undertakings established in the United States results from implementing the criterion of a by-pass ratio of 3 or more. The Regulation applies with equal strictness to European operators and manufacturers and to those of the United States.

83 Fourth, the Community legislature was entitled to treat re-engining of aeroplanes with engines with a by-pass ratio less than 3 in the same way as the use of hushkits. On the one hand, it could reasonably consider that those techniques are less effective as regards noise reduction than re-engining with engines with a by-pass ratio of 3 or more, as follows from paragraph 52 above and recital 5 in the preamble to the Regulation (see paragraph 33 above) respectively. On the other hand, they do not have the same advantages as regards fuel economy and the reduction of gaseous emissions as engines with a high by-pass ratio.

84 Accordingly, it does not appear that Article 2(2) of the Regulation infringes the principle of non-discrimination.

The ATBT

85 Omega criticises, first, the judgment in Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, in which the Court held (paragraph 47) that the WTO agreements are not in principle among the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions.

86 According to Omega, in examining the compatibility of Community measures with international agreements, the Court distinguishes, in paragraph 42 of *Portugal* v *Council*, according to whether they are based on 'reciprocal and mutually advantageous' arrangements or not. Omega considers, however, that that distinction is unhelpful, as all international agreements have such a basis.

87 Omega submits, second, in the alternative, that Article 2 of the ATBT is sufficiently precise to have direct effect. As regards the compatibility of the Regulation with that provision, it observes that the criterion of by-pass ratio, fixed at 3 in the Regulation, disregards several provisions of Article 2 of the ATBT.

88 It submits, to begin with, that Article 2(2) of the Regulation is a 'technical regulation' within the meaning of the ATBT. Next, paragraph 2.4 of the ATBT provides that, where technical regulations are required and relevant international standards exist, Members are to use them, or the relevant parts of them, as a basis for their technical regulations. Finally, paragraph 2.8 of the ATBT urges Members, when drawing up technical regulations, to base them not on the design and technical characteristics of the products but rather on their performance, contrary to what the Regulation provides.

89 On this point, suffice it to say that Omega misunderstands the basis of the Court's case-law. The decisive factor here is that the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is indeed the solution recommended by WTO law, but other solutions are also authorised, for example settlement, payment of compensation or suspension of concessions (see, to that effect, *Portugal* v *Council*, paragraphs 36 to 39).

90 In those circumstances, to require the judicial organs to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility of finding negotiated solutions, even on a temporary basis (see, to that effect, *Portugal* v *Council*, paragraph 40).

91 It follows that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the domestic legal order of the contracting parties (see *Portugal* v *Council*, paragraph 41).

92 It is common ground, moreover, that some of the contracting parties, which are among the most important trading partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules in the light of which their judicial organs are to review the lawfulness of their rules of domestic law (see *Portugal* v *Council*, paragraph 43).

93 It follows from all the above considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the lawfulness of acts of the Community institutions (see *Portugal* v *Council*, paragraph 47).

94 It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to precise provisions of the WTO agreements, that it is for the Court to

review the lawfulness of the Community measure in question in the light of the WTO rules (see *Portugal* v *Council*, paragraph 49).

95 That is not the case here. The Regulation is not intended to implement in the Community legal order a particular obligation assumed in the context of the WTO, nor does it refer expressly to precise provisions of the WTO agreements.

96 Accordingly, it does not appear that the ATBT affects the validity of Article 2(2) of the Regulation.

97 The answer to be given to the national courts must therefore be that consideration of the questions submitted by them has disclosed no factor such as to affect the validity of Article 2(2) of the Regulation.

Costs

98 The costs incurred by United Kingdom Government and by the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), by order of 21 December 1999 and by the High Court (Ireland) by order of 21 March 2000, hereby rules:

Consideration of the questions submitted has disclosed no factor such as to affect the validity of Article 2(2) of Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993).

Rodríguez Iglesias	Jann	Macken
Colneric	von Bahr	Gulmann
Edward	Puissochet	Wathelet
Cunha Rodrigues		Timmermans

Delivered in open court in Luxembourg on 12 March 2002.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President