JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
19 June 1997 *

In Case T-260/94,

Air Inter SA, a company incorporated under French law, having its registered office in Paray Vieille Poste, France, represented by Jean-Pierre Spitzer, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Rolf Wägenbaur, Principal Legal Adviser, and Lucio Gussetti, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

TAT European Airlines, represented by Antoine Winckler, of the Paris Bar, and Romano Subiotto, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 2 Place Winston Churchill,

* Language of the case: French.

and

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Richard Plender QC, with an address for service in Luxembourg at the United Kingdom Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for annulment of Article 1 of Commission Decision 94/291/EC of 27 April 1994 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/IV/93 — TAT — Paris (Orly)-Marseille and Paris (Orly)-Toulouse) (OJ 1994 L 127, p. 32),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: C. W. Bellamy, President, C. P. Briët and A. Kalogeropoulos, Judges,

Registrar: J. Palacio Gonzáles, Administrator,

having regard to the written procedure and further to the hearing on 13 November 1996,

gives the following

Judgment

The legal background

1 With a view to the gradual establishment of the internal market for air transport, the Community legislature adopted three sets of measures in 1987, 1990 and 1992 which were known as 'packages' on account of the fact that they consisted of several documents. The third 'package', adopted on 23 July 1992, consists of five regulations which aim to ensure the freedom to provide air transport services and the application of the Community competition rules in that sector.

2 One of those five regulations is 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, hereinafter 'Regulation No 2408/92' or 'the Regulation'), which entered into force on 1 January 1993 pursuant to Article 16 thereof.

3 Article 3(1) sets out the principle that 'subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community'.

4 Article 5 provides as follows:

'On domestic routes for which at the time of entry into force of this Regulation an exclusive concession has been granted by law or contract, and where other forms of transport cannot ensure an adequate and uninterrupted service, such a concession may continue until its expiry date or for three years, whichever deadline comes first.'

5 Article 8 provides as follows:

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

2. The exercise of traffic rights shall be subject to published Community, national, regional or local operational rules relating to safety, the protection of the environment and the allocation of slots.

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

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

[...]'.

6 Pursuant to Article 2(m) in conjunction with Annex II to the Regulation, the 'airport systems' referred to in Article 8(1) include, as regards France, 'Paris-Charles de Gaulle/Orly/Le Bourget'.

7 Article 11 provides that the Commission is to be assisted by an Advisory Committee composed of the representatives of the Member States and chaired by the representative of the Commission.

8 Article 12 lays down that, in carrying out its duties under the Regulation, the Commission may obtain all necessary information from the Member States and air carriers concerned.

Facts

The administrative procedure

9 By letter of 21 June 1993 TAT European Airlines ('TAT'), established at Tours, France, applied to the Directorate-General for Civil Aviation in the French

Ministry of Transport for a licence to operate on the Paris (Orly)-Toulouse and Paris (Orly)-Marseille routes, referring, in its application, to the Regulation.

10 By letter of 21 July 1993 the Director General of Civil Aviation rejected that application, basing his rejection on Article 5 of the Regulation. In his letter he indicated to TAT that under that provision the French authorities could maintain the exclusivity which they had granted to Air Inter by an agreement of 5 July 1985 signed by the French State and that company (hereinafter 'the 1985 Agreement'). At that time, Air France, in which the French State had a shareholding in excess of 99%, held more than 70% of the share capital of Air Inter.

11 On 28 September 1993 TAT lodged a complaint with the Commission claiming that there had been an infringement of Articles 3(f), 86 and 90 of the EC Treaty and a failure to comply with an agreement concluded on 30 October 1990 between the Commission, the French Government and Air France (hereinafter 'the 1990 Agreement') aimed at opening up, *inter alia*, the Paris-Toulouse and Paris-Marseille routes to competition. In the alternative, TAT claimed that there had been an infringement of the Regulation. It submitted that the monopoly of the Air France group on the Paris (Orly)-Marseille and Paris (Orly)-Toulouse routes should have come to an end on 1 March 1992, as provided for in the 1990 Agreement. Nor was Article 5 of the Regulation applicable, since Air Inter had not enjoyed exclusivity on those two routes, as TAT provided a service from Roissy-Charles de Gaulle airport (hereinafter 'CDG') on those same routes. Finally, the discrimination against TAT was incompatible with Article 8(1) of the Regulation.

12 By letter dated 13 October 1993 to the Director General of the Commission's Directorate-General for Transport (hereinafter 'DG VII'), TAT supplemented its submissions on Articles 5 and 8(1) of the Regulation and requested the Commission to adopt a decision on the basis of Article 8(3) of the Regulation.

13 By letter of 20 October 1993 the Commission's Directorate-General for Competition (hereinafter 'DG IV') sent a copy of TAT's complaint to the French authorities and to the Air France group asking for their comments, if any. The supplement to the complaint lodged by TAT was not annexed to that letter.

14 By letter of 22 October 1993 the Director General of DG VII also notified the French authorities of TAT's complaint, but did not send a copy of it to them. He also informed them that, at first sight, he considered TAT's submissions to be well founded.

15 Neither the complaint nor the supplement to the complaint was sent by the Commission to Air Inter.

16 In a letter dated 21 December 1993 — addressed to the Secretary-General of the Commission with copies to DG IV and DG VII — the French authorities sent their observations on TAT's complaint. They submitted that Article 5 of the Regulation was applicable, since, with the exception of the Nice service, the opening up of competition provided for by the 1990 Agreement concerned only routes to or from CDG, so that Air Inter had retained exclusivity for the routes to or from Orly Airport. Its reply did not mention Article 8 of the Regulation.

17 By letter of 21 January 1994 the Director General of DG VII notified the French authorities of the lodging by TAT of a supplement to the complaint and pointed out that Article 8(3) of the Regulation empowered the Commission to adopt a decision.

18 On 16 February 1994, in reply to that letter, the French authorities sent to the Commission a letter summarizing their position.

19 After that exchange of correspondence, the Advisory Committee provided for in Article 11 of the Regulation met on 28 February 1994. During that meeting the delegations of the Member States were able to give their views on the draft decision based on Article 8(3) of the Regulation, which had been sent to them by the Commission on 10 February 1994.

20 The Advisory Committee's opinion was in the following terms:

'The majority of the members present expresses the following opinion: on the basis of the information available to the Committee, it appears that the incorrect application of Article 5 by France has resulted in discriminatory effects. The majority of the members has, however, spoken against a decision taken on the basis of Article 8 of Regulation No 2408/92.'

21 On 4 March 1994 a delegation headed by the Head of Cabinet of the Commissioner responsible for transport received a delegation from Air Inter in order to discuss the possible implications of a Commission decision, in the light of the position adopted, for the future of Air Inter on the Community market. After the meeting Air Inter sent a letter, signed by the Deputy Managing Director, dated 7 March 1994, setting out 'Air Inter's situation as the Commission is about to take decisions in the TAT cases'. Lastly, by letter of 15 March 1994 addressed to the President of the Commission, Air Inter's board of directors expressed its concern regarding the future of Air Inter in view of the liberalization of domestic air transport and, in particular, of the introduction of competition on the most profitable routes in the French network.

22 On 17 March 1994 the French Government sent a new letter to the Commission, drawing attention to the French delegation's observations at the meeting of the Advisory Committee regarding in particular, Articles 5 and 8 of the Regulation, Article 90 of the EC Treaty, and the 1985 Agreement and the 1990 Agreement.

23 At the request of the French Government, the Director of Legal Affairs at the Ministry of Foreign Affairs met the Director General of the Commission's Legal Service on 30 March 1994 in order to discuss TAT's complaint.

24 On 12 April 1994 the Commissioner responsible for transport met the French Prime Minister in order to discuss the various questions concerning French air transport and, in particular, the allocation of traffic within the Paris Airport system.

The contested decision

25 On 27 April 1994 the Commission adopted Decision 94/291/EC on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/IV/93 — TAT — Paris (Orly)-Marseille and Paris (Orly)-Toulouse) (OJ 1994 L 127, p. 32, hereinafter 'Decision 94/291' or 'the contested decision'), whose operative part is in the following terms:

'*Article 1*

France may not continue to refuse Community air carriers traffic rights on the Paris (Orly)-Marseille and Paris (Orly)-Toulouse routes on the grounds that the French authorities were applying Article 5 of Regulation (EEC) No 2408/92 on these routes.

Article 2

This Decision is addressed to the French Republic. (...)

Article 3

France is required to give effect to this Decision by 27 October 1994 at the latest.'

26 In the statement of reasons for the contested decision the Commission states, first of all, that it holds powers for the allocation of traffic between airports within an airport system which are conferred on it by Article 8(3) of the Regulation. As far as the complaint lodged by TAT is concerned, it considers it necessary to use those powers. The measure by which the French authorities refuse to allow Community carriers, and more particularly TAT, to exercise traffic rights on the Paris (Orly)-Marseille and Paris (Orly)-Toulouse routes is discriminatory, to the advantage of Air Inter alone, in the allocation of traffic between the airports within the Paris airport system.

27 The Commission then states that the maintenance of Air Inter's exclusive concession constitutes a misapplication by the French authorities of Article 5 of the Regulation. That article aims to ensure adequate and uninterrupted transport services between two points (cities or regions) within the same Member State. Exclusive rights may be maintained only where there is no other way of travelling from one city to another, adequately and uninterruptedly, by train or bus or, in the case of indirect flights or where an alternative airport is available, by plane. Consequently, exclusive rights to a route terminating in an airport system would serve their purpose only if they apply to all the airports in that system.

28 The Commission goes on to observe that the 1985 Agreement itself defines the routes allocated exclusively to Air Inter as point-to-point rather than airport-to-airport routes and makes no reference whatsoever to the different airports of the Paris airport system. In those circumstances, by authorizing TAT to operate on the Paris-Marseille and Paris-Toulouse routes to and from CDG with effect from 1 March 1992, the French authorities had put an end to the exclusivity enjoyed by Air Inter. Furthermore, the Commission considers that upon the entry into force of the Regulation Air Inter did not hold an exclusive concession for the routes in question. As regards the Paris-Marseille route, the 1985 Agreement gave express permission to the Air Afrique company to operate that same route concurrently with Air Inter. As regards the Paris-Toulouse route (and by extension the Paris-Marseille route), it follows from the 1990 Agreement that Air Inter's exclusivity on that route ended on 1 March 1992 at the latest.

29 In the alternative, the Commission states that, even if the grant of an exclusive concession were theoretically possible for regular air services between Orly airport, on the one hand, and Marseille and Toulouse, on the other, Article 5 cannot be applied in the present case. There are other forms of transport, besides those air routes, which could ensure an adequate and uninterrupted service: the existing direct air services between Paris (CDG) and Marseille and Toulouse respectively.

30 The Commission states that the effects of the discrimination at issue are considerable. Orly airport is the travellers' choice and accounts for between 85% and 90% of French domestic traffic to and from Paris. Moreover, the operation of the Paris-Marseille and Paris-Toulouse routes is more expensive from CDG than from Orly, partly for geographical reasons.

31 Finally, the Commission accepts that its decision may have major repercussions on the structure and organization of the routes in question, which is why it considers it advisable to allow a period for adjustment, expiring on 27 October 1994.

Procedure and forms of order sought

32 Air Inter brought this action by application lodged at the Registry of the Court of First Instance on 12 July 1994.

33 By application lodged at the Registry of the Court of Justice on 22 June 1994, the French Republic had also brought an action for a declaration that the contested decision was void. That action was registered in the Court Registry under Case C-174/94. By interim order of 26 October 1994 in Case C-174/94 R *France* v *Commission* [1994] ECR I-5229 the President of the Court of Justice dismissed the French Republic's application for the suspension of operation of the contested decision.

34 By order of 28 October 1994 the Court of First Instance declined jurisdiction in the present case, Case T-260/94, pursuant to the second sentence of the third paragraph of Article 47 of the EC Statute of the Court of Justice, in order that the Court of Justice could rule on the application for annulment, which was also sought in the action brought by the French Republic in Case C-174/94. The order declining jurisdiction was registered in the Registry of the Court of Justice under No C-301/94.

35 By orders of 19 January and 8 February 1995 the President of the Court of Justice gave the United Kingdom and TAT leave to intervene in support of the form of order sought by the Commission in Case C-301/94. Certain confidential documents were notified to the intervening parties in a non-confidential version produced by the principal parties.

36 The Court of Justice decided to open the oral procedure in Case C-301/94 without any preparatory inquiry. A report for the hearing was sent to the parties.

37 Thereafter the French Republic formed the view that it no longer had an interest in annulment of the contested decision and withdrew its action in Case C-174/94. Case C-174/94 was therefore removed from the Register of the Court of Justice by order of 19 March 1996. By order of the Court of Justice of 14 May 1996, Case C-301/94 was referred back to the Court of First Instance; the costs were reserved.

38 The proceedings in the present case, T-260/94, were then recommenced before the Court of First Instance, which ordered certain measures of organization of procedure. The oral procedure took place essentially on the basis of the Report for the Hearing in Case C-301/94 which had already been distributed.

39 The parties submitted oral argument and replied to the Court's questions at the hearing on 13 November 1996 before the Court, composed of C. W. Bellamy, President, H. Kirschner, C. P. Briët, A. Kalogeropoulos and A. Potocki, judges.

40 Following the death of Judge Kirschner on 6 February 1997, the three judges whose signatures appear below deliberated on the present judgment in accordance with Article 32(1) of the Rules of Procedure.

41 The applicant claims that the Court should:

— annul Article 1 of Decision 94/291;

— order the Commission to pay the costs.

42 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

43 TAT contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs, including those incurred by TAT.

44 The United Kingdom contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs, including those incurred by the United Kingdom.

Substance

45 In support of its application, the applicant relies on a number of pleas contesting both the formal and the substantive legality of the contested decision. As regards its formal legality, the applicant complains, principally, that the Commission infringed its rights of defence and, in the alternative, that it infringed the *audi alteram partem* principle and the principle of good faith as against the French Republic. As regards its substantive legality, the applicant complains, principally, that the Commission abused the procedure provided for in Article 8(3) of the Regulation and, in the alternative, that it infringed Article 5 thereof. Again in the alternative, it alleges infringement of Article 90(2) of the Treaty and infringement of the principle of proportionality. Finally, and in the further alternative, it claims that the refusal by the French authorities to allow TAT access to the two routes in question does not discriminate against that company, since the applicant's exclusivity on those routes was justified by Article 5 of the Regulation.

The plea of infringement of the applicant's rights of defence

Arguments of the parties

46 The applicant observes that it is settled law that observance of the rights of the defence constitutes a fundamental principle of Community law which must be observed even in the context of an administrative procedure. Consequently, a person who may be affected by a Commission decision should be placed in a position in which he may make known his views before the decision is adopted.

47 The applicant states that, in the present case, although it is the only operator concerned by the contested decision, the Commission never formally invited it to appear before it, never sent any documents to it and did not invite it to submit observations on the matter. The applicant therefore considers that it was not able to make its view known. It is thus in a similar situation to that of the Netherlands PTT undertakings examined by the Court of Justice in its judgment in Joined

Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565. It also refers to the judgment in Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885.

48 Inasmuch as the Commission claims to have given a formal hearing to the applicant on 4 March 1994, the applicant states that that meeting took place at its own request and four months after the Commission had already adopted a position. Furthermore, the purpose of the meeting was purely economic, as was also the applicant's letter of 7 March 1994. Finally, the letter from the applicant's directors of 15 March 1994 merely expressed their concerns.

49 The applicant contests the Commission's argument that the contested decision, far from concerning the applicant's specific situation, is of a general nature in that it concerns the French Government's policy on airports. The national measure in question was the French authorities' refusal to grant the traffic rights in question to TAT, a refusal which directly benefited the applicant. Moreover, the applicant is explicitly concerned by the contested decision, which concerns the legality of the exclusivity granted to the applicant on the routes at issue. Finally, it is wholly and directly affected by the consequences of the contested decision.

50 The applicant observes that Article 8(3) of the Regulation must be interpreted as requiring the Commission not only to place the Member State concerned in a position to defend its interests, but also any other party directly concerned, such as the applicant. Consequently, even in the absence of specific provisions, the Commission was required to make procedural arrangements on its own initiative in such a way as to ensure effective protection. The general principle of protection of the rights of the defence is applicable where specific rules exist and *a fortiori* where there are no such rules.

51 If the Court interprets Article 8(3) as authorizing a derogation from the principle of the observance of the rights of the defence of any interested party, the applicant considers that the Court should then examine the validity of that provision. Any Community regulation authorizing a derogation from a fundamental principle of Community law is *ipso jure* in breach of Community law. Consequently, the Court could not but declare Article 8(3) void.

52 Finally, the applicant considers it to be absurd to claim, in this context, that it was sufficient to consult the representatives of the Member States sitting in the Advisory Committee. That committee's role was not to represent the interests of private undertakings, but to assist the Commission and to inform it of the Member States' positions.

53 The Commission states that the Regulation does not provide for a procedure allowing the undertakings concerned to be involved. Thus, the procedure under Article 8(3) of the Regulation adopts the broad outline of the procedure under Article 169 of the Treaty, which does not provide for any obligation to consult either. The Commission observes, moreover, that under a procedure initiated at the request of a Member State under Article 8(3) of the Regulation it must take a decision within a period of one month. If there is a large number of airlines benefiting from a discriminatory measure, it is practically impossible to comply with that time-limit.

54 The Commission disputes that the judgments in *Netherlands and Others* v *Commission* and *Fiskano* v *Commission* are relevant in this case. It argues in particular that the contested decision concerns the allocation of air routes within the Paris airport system and that the applicant suffers the economic effects of the decision only indirectly and partially. The fact that the French authorities have claimed that the applicant enjoys an exclusive concession under Article 5 of the Regulation does not preclude the substantive question from being the question whether the general measures adopted by the French Republic might discriminate in the distribution

of traffic in the Paris airport system and so affect the rights of all Community companies. Misuse of that provision could not suffice on its own to impose an obligation to consult the applicant.

55 The Commission claims that, in any event, the applicant was given a formal hearing on 4 March 1994 and it made known its point of view, in particular in the letter of 7 March 1994, and it was thus unnecessary for the Commission to hear it again. In its rejoinder (p. 6) it explains that the French authorities kept the applicant continuously informed of developments in the matter. That flow of information was confirmed by those same authorities in the context of the parallel procedure pending before the Court of Justice. In that regard, the Commission refers to page 10 of the reply lodged by the French Republic in Case C-174/94 (see paragraph 33 above).

56 The United Kingdom supports the Commission's line of argument and observes that the judgment in *Netherlands and Others* v *Commission* is irrelevant in this case because the procedure at issue, far from being opened against the applicant, took place between the Commission and the French Republic alone. Moreover, that judgment concerns the application of Article 90(3) of the Treaty, which does not establish special rules regarding the persons to be consulted and the consultation procedure, whereas, in the present case, Regulation No 2408/92 lays down specific rules.

Findings of the Court

57 Article 8(3) of the Regulation does not provide for the direct participation of air carriers in the administrative procedure leading to the adoption by the Commission of a decision on the distribution of traffic within an airport system. The legal framework requires the Commission to address only the Member State concerned after consulting the Advisory Committee, composed of representatives of the Member States. Only generally and at its option 'may' the Commission obtain

information from air carriers in order to carry out its duties (Article 12 of the Regulation). It follows that the Regulation does not in itself confer rights of defence on an air carrier faced with a situation such as that in which the applicant was placed in this case.

58 In so far as the Commission seeks to justify that silence by claiming that the procedure under Article 8(3) was modelled on the procedure provided for in Article 169 of the Treaty, in which only the Commission and the Member State concerned participate, it should be observed that, under Article 169 of the Treaty, the failure of a Member State to fulfil its obligations is established only by the judgment of the Court of Justice, whereas, under Article 8(3) of the Regulation, it is the Commission's decision which imposes the distribution of traffic which the Commission wishes to see. The procedure under Article 169 is therefore essentially a judicial procedure, whereas the procedure under Article 8(3) is a wholly administrative procedure. Consequently, the two procedures display substantive differences, so that the Commission's argument based on reference to Article 169 of the Treaty cannot be accepted.

59 As regards the procedure initiated under Article 8(3) of the Regulation, which led to the adoption of the contested decision, it is settled law that respect for the rights of the defence, in all proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person, is a fundamental principle of Community law which must be guaranteed even in the absence of any specific rules (see, for example, the judgment in *Netherlands and Others* v *Commission*, paragraph 44). That principle requires that the person concerned must be placed in a position in which he can effectively make known his view of the matters on the basis of which the Commission adopted its measure (judgment in *Fiskano* v *Commission*, paragraph 40).

60 In so far as the Commission claims that the judgment in *Netherlands and Others* v *Commission* — given in the context of Article 90(3) of the Treaty — is irrelevant to the present case because the procedure at issue is laid down by specific rules excluding the participation of the air carriers who may be affected, it must be observed that the application of the fundamental principle of the rights of the

defence cannot be excluded or restricted by any legislative provision. Respect for that principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle (see, to that effect, the judgment in Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 30). It follows that the Commission's argument based on the absence of a specific provision in the legislation in question must be rejected.

61 As to the United Kingdom Government's argument that the procedure at issue in this case was not 'opened against' the applicant, it should be observed that, although the procedure in question was not formally commenced against the applicant as an individual economic operator, that was also not the case in the situation with which the judgment in *Netherlands and Others* v *Commission* was concerned, in which, in a procedure initiated under Article 90(3) of the Treaty, the Commission formally addressed only the Kingdom of the Netherlands and not the Netherlands PTT companies. That finding did not, however, prevent the Court of Justice from conferring rights of defence on those companies on the ground that they were the direct beneficiaries of the State measure at issue and that they were expressly named in the Netherlands law that had been declared unlawful, that they were expressly named in the decision at issue and that the economic consequences of that decision directly affected them (paragraphs 50 and 51 of that judgment).

62 It is therefore necessary to examine whether the reasoning adopted in the judgment in *Netherlands and Others* v *Commission*, conferring rights of defence in the context of Article 90(3) of the Treaty, may be transposed to the present case. First of all, the applicant was the direct beneficiary of the State measure at issue, namely the continuation, to its advantage, of a privileged position on the two routes in question, it not being necessary, at this stage, to ascertain whether it could in fact have claimed legal exclusivity. The applicant's economic position was therefore going to be affected by the contested decision, which ordered the French authorities to open up those two routes to competition by other Community air carriers. Thus, the applicant was going to bear the economic consequences of the contested

decision directly. Second, the applicant was expressly named in the national instrument on which it relied for its exclusive traffic rights, namely the 1985 Agreement, it not being necessary here to examine the legal effect of that agreement. Finally, the contested decision repeatedly expressly mentions the applicant. Consequently, the conditions laid down by the judgment in *Netherlands and Others* v *Commission* are satisfied in this case.

63 Consequently, the applicant had rights of defence which should have been observed in the procedure culminating in the adoption of the contested decision and it is unnecessary to consider the general question, raised by the Commission, whether rights of defence exist also in a situation where a procedure initiated under Article 8(3) of the Regulation, which has to be completed within a period of one month, would affect an indeterminate number of air carriers.

64 As regards the question whether the applicant's rights of defence were observed in the present case, the Court of First Instance held in Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, which concerned the reduction in financial assistance which the European Social Fund had initially granted to the beneficiary undertakings in the course of a procedure in which the national authority had been the sole interlocutor of the Fund, that the applicant undertakings had a right to be heard and it pointed out that that right had not been upheld in dealings between the Commission and the beneficiaries or in those between the national authority and the beneficiaries (paragraphs 49 and 50 of the judgment).

65 In the present case it is therefore necessary to examine whether the applicant's rights of defence have been observed in a tangible way, either directly in its dealings with the Commission or indirectly through the French authorities, or through the combination of those two administrative channels.

66 It was the applicant itself which approached the Commission by sending the letter of 7 March 1994, after having been granted a meeting by the Commission on

4 March 1994. In that letter it explained its business situation, in particular with regard to the air services it supplied and its contractual relationship with the French State, which had entrusted it with public service tasks. It pointed to its difficult financial situation resulting from increased competition from both airlines and railways. In short, it was particularly opposed to an abrupt and hasty opening of the main air routes which it served from and to Orly airport.

67 Although, as it has stated before the Court, the applicant only made 'purely economic' points on that occasion, nothing prevented it from also submitting legal arguments. The reason for which it refrained from doing so can be explained only by the fact that it took the view that the Commission was adequately informed from the legal point of view.

68 The Commission — referring to the French authorities' statements (see paragraph 55 above) — has indicated, without contradiction in that regard by the applicant, that the applicant had been kept informed by those authorities of the course of the procedure. It must therefore be concluded from this that the applicant was at least aware of the observations submitted by the French authorities to the Commission.

69 Those observations, in particular those set out in the letters of 21 December 1993 and 17 March 1994, concerned in particular the requirements imposed on the applicant by the 1985 Agreement, the imperilment of the applicant's operation of the French domestic air network and of the internal cross-subsidy system if the Orly-Toulouse and Orly-Marseille routes were opened up to competition, the effects of the 1990 Agreement, which, in the French authorities' opinion, concerned only multi-designation from CDG, and the alleged waiver of the applicant's exclusivity as a result of the rights granted to Air Afrique in particular. Moreover, the French authorities stated in those letters that the applicant was an undertaking entrusted with a service of general interest within the meaning of Article 90(2) of the Treaty, that provision's rank in the hierarchy of norms being above that of Regulation No 2408/92, which carried out harmonization within the

Community. Finally, they undertook an in-depth interpretation of Article 5 of the Regulation, which, in their opinion, concerned links between two airports and not between cities and thus permitted the exclusivity granted to the applicant to be maintained.

70 The observations submitted by the French authorities thus dealt with the essential legal aspects of the present case, as they appear in the contested decision. They set out in particular the applicant's specific situation. The applicant has never claimed during the course of the proceedings before the Court that the observations submitted in that regard were incomplete or contrary to its interests. If that had been the case, it would certainly not have failed to supplement the legal arguments submitted by the French authorities.

71 That finding is not rebutted by the claim, submitted by the applicant in connection with another plea, according to which the Commission's interpretation of the concept of an adequate and uninterrupted service within the meaning of Article 5 of the Regulation was submitted for the first time before the Court of First Instance, which proves that the applicant was not in a position to adopt a position in that regard during the administrative procedure (see paragraph 101 below). As is explained below (paragraph 123), the outcome of the present dispute does not depend on the interpretation of those terms; they are, moreover, taken into account in the decision only as a subsidiary consideration (OJ, p. 36, right-hand column, penultimate paragraph). They are not therefore essential legal aspects of the present case.

72 In those circumstances, the applicant's rights of defence were respected. It follows that the plea of infringement of those rights cannot be accepted.

The pleas of infringement of the principle of audi alteram partem and of good faith as against the French Republic

Arguments of the parties

73 The applicant claims that the Commission notified the French Government of its favourable position in regard to TAT's arguments even before it had heard the French Government regarding the arguments set out by TAT in its complaint and supplementary complaint. That approach proves the Commission's bias in that regard. That factual situation could not be changed by the subsequent conduct of the procedure at the end of which the Commission did place the French Government in a position to submit its defence. The Commission had already in fact adopted its decision before hearing that government.

74 The applicant states that in the present case the Commission did not follow the procedure for cases involving failures to fulfil obligations or cases falling within the scope of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 132), in which it first informs the Member State, the undertakings or associations of undertakings in question of its objections and requests them to inform it of their position and then adopts its own position after receiving the arguments submitted.

75 The applicant observes that examination of Article 5 of the Treaty and Article 10(2) of Regulation No 17, and also the case-law of the Court of Justice and of the Court of First Instance (Order of the Court in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, judgments in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 and Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131) that there is a duty of cooperation between the Community institutions and the Member States and that this cooperation must be sincere. The Commission must act in good faith towards the Member States.

76 In that context, by claiming that the applicant's exclusivity had been terminated by the French authorities themselves on 1 March 1992 when they opened the two Paris (CDG)-Marseille and Paris (CDG)-Toulouse routes for TAT, the Commission acted in bad faith. It must have been aware that it was on account of its demand for such access in 1990 that the two routes in question had been opened. It cannot therefore claim that the French authorities had terminated the exclusivity, particularly since those authorities and the applicant had always firmly wished to apply the 1985 Agreement for its full term. That agreement did not concern routes but the network of routes as such.

77 The Commission contends that from the beginning of the procedure the French authorities had all the information necessary to ensure their defence. It observes that the procedure under Article 8(3) of the Regulation provides that its decision may not be adopted before the Advisory Committee provided for in Article 11 of the Regulation has given its opinion. Within that committee, all the Member States, and therefore also the Member State concerned, can express their view on the issues which are the subject-matter of a draft decision that has been communicated to them in good time. In the present case, that draft was communicated 15 days before the meeting of the committee and contained an exact and complete explanation of the objections which the Commission intended to uphold against France and an exact and complete summary of the legal and factual arguments, including those submitted by TAT.

78 According to the Commission, when it initiates an investigation on its own initiative under Article 8(3), no time-limit is imposed on it and its decision is based on the information acquired in the course of its examination, without restriction as to the area of its investigations and the sources of information. It is not therefore bound by the subject-matter of a complaint.

79 Finally, referring to the wording of the contested decision (OJ, p. 36), it disputes that it stated that the exclusivity enjoyed by the applicant had been terminated by the French authorities themselves on 1 March 1992.

Findings of the Court

80 The applicant has a legitimate interest in claiming an infringement of the principle of *audi alteram partem* as against the French Republic, in so far as the request addressed to that Member State inviting it to submit its observations was an essential procedural requirement within the meaning of Article 173 of the Treaty (see, to that effect, the judgments in Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraphs 17 and 21, and in Joined Cases T-432/93, T-433/93 and T-434/93 *Socurte and Others* v *Commission* [1995] ECR II-503, paragraph 63).

81 As to the issue whether the French Republic's rights of defence were observed, that is to say, whether it was placed in a position effectively to make known its views on the evidence relied upon by the Commission in adopting the contested decision, it should be noted that the procedure under Article 8(3) of the Regulation may be initiated by the Commission either at the request of a Member State or on its own initiative.

82 In the present case, the procedure at issue was initiated by the Commission solely on its own initiative. In the scheme of the provision applied, the initial and supplementary complaints lodged by TAT were not documents which were indispensable to the initiation of the procedure but items of evidence which could have led the Commission to take the view that there were grounds for it to commence that procedure on its own initiative.

83 In those circumstances and in accordance with the principle laid down by the judgment in *Netherlands and Others* v *Commission* (at paragraph 45), the Commission was required to communicate to the French Republic only a full and precise statement of the reasons for which it had initiated the procedure on its own initiative. As to TAT's complaints, it could therefore choose to send them unabridged to the French Republic or to include their essential subject-matter in that statement.

84 That finding is not inconsistent with the second principle laid down in the judgment in *Netherlands and Others* v *Commission* (at paragraph 46), according to which the Member State in question must be placed in a position in which it may express its views 'on the observations submitted by interested third parties'. The Court did not exclude, in principle, the possibility of the Commission's summarizing those observations and communicating such a summary to the State, provided that it was exact and complete. In that same judgment (at paragraph 49) it criticized the Commission's procedure only on the general ground that the government in question was not given a hearing 'with regard to the consultations which the Commission had had with the ... trade organizations' concerned.

85 In the present case, the Commission informed the French air transport authorities by letter of 20 October 1993 of the receipt from TAT of a complaint against the French Republic and the Air France group and sent to them a copy of that complaint with a request to submit any comments they might have. Moreover, by letter of 22 October 1993 to the French Government it summarized TAT's complaint and gave an initial evaluation of the legal situation, while once more requesting it to submit any observations. Although, on that latter occasion, the Commission indicated that the arguments put forward by TAT appeared to it 'to be well founded in the light of the documents then in its possession' that assessment, far from constituting bias against the applicant and the French authorities, could only be a provisional assessment pending the observations of the French authorities. Nothing in the evidence before the Court suggests that this assessment was not capable of being modified before the adoption of the final decision, which in the present case was made six months later.

86 Second, the Commission informed the French Government by letter of 21 January 1994 that TAT had supplemented its initial complaint by basing it also on an infringement by the French authorities of Article 8(1) of the Regulation. It added that TAT was claiming that, by misapplying Article 5 of the Regulation, the French authorities had in fact discriminated, to the advantage of the applicant, in the allocation of traffic between the airports within the Paris system and that TAT was therefore asking the Commission to adopt a decision on the basis of Article 8(3). Although it is true that the Commission thus merely gave a summary of that supplementary complaint without sending a copy of the complaint to the French Government, the applicant does not claim that that summary is wrong or incomplete. In particular, it does not allege that the contested decision contains new matters clearly taken from the full text of the supplementary complaint, which had not been communicated by the Commission in the course of the administrative procedure.

87 Finally, it is not disputed that before the meeting of the Advisory Committee of 28 February 1994 a draft decision was sent by the Commission to the French authorities and that they did not claim that it was wrong or incomplete as regards presentation of matters of fact and of law. Moreover, several meetings between representatives of the Commission and of the French Government took place before the contested decision was finally adopted (see paragraphs 13 to 24 above).

88 In those circumstances, the Commission placed the French Republic in a position in which it could effectively make known its views on the essential evidence which it used for the purpose of adopting the contested decision. Moreover, as the Court has found above (paragraphs 69 and 70), the French Republic did in fact exercise its rights of defence by commenting on all the essential matters of fact and of law which were relevant for the conduct of the administrative procedure.

89 Consequently, the plea of infringement of the principle of *audi alteram partem* as against the French Republic must be rejected.

90 The plea of infringement of the principle of good faith as against the French Republic will be examined below in the context of the pleas of infringement of the relevant provisions of Regulation No 2408/92 and infringement of Article 90(2) of the Treaty.

The pleas of infringement of Regulation No 2408/92

91 The objections concerning the Commission's application of Regulation No 2408/92 should be considered together. This examination will concern the interpretation of Articles 8 and 5 of the Regulation. In that context, it will also deal with the question whether the exclusivity reserved for the applicant discriminated to the disadvantage of other air carriers such as TAT or whether the applicant could — as in its previous plea, claiming in particular infringement of the principle of good faith as against the French Republic — rely on the 1985 Agreement and the 1990 Agreement in order to justify its exclusivity even under the scheme of the Regulation.

Arguments of the parties

92 The applicant claims, principally, that the Commission misused the accelerated procedure provided for in Article 8(3) of the Regulation in order to put an end, before the period of three years allowed by Article 5 of that regulation, to the contractual exclusivity which it enjoyed on the Orly-Marseille and Orly-Toulouse routes under the 1985 Agreement. The question of the existence of exclusive concessions is not mentioned or covered by Article 8(1) and (2) of the Regulation. The applicant's situation goes back several decades and is governed by an agreement based on public service requirements aimed at regional development and a fair spread of traffic. If the Commission had wished to have the applicant's exclusivity on its French domestic network brought to an end, it should have initiated the procedure under Article 169 of the Treaty.

93 The applicant claims, in the alternative, that the Commission misinterpreted Article 5 of the Regulation. First, the Commission's premise that freedom of air traffic is the rule and that restrictions to that freedom are the exception should be rejected. Interpretation of Article 5 should not be in terms of principles and exceptions but rather in terms of a common transport policy in which all the different

interests should be taken into account. The article represents concessions made in the Council to those defending general interest tasks.

94 The applicant concludes from this that Article 5 is manifestly intended to allow situations legally existing before the entry into force of the Regulation to continue for a period of three years. Thus, in each Member State which did not wish to expose its public service to abrupt changes, agreements conferring exclusive concessions for air traffic could be continued during that period, which aims to give the Member States time to establish arrangements ensuring the maintenance of the general interest to an extent compatible with the new Community context and to allow the undertakings concerned a minimum amount of time to make adjustments to their operating arrangements.

95 That interpretation is confirmed by the drafting history of the Regulation. As the last paragraph of Article 4, the draft provision which was to become Article 5 provided for 'transitional arrangements for concessions already existing in regard to public service obligations'. The Council's intention had therefore been to maintain such concessions for a period of three years.

96 In that regard, the applicant states that, by virtue of Article 5, the 1985 Agreement guaranteeing it an exclusive concession could continue until 1 January 1996. Neither of the two parties had terminated that agreement and it had not therefore expired. It claims that the fact that that agreement expressly permitted Air Afrique to operate on the Paris-Marseille route was not of such a nature as to deprive its concession of its exclusive character. The departures on the routes operated by Air Afrique were solely from CDG, not from Orly airport. Moreover, the route operated by Air Afrique was a mere cabotage route, extended to Africa, whose frequency was extremely limited (one flight per week).

97 Nor was the exclusivity enjoyed by the applicant on the two routes in question ended as a result of the fact that TAT operated regularly on the CDG-Toulouse and CDG-Marseille routes. The opening up of those routes constituted an exception imposed by the Commission on the French Government under the 1990 Agreement. However, that agreement should be interpreted in the light of the applicant's exclusive rights. Moreover, the fact that on the occasion of the 1990 Agreement the Commission did not require a new agreement to be drawn up confirms that the correct interpretation is that the applicant retained exclusivity from Orly.

98 The applicant states that its exclusivity concerned a complete network of a number of routes, since only such a 'network approach' allowed the cross-subsidy of tariffs necessary for the regional development desired by the French State. At the hearing it amplified that argument, pointing out that the establishment of networks is highly typical for France, but difficult to understand for some of its European partners. The concept of a network is linked to that of public service. Operators entrusted with the provision of a public service, such as the applicant, are required to provide that service at similar prices throughout France. Since the applicant had to finance its air transport entirely by itself, without public aid, it needed to cross-subsidize tariffs within the network system. In the context of that cross-subsidy, income from the 'money-spinner' routes, such as Paris-Marseille and Paris-Toulouse, were intended to finance the loss-making routes. Such a system of subsidies cannot function without a grant of exclusivity on the 'money-spinner' routes.

99 A literal interpretation of Article 5 of the Regulation should be guided by the abovementioned considerations. Thus, 'domestic routes' are those defined in the exclusive concessions, namely routes forming part of the abovementioned network and not routes between cities, as the Commission claims. That interpretation is in conformity with the wording of the Regulation, which makes several references to services between one airport and another. According to the applicant, if Article 5 of the Regulation were interpreted as meaning that the word 'route' means a route from city to city, that provision would be devoid of any substance: it would suffice for there to be two airports in one city for any exclusive concession existing at the date of entry into force of the Regulation to be excluded from the scope of Article 5.

100 The applicant goes on to contest the Commission's arguments that, on any view, there was an 'adequate and uninterrupted service' offered by 'other forms of transport', namely the air service between Paris (CDG)-Marseille and Paris (CDG)-Toulouse, the reason for which the Commission claimed that it was necessary to exclude the Paris (Orly)-Marseille and Paris (Orly)-Toulouse routes from the scope of the exclusivity. In that regard, the concept of 'form of transport' should be understood as meaning 'mode of transport', so that air routes are not to be taken into account. In any event, TAT's service on the CDG-Marseille and CDG-Toulouse routes, which since March 1992 had varied between one flight per day and one flight per week, cannot be characterized as 'an adequate and uninterrupted service' in view of the needs of business circles in the regions concerned.

101 The applicant also claims that it became aware, for the first time in the defence, of the Commission's interpretation of the 'adequate and uninterrupted' criteria. That proves that it was not put in a position to submit observations. Furthermore, TAT is refusing to enter into real competition by developing the market from CDG, preferring parasitism at Orly. TAT had access to Toulouse and Marseille from CDG, which is a larger platform than Orly in terms of size, number of runways and passengers. If TAT is in fact refusing to operate the Paris-Marseille and Paris-Toulouse routes from CDG, that is not because the applicant or the French Government has been pursuing discriminatory practices.

102 Finally, Article 5 of the Regulation leaves the Member States a residuary power in regard to exclusive concessions. It is impossible to maintain exclusivity within the meaning of that provision without barring all other airline companies from access to the protected route. That provision therefore covers the possibility of imposing the measures which the Commission has wrongly characterized as discriminatory. In adopting the contested decision, the Commission is trying to impose total liberalization with immediate effect, whereas that liberalization should be progressive, measured, and aimed at reconciling the multiplicity of interests involved. On that basis, consideration should be given simultaneously to the principle of non-discrimination and the requirements of a public service and, in particular, the requirements of regional development, social cohesion and consumer rights, as well as environmental and safety requirements.

103 The Commission states first of all that the French measure at issue is a measure distributing traffic between the airports of the Paris system, which may be appraised on the basis of Article 8 of the Regulation. That distribution took the form of disguised discrimination. It infringed the principle of non-discrimination laid down in Article 8 of the Regulation, which is why the Commission has the powers provided for in Article 8(3).

104 The Commission claims that Article 5 of the Regulation aims to avoid a breakdown in a given service between two points within a Member State. The maintenance, subject to certain conditions, of an exclusive concession is therefore justified by the public interest in ensuring continuity of links between two cities, where there is no adequate and uninterrupted transport service. In the present case, those conditions are not satisfied. As at 1 January 1993 the applicant was no longer the exclusive concessionaire on the Paris-Marseille and Paris-Toulouse routes, since TAT had received authorization on 1 March 1992 to operate flights between Paris and the two cities in question. On that basis, the 1985 Agreement must be regarded as superseded. Whatever the cross-subsidy scheme envisaged in 1985 by the French Republic and the applicant, that scheme must now be evaluated on the basis of the provisions of Community law and, in particular, of Regulation No 2408/92, which override inconsistent national measures.

105 The Commission observes, second, that 'domestic routes' within the meaning of Article 5 of the Regulation are routes between two cities and not airport-to-airport routes. The term 'route' is generic and refers to both routes by air and routes by rail, bus or other means of transport. Moreover, in the present case, 'other forms of transport' exist which can ensure 'an adequate and uninterrupted service', namely routes by air from and to CDG and several rail links. The concept of 'uninterrupted' implies the absence of a risk of interruption of the service for climatic or other reasons; the adequate nature of that service is assessed in the light of various factors, such as the frequency of the service and the journey time, but also passenger needs, prices and capacities offered.

Findings of the Court

— Interpretation of Article 8(3) of the Regulation

106 Inasmuch as the applicant complains that the Commission adopted a decision under Article 8(3) of the Regulation instead of initiating the procedure for failure to fulfil obligations provided by Article 169 of the Treaty, the applicant has not contested that provision by raising a plea of illegality under Article 184 of the Treaty. It does not therefore claim that the procedure established by Article 8(3) of the Regulation is incompatible as such with higher-ranking Community law, in particular with Article 169 of the Treaty. Consequently, examination of this complaint is limited to verifying whether the Commission correctly applied that procedural rule.

107 In that regard, it suffices to observe that TAT, which had already been allowed to provide a service on the Paris-Toulouse and Paris-Marseille routes to and from CDG, met with a refusal by the French authorities to allow access to Orly airport for the purposes of exercising traffic rights on the same routes, that refusal having been based on the fact that the provision of services on those routes from and to Orly was reserved solely for the applicant. However, since the two airports form part of the Paris airport system within the meaning of Article 2(m) and Annex II to the Regulation, the French authorities' measure was necessarily adopted as part of the distribution of traffic between the airports within that system for the purposes of Article 8(1) of the Regulation. Consequently, the Commission was authorized to rely on the powers conferred by Article 8(3) of the Regulation and to examine the application by the French authorities of Article 8(1).

108 Moreover, the argument which the applicant bases on the 'accelerated' nature of the procedure provided for in Article 8(3) is misconceived, since the Commission did not initiate the procedure at issue at the request of a Member State — in which case it would have to have been terminated within a period of one month — but on its own initiative. In fact, that procedure was initiated on the Commission's

initiative following a complaint by TAT at the end of September 1993 and was terminated by the contested decision at the end of April 1994, namely seven months later.

109 Furthermore, Regulation No 2408/92 was adopted on 23 July 1992. The Member States must therefore have been aware, from July 1992, of the possibility of Article 8(3) of that regulation being applied in the area of traffic distribution between airports within an airport system.

110 Finally, nothing in Article 8 supports the conclusion that the mere fact that a measure for distributing traffic within an airport system is part of a scheme of national exclusive concessions dating back over several decades, such as that upon which the applicant relies, can by itself take that measure outside the scope of the procedure provided for by that article.

111 It follows that the Commission neither misused the procedure in deciding to initiate the procedure at issue nor failed to observe the conditions for the application of Article 8(3) of the Regulation. Consequently, the applicant's first objection must be rejected.

— The relationship between Article 8 and Article 5 of the Regulation

112 As regards the question whether the contested decision, adopted following the abovementioned procedure, can withstand the other objections raised by the applicant in the alternative, it should be observed, first of all, that the power conferred by Article 8(1) of the Regulation on the Member States to regulate the distribution of traffic within an airport system is restricted in so far as they must do so

'without discrimination on grounds of nationality or identity of the air carrier'. The French authorities' refusal to grant TAT's applications for access to Orly airport was based on Article 5 of the Regulation, on the ground that that provision authorized the continuation of the exclusive concession granted to the applicant on the Orly-Marseille and Orly-Toulouse routes. That refusal can therefore be considered to have been made without discrimination based on TAT's identity only if exclusivity reserved to the applicant on the two routes in question was in fact authorized by Article 5 of the Regulation.

113 In any event, Article 1 of the contested decision merely states that the French Republic may not continue to refuse access on those two lines 'on the grounds that the French authorities were applying Article 5 [of the Regulation] ...'. Since the subject-matter of the contested decision was limited in that way, all the applicant's arguments concerning consumer rights and environmental and safety requirements must be rejected as to no avail in the present context, which concerns Article 8(1) and (3) and Article 5 of the Regulation alone.

— As regards the interpretation of Article 5 of the Regulation

114 The actual wording of Article 5 of the Regulation does not bear out the applicant's contention that, first, the article is essentially intended to leave in force national agreements conferring an exclusive concession and, second, that those agreements have a decisive influence on the interpretation of the article. Article 5 makes the continuation of an existing exclusive concession subject to several specific conditions. Thus the Community legislature did not simply adopt a rule such as that, referred to by the applicant, contained in the draft of the last paragraph of an Article 4 of the Regulation, providing for the straightforward continuation of pre-existing concessions (see paragraph 95 above).

115 Moreover, the Court of Justice has consistently held that the Community legal order does not in principle aim to define its concepts on the basis of one or more

national legal systems without express provision to that effect (see, in particular, the judgment in Case 64/81 *Corman* v *Hauptzollamt Gronau* [1982] ECR 13, paragraph 8). The terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation, which must be found by taking into account the context of the provision and the purpose of the relevant regulations (see, in particular, the judgment in Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 11). It follows that Article 5 of the Regulation calls for an independent interpretation which takes into account its wording, general scheme and purpose.

116 Applying those rules of interpretation, it must first be considered whether the exclusive concession on which the applicant relies on the Orly-Marseille and Orly-Toulouse routes was granted for domestic 'routes'.

117 The Regulation uses the term 'routes' several times and in different contexts, without that term appearing as such in the list of 15 definitions set out in Article 2. It is therefore a term whose meaning may sometimes differ according to the context in which it is used, in particular according to the specific contextual aim, in order to signify either an air route between two airports or a transport link, in the generic sense, between two cities or regions.

118 As regards the scheme and purpose of Article 5 of the Regulation, that provision refers only to 'routes' for which there is no adequate and uninterrupted alternative transport service. That form of words must mean routes between cities and regions rather than routes between airports, as the applicant argues. Airports are not the final destination for travellers, freight and mail, but rather a necessary point of

transit, the ultimate destination being the city or region served by the airport concerned. It is therefore clear that Article 5 aims to ensure, on a transitional basis, the continuity of air transport services protected by an exclusive concession, provided that, without such exclusivity, users would be faced with an inconvenient loss of connections between particular cities or regions.

119 As regards Orly and CDG airports, which form part of the Paris airport system, that conclusion is borne out by Article 2(m) in combination with Annex II to the Regulation, according to which those two airports are grouped together in order to serve Paris or the Paris conurbation. It must also apply in relation to the Marseille and Toulouse airports, which cannot reasonably be regarded as the ultimate destination of a journey commenced in Paris and which are also intended to serve their respective cities or conurbations. It follows that the applicant's argument that the term 'route' refers to an air route, in the technical sense, between two airports must be rejected.

120 It is therefore only on 'domestic routes', defined as traffic links between particular cities or regions, that an exclusive concession could possibly exist, under Article 5, in the applicant's favour. However, even assuming that, under the 1985 Agreement and the 1990 Agreement, the applicant did in fact enjoy exclusivity from and to Orly airport on the Paris-Marseille and Paris-Toulouse routes, it is not disputed that even before the entry into force of the Regulation airlines other than the applicant served the same routes, even if only from and to CDG. Article 19 of the 1985 Agreement authorized Air Afrique to operate on the Paris-Marseille route ('ligne'). Moreover, the applicant has not disputed the statement in the contested decision that the French authorities authorized TAT to operate on the two routes in question from and to CDG as from 1 March 1992 and have not since placed any obstacle in the way of other Community companies wishing to operate those same routes (OJ, p. 36).

121 Consequently, however the 1985 Agreement and the 1990 Agreement are interpreted, the applicant cannot claim to have held at the material time an exclusive concession in respect of the two 'domestic routes' within the meaning of Article 5, namely between the city of Paris and the cities of Marseille and Toulouse respectively.

122 That conclusion is not affected by the applicant's arguments that the route on which Air Afrique operated was a mere cabotage route and that the services provided by TAT from and to CDG are neither adequate nor uninterrupted, inasmuch as they varied between one flight per day and one flight per week. It is clear from the very wording of Article 5 that the question whether 'other forms of transport can ensure an adequate and uninterrupted service' arises only where an exclusive concession exists on the 'domestic routes' in question. Since, as the Court has just found, the applicant did not enjoy such exclusivity, the question of the adequacy and uninterrupted nature of the services supplied by Air Afrique and TAT on the Paris-Marseille and Paris-Toulouse routes is irrelevant.

123 Consequently, the applicant's argument that the Commission set out its interpretation of the adequate and uninterrupted criteria for the first time in its defence must also be rejected as of no avail (see paragraphs 71 and 101 above).

124 It follows from the foregoing that Article 5 of the Regulation is not applicable in the present case. Contrary to the applicant's assertions, that conclusion does not entirely deprive that provision of its substance. Article 5 covers specifically the situation of an exclusive concession granted on a route between two cities, neither of which forms part of an airport system, such as the Marseille-Ajaccio or the Nice-Calvi routes, provided that another adequate and uninterrupted form of transport does not exist.

125 Finally, the applicant's argument that if Article 5 were not applicable to the two routes in question, the particular French system of internal cross-subsidy of tariffs could be totally undermined is irrelevant in the context of pleas alleging infringement of the Regulation alone. Article 5 of the Regulation provides for a 'route by route' examination, to the exclusion of any 'network approach' and of any cross-subsidy of tariffs linked to such a network concept. The questions relating to the necessity of the French domestic network and the related cross-subsidy system are therefore examined below, in relation to the plea of infringement of Article 90(2) of the Treaty. In any event, the applicant has not claimed that the authorization for another airline at Orly airport affects, to the detriment of travellers, the services which it provides on the Paris-Marseille and Paris-Toulouse routes.

126 It follows that TAT, which was refused access to Orly airport, has been discriminated against on grounds of its identity within the meaning of Article 8(1) of the Regulation, since that refusal could not be justified under Article 5 of the Regulation. Consequently, any claim that there was no such discrimination must be rejected. This is particularly so in regard to the argument by which the applicant attempts to show that CDG was in reality a more favourable platform for TAT's economic needs than Orly airport. Since Article 5 could not be relied on in order to bar access to Orly airport, it was not for the applicant or for the French authorities to choose for other airline companies, such as TAT, the platform which they considered to be the most economically favourable.

127 Finally, it follows that the applicant cannot argue, as it does in the second part of its second plea (see paragraph 76 above), that the Commission acted in bad faith as against the French Republic by adopting the contested decision on 27 April 1994. The French authorities must have been aware that Regulation No 2408/92 would override any inconsistent contractual term or legislative provision. That regulation,

adopted on 23 July 1992, does not contain any provision setting out the relationship between these new Community provisions and the special aspects of French policy on regional development, management of the domestic air network and establishment of a system of tariff cross-subsidy, as relied on by the applicant.

128 It follows from all the foregoing that the pleas of infringement of the Regulation, and also the plea of lack of good faith as against the French Republic, must be rejected.

The plea of infringement of Article 90(2) of the Treaty

Arguments of the parties

129 The applicant claims that it performs a general interest task, namely its contribution to the opening up of a large number of French cities and regions in the context of regional development, based on a cross-subsidy of tariffs, which enables it to finance about 20 unprofitable domestic air routes thanks, essentially, to the profitability of the Paris (Orly)-Marseille and Paris (Orly)-Toulouse routes. It therefore repeats the arguments set out in the context of the previous pleas (see paragraph 98 above). It refers here to documents in Annex 6 to the application, which show that the internal subsidies made possible by the exclusivity it holds on the two routes in question enabled it to finance losses on 27 other routes in 1992. It adds that, under the agreements concluded with the French State, its task of providing services meant taking the place of the French State in French regional development in the air sector. Consequently, it had to be given the necessary means, which were the profits achieved on the two routes at issue.

130 The applicant accordingly concludes that, for as long as such a public service task exists, the French Government is entitled to refuse access on the two profitable routes to competing airline companies. In its view, such an approach is justified in the light of the judgments of the Court of Justice in Case C-320/91 *Corbeau* [1993] ECR I-2533 and in Case C-393/92 *Municipality of Almelo and Others* v *Energiebedrijf IJsselmij NV* [1994] ECR I-1477. Consequently, by deciding that the French Government was not entitled to refuse the applicant's competitors access to the profitable lines in question, the Commission infringed Article 90(2) of the Treaty.

131 The applicant adds that the assertion that Article 4 of the Regulation reproduced the terms of Article 90(2) of the Treaty is incorrect, since the scope of the latter provision is wider than that of Article 4. It is incompatible with the hierarchy of norms for secondary legislation to permit limits to be placed on a permanent exception contained in a provision of the Treaty. Article 90(2) of the Treaty therefore allows restrictions on competition to be justified and is applicable to the matter dealt with in Article 5 of the Regulation.

132 TAT is wrong in submitting that exclusivity on the routes in question is not indispensable to enable the applicant to ensure financial equilibrium for its network and to assume its public service obligations. Finally, it follows from the judgments of the Court of Justice in Case 72/83 *Campus Oil and Others* v *Minister for Industry and Energy and Others* [1984] ECR 2727 and in Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069 that restrictions on competition may be justified on quite specific grounds. Those grounds are *inter alia* transparency, universal service, uniform fixing of fares and the Community interest. All those conditions are fulfilled in this case by the 1985 Agreement.

133 The Commission considers that, since the adoption of Regulation No 2408/92, reference should no longer be made directly to the application of Article 90(2) of the Treaty in order to meet the requirements of any public service tasks performed

under the legislation in force. Through Article 4 of the Regulation the Council has given substance to the abstract terms of Article 90(2), in relation to air transport services within the Community, and weighed up the various interests involved. In so far as the situation referred to in Article 90(2) of the Treaty had thus been examined by the Council in regard to the aviation sector, Article 4 of the Regulation had already carried out the purpose of Article 90(2) of the Treaty.

Findings of the Court

134 Article 90(2) of the Treaty excludes the application of the Treaty rules in so far as their application would obstruct the performance, in law or in fact, of the 'particular tasks' assigned to an undertaking 'entrusted with the operation of services of general economic interest'.

135 As Article 90(2) is a provision which thus permits, in certain circumstances, derogation from the rules of the Treaty, it must be strictly interpreted (judgment of the Court of Justice in Case 127/73 *BRT* v *SABAM and NV Fonior* [1974] ECR 313, paragraph 19) and its application is not left to the discretion of the Member State which has entrusted an undertaking with the operation of a service of general economic interest (judgment of the Court of Justice in Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 30).

136 In the light of those principles it is necessary to examine whether the applicant is entitled to rely on Article 90(2) of the Treaty in the present case.

137 The applicant is opposed to the application of Articles 5 and 8 of Regulation No 2408/92, adopted under Article 84 of the Treaty, as those articles have been interpreted above.

138 The application of those articles could, however, be excluded only in as much as they 'obstructed' performance of the tasks entrusted to the applicant. Since that condition must be interpreted strictly, it was not sufficient for such performance to be simply hindered or made more difficult. Furthermore, it was for the applicant to establish any obstruction of its task (see, to that effect, the judgment of the Court of Justice in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 15).

139 In that regard, the applicant merely asserts that the organization of domestic air transport was based on a system of cross-subsidy between profitable routes and unprofitable routes and that the exclusivity which had been granted to it on the Orly-Marseille and Orly-Toulouse routes was justified by its obligation to operate the unprofitable routes regularly and at tariffs that were not prohibitive, in order to contribute to regional development. It does not put a figure on the probable loss of revenue if other air carriers are allowed to compete with it on the two routes in question. Nor has it shown that that loss of income will be so great that it will be forced to abandon certain routes forming part of its network.

140 In any event, the domestic air network system combined with the internal cross-subsidy system to which the applicant refers in support of its case did not constitute an aim in themselves, but were the means chosen by the French public authorities for developing the French regions. The applicant has not argued and still less established that, following the entry into force of Regulation No 2408/92, there was no appropriate alternative system capable of ensuring regional development and in particular of ensuring that loss-making routes continue to be financed (see also the order of the President of the Court in Case C-174/94 R *France* v *Commission* [1994] ECR I-5229, paragraph 35).

141 Consequently, the applicant has not shown that the contested decision would obstruct the performance in law or in fact of the particular task assigned to it. It follows that the plea of infringement of Article 90(2) of the Treaty cannot be accepted either.

The plea of infringement of the principle of proportionality

Arguments of the parties

142 The applicant observes that it is settled law (judgments of the Court of Justice in Case 122/78 *Buitoni* [1979] ECR 677 and Case 114/76 *Bela-Mühle* [1977] ECR 1211) that the principle of proportionality, whereby contested measures are examined to determine whether they are both necessary and appropriate in the light of the objectives pursued, may be relied on by natural or legal persons in order to contest any measure adopted by the Community authorities, whether laid down by law, regulation or administrative action. In the present case, the French Government's decision to draw up a new law on regional development and a new system of financing domestic loss-making routes and to allow progressive opening up to competition on the same domestic market was quite proportionate to the objective of liberalizing air routes. On the other hand, the Commission's decision to impose the opening up of competition on the profitable routes a few months ahead of the timetable laid down by the French Government was disproportionate in relation to the objective pursued and failed to take account of the interests of the applicant, which needed a transitional period in order to adapt itself.

143 The Commission argues that the cases cited are not relevant in this case because they concerned the procedure under Article 177 of the Treaty, whereas the present case concerns a procedure under Article 173 of the Treaty, and that it adopted its

decision on the basis of a regulation, whose illegality could be put in issue only under Article 184 of the Treaty. As it is, the applicant does not challenge the Regulation in itself but the use of the powers conferred on the Commission by that regulation.

Findings of the Court

144 It is settled law that the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued; where there is a choice between several appropriate measures, the least onerous measure must be used (see, for example, the judgments of the Court of Justice in Case 15/83 *Denkavit Nederland* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171, paragraph 25 and in Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21).

145 In the present case, it follows from examination of the previous pleas that, in adopting the contested decision, the Commission correctly applied Articles 8 and 5 of Regulation No 2408/92. Moreover, the legality of those provisions was not contested by a plea of illegality raised under Article 184 of the Treaty. Consequently, the contested decision cannot be characterized as excessive, particularly since Article 3 of that decision even gave the French Republic a period of six months in which to make adjustments.

146 It follows that the plea of infringement of the principle of proportionality must also be rejected.

147 Since none of the pleas submitted by the applicant has been upheld, the application must be dismissed as unfounded.

Costs

148 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the costs, including those incurred by TAT and those relating to the proceedings in Case C-301/94 which took place before the Court of Justice. The United Kingdom, which has intervened, must be ordered to bear its own costs in accordance with Article 87(4) of the Rules of Procedure.

149 The applicant's claim, submitted for the first time at the hearing, for an order that the Commission pay the whole of the costs pursuant to Article 87(3) of the Rules of Procedure should not be granted. It contains no details as to the existence of exceptional grounds or the unreasonable or vexatious nature of the costs which the Commission is claimed to have caused the applicant to incur.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition),

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs, including those of the proceedings in Case C-301/94 which took place before the Court of Justice and those incurred by TAT, but not those incurred by the United Kingdom Government, an intervening party, which shall bear its own costs.**

Bellamy Briët Kalogeropoulos

Delivered in open court in Luxembourg on 19 June 1997.

H. Jung C. W. Bellamy

Registrar President