European Court of Justice, 26 March 2009, Selex v Commission - Eurocontrol

COMPETITION LAW

No economic activity Eurocontrol

- **The acquisition of prototypes in the context of that ac-tivity and the related management of intellectual property rights did not make that activity an economic one, since the acquisition did not involve the offer of goods or services on a given market.**

It is clearly not on that ground that the Court of First Instance held that the Commission did not make a manifest error of assessment when it took the view that the research and development activity financed by Eurocontrol was not an economic activity and that the rules on competition were not applicable to it. Indeed, it is apparent from paragraph 75 of the judgment under appeal that the Court of First Instance considered that the acquisition of prototypes in the context of that activity and the related management of intellectual property rights did not make that activity an economic one, since the acquisition did not involve the offer of goods or services on a given market. Moreover, for the reasons set out at paragraph 102 above, that analysis is untainted by errors of law.

- **Eurocontrol granted li-cences relating to the prototypes at no cost indicated that the management of intellectual property rights was not an economic activity.**

Next, Selex criticises the judgment under appeal for stating, at paragraph 77, that intellectual property rights were not acquired for the purpose of their com-mercial exploitation and that the licences were granted at no cost. Those assertions, even if they were true, are in conflict with the case-law which states that the fact that an entity does not seek to make a profit is irrele-vant for the purpose of determining whether it is an undertaking. Contrary to those submissions, it is apparent from the case-law that the fact that a body is non-profit-making is a relevant factor for the purpose of determining whether or not an activity is of an eco-nomic nature but it is not sufficient of itself (see, inter alia, to that effect, Case C-244/94 Fédération française des sociétés d'assurance and Others [1995] ECR I-4013, paragraph 21; Case C-67/96 Albany [1999] ECR I-5751, paragraph 85; and Case C-237/04 Eniri-sorse [2006] ECR I-2843, paragraph 31). Accordingly, the Court of First Instance did not err in law when, after pointing out that, when assessing whether a given activity is an economic activity, the absence of remuneration is only one indication among several others and cannot by itself exclude the possibil-ity that the activity in question is economic in nature, it considered that the fact that Eurocontrol granted li-cences relating to the prototypes at no cost indicated that the management of intellectual property rights was not an economic activity, an indication that was also supported by other evidence.

- **The grounds of the judgment under appeal that are the subject of criticism do not in any way preclude the possibility that technological development may be an economic activ-ity and nor do they preclude the possibility that an entity which has public service obligations can pursue an activity of that nature.**

On that point, it must be noted that the grounds of the judgment under appeal that are the subject of criticism do not in any way preclude the possibility that technological development may be an economic activ-ity and nor do they preclude the possibility that an entity which has public service obligations can pursue an activity of that nature. The Court of First Instance simply assessed the factors specific to the case and, without erring in law or falling foul of the case-law invoked, deduced from the fact that no charge was made for the management of intellectual property rights and the fact that Eurocontrol's mission was pursued purely in the interests of public service – the activity forming part of that mission and being ancillary to that of promoting technical development – that the activity was not economic in nature.

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European Court of Justice, 26 March 2009
(C.W.A. Timmermans, K. Schiemann, P. Kūris, L. Bay Larsen and C. Toader)
JUDGMENT OF THE COURT (Second Chamber)
26 March 2009 (*)
(Appeals – Competition – Article 82 EC – Concept of an 'undertaking' – Economic activity – International organisation – Abuse of a dominant position)
In Case C-113/07 P,
APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 23 February 2007,
SELEX Sistemi Integrati SpA, established in Rome (Italy), represented by F. Sciaudone, R. Sciaudone and D. Fioretti, avvocati,
appellant,
the other parties to the proceedings being:
Commission of the European Communities, represented by V. Di Bucci and F. Amato, acting as Agents, with an address for service in Luxembourg,
defendant at first instance,
European Organisation for the Safety of Air Navigation (Eurocontrol), represented by F. Montag and T. Wessely, Rechtsanwälte,
intervener at first instance,

THE COURT (Second Chamber),
composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, P. Kūris (Rapporteur), L. Bay Larsen and C. Toader, Judges,
Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,
having regard to the written procedure and further to the hearing on 8 May 2008,
after hearing the **Opinion of the Advocate General at the sitting on 3 July 2008**,
gives the following

Judgment

1 By its appeal, SELEX Sistemi Integrati SpA ('Selex') requests the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-155/04 SELEX Sistemi Integrati v Commission [2006] ECR II-4797 ('the judgment under appeal'), by which that court dismissed the application for annulment or amendment of the decision of the Commission of the European Communities of 12 February 2004 rejecting the appellant's complaint concerning an alleged infringement by the European Organisation for the Safety of Air Navigation (Eurocontrol) of the provisions of the EC Treaty relating to competition ('the contested decision').

I – Background to the dispute

2 Selex has been operating in the sector of air traffic management systems since 1961. On 28 October 1997, it lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) in which it criticised Eurocontrol for abusing its dominant position and distorting competition.

3 The complaint stated that the regime of intellectual property rights governing contracts, concluded by Eurocontrol, for the development and acquisition of prototypes of new systems and equipment for applications in the field of air traffic management was liable to create de facto monopolies in the production of systems which are subsequently standardised by that organisation. It claimed that that situation was all the more serious because Eurocontrol had failed to observe the principles of transparency, openness and non-discrimination in connection with the acquisition of the prototypes. In addition, the complaint stated that, as a result of assistance provided by Eurocontrol to national administrations, at the latters' request, undertakings which had supplied prototypes were in a particularly advantageous position as compared with their competitors in tendering procedures organised by national authorities seeking to acquire equipment.

4 The Commission rejected the complaint in the contested decision. After stating that the Community competition rules apply in principle to international organisations, provided that the activities concerned can be described as economic activities, it stated, first of all, that the activities which were the subject of the complaint could not be so described, so that Eurocontrol could not be considered to be an undertaking within the meaning of Article 82 EC and, in any event, those activities were not contrary to that provision. It then went on to state that Eurocontrol's regulation, standardisation and validation activities did not constitute 'activities of an undertaking', that no breach of the competition rules had been established with regard to the activities of that organisation connected with the acquisition of prototypes and management of intellectual property rights and, lastly, that assisting national administrations was not an economic activity.

II – Procedure before the Court of First Instance and the judgment under appeal

A – Procedure before the Court of First Instance

5 By application lodged at the Registry of the Court of First Instance on 23 April 2004, Selex brought an action for the annulment or amendment of the contested decision.

6 By order of 25 October 2004, Eurocontrol was granted leave, pursuant to Article 116(6) of the Rules of Procedure of the Court of First Instance, to intervene in support of the form of order sought by the Commission by making its submissions at the hearing.

7 On 5 April 2005, Eurocontrol was invited to lodge a statement in intervention, pursuant to Article 64 of the Rules of Procedure. On 4 May 2005, it was authorised, in addition, to receive a copy of the pleadings in the case.

8 Further to an application by the applicant that the defendant be requested, by way of measures of organisation of procedure, to produce, inter alia, a letter of 3 November 1998 in which the defendant had invited Eurocontrol to submit its observations on the complaint ('the letter of 3 November 1998'), the Commission produced the letter and stated that it did not possess any other relevant documents. By document lodged at the Registry of the Court of First Instance on 27 April 2005, the applicant then made an application for witnesses to be heard and documents to be produced by the Commission and introduced three new pleas in law.

B – The judgment under appeal

9 The Court of First Instance dismissed the action in the judgment under appeal.

10 First of all, at paragraphs 28 and 29 of the judgment under appeal, the Court of First Instance ruled that Selex's application for amendment of the contested decision was inadmissible. At paragraphs 33 to 40 of that judgment, it also rejected as inadmissible, on the basis of the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, the new pleas in law introduced by Selex, rejecting the latter's argument that the letter of 3 November 1998 constituted a new fact which came to light in the course of the procedure as a result of a letter from the director of Eurocontrol of 2 July 1999 which was annexed to the defence.

11 At paragraphs 41 to 44 of the judgment under appeal, the Court of First Instance also rejected as inadmissible the plea raised by Eurocontrol seeking a ruling that, by virtue of its immunity under international public law, the rules of the European Union did not apply to it on the ground that, under the fourth paragraph of Article 40 of the Statute of the Court of

Justice, applicable to the Court of First Instance, and Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener did not have standing to raise that plea, which had not been put forward by the Commission.

12 As regards the substantive application, in dismissing the action, the Court of First Instance then rejected the three pleas in law raised by Selex alleging, respectively, manifest error of assessment as to the applicability of the Community competition rules to Eurocontrol, manifest error of assessment as to the existence of an infringement of the Community competition rules and breach of essential procedural requirements and did so on grounds that will be summarised below.

13 By way of preliminary point, the Court of First Instance stated that annulment of the contested decision presupposed that the applicant's first two pleas would be upheld. It pointed out, at paragraphs 47 to 49 of the judgment under appeal, first, that 'where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality' and, second, that the contested decision was based on the double finding that Europol was not an undertaking and that the conduct complained of was not contrary to Article 82 EC.

14 Examining the first plea, at paragraphs 50 to 55 of the judgment under appeal the Court of First Instance drew attention to the case-law of the Court of Justice on the concepts of 'undertaking' and 'economic activity' and rejected the Commission's argument claiming, by reference to Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43, that Eurocontrol could not in any case be considered to be an undertaking for the purposes of Community competition law. It stated that, since the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority, the various activities of an entity must be considered individually and, accordingly, the judgment relied on did not preclude Eurocontrol from being regarded as an undertaking within the meaning of Article 82 EC in relation to other activities than those referred to in that judgment.

15 In examining that plea, the Court of First Instance therefore made a distinction between the various activities in question in the present case, namely the activity of technical standardisation, the activity of research and development and that of assisting the national administrations.

16 With regard, first, to the activity of technical standardisation, at paragraphs 56 to 62 of the judgment under appeal, the Court of First Instance considered that, while the adoption of standards by the Council of Eurocontrol was a legislative activity and therefore a public task performed by that organisation, the preparation and production of technical standards could be separated from its tasks of managing airspace and developing air safety but could not be deemed to be an economic activity, since the applicant had failed to demonstrate that that activity consisted in offering goods or services on a given market.

17 In that context, the applicant's arguments that, first, it could be inferred from the economic nature of the activity of acquiring prototypes that technical standardisation was also an economic activity and, second, the reasoning employed in Case T-319/99 FENIN v Commission [2003] ECR II-357 could not be applied in the present case were rejected at paragraphs 63 to 68 of the judgment under appeal. Citing the judgment in FENIN, the Court of First Instance stated, in essence, that whether or not the activity of purchasing was an economic activity depended on the subsequent use to which the goods acquired was put, so that, in the present case, the fact that technical standardisation was not an economic activity implied that the acquisition of prototypes in connection with that activity was not an economic activity either.

18 Second, with regard to research and development, the Court of First Instance stated first of all, at paragraph 74 of the judgment under appeal, that there was no basis in the contested decision for the applicant's assertion that the Commission had not disputed the economic nature of that activity. It then went on to state in particular, at paragraphs 75 to 77 of the judgment under appeal, that the acquisition of prototypes in that context and the related management of intellectual property rights were not capable of making that activity an economic one, since the acquisition did not involve the offer of goods or services on a given market. Pointing out, in that connection, that that activity consisted in granting public subsidies to undertakings in the relevant sector and acquiring ownership of the prototypes and the property rights resulting from the subsidised research in order to make the results of that research available at no cost to the sector concerned, the Court of First Instance found that '[that] activity [was] ancillary to the promotion of technical development, forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims'.

19 Third, with regard to the activity of assisting the national administrations, the Court of First Instance considered on the other hand, at paragraph 86 of the judgment under appeal, that it was separable from Eurocontrol's tasks of airspace management and development of air safety, on the ground that that activity had a very indirect relationship with air navigation safety, pointing out in that connection that the assistance provided by Eurocontrol only covered technical specifications in the implementation of tendering procedures, was provided only on the request of the national administrations and was therefore in no way essential or indispensable to ensuring the safety of air navigation.

20 Moreover, with regard to assistance to the national administrations, the Court of First Instance found, at paragraph 87 of the judgment under appeal, that this was a case of an offer of services on the market for advice, a market on which private undertakings

specialising in that area could also very well offer their services. In that context, at paragraphs 88 to 91 of the judgment under appeal, the Court of First Instance pointed out that the fact that an activity may be exercised by a private undertaking is a further indication that the activity in question may be described as a business activity, the fact that activities are normally entrusted to public offices cannot necessarily affect the economic nature of such activities and the fact that the assistance provided is not remunerated may constitute an indication that it is not an economic activity, although it is not in itself decisive, as may the fact that that assistance is given in pursuit of a public service objective. The Court of First Instance therefore considered that that activity constituted an economic activity and that, accordingly, Eurocontrol was, in the exercise of that activity, an undertaking within the meaning of Article 82 EC.

21 However, after considering the second plea raised by the applicant in relation to that activity, the Court of First Instance rejected the plea, stating first of all, at paragraph 104 of the judgment under appeal, that the national administrations alone have the power to award contracts and are therefore responsible for compliance with the relevant provisions on tendering procedures, Eurocontrol's contribution being neither mandatory nor systematic. It went on to point out, at paragraphs 105 to 108 of that judgment, that the applicant had failed to adduce any evidence of the definition of the relevant market or the dominant position and had also failed to demonstrate the existence of conduct that fulfilled the criteria of abuse of such a position. Finally, at paragraphs 111 and 112 of the judgment under appeal, the Court of First Instance rejected the applicant's claims that the letter of 3 November 1998 proved that the Commission itself was persuaded that Eurocontrol had abused a dominant position.

22 Lastly, after rejecting, at paragraphs 117 to 120 and 124 to 127 of the judgment under appeal, the complaints alleging a failure to provide reasoning and breach of the rights of defence put forward by the applicant in the third plea, at paragraphs 132 and 133 of that judgment, the Court of First Instance also rejected the applicant's request for measures of inquiry.

III – Forms of order sought by the parties

23 Selex claims that the Court should:

– reject the plea of immunity raised by Eurocontrol as inadmissible;

– reject the Commission's applications for amendment of the grounds of the judgment of the Court of First Instance;

– set aside the judgment under appeal and refer the case back to the Court of First Instance; and

– order the Commission to pay the costs of the appeal proceedings and those of the proceedings at first instance.

24 The Commission contends that the Court should:

– dismiss the appeal in its entirety, if necessary on the basis of a partial amendment of the grounds of the judgment of the Court of First Intance; and

– order the appellant to pay the costs.

25 Eurocontrol contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs, including the costs relating to its intervention.

IV – The appeal

26 In support of its appeal, Selex puts forward 4 pleas in law relating to the procedure before the Court of First Instance and 12 pleas relating to the substance of the case. The latter pleas allege that the Court of First Instance erred in law as regards, first, the applicability of Article 82 EC to the activities of Eurocontrol at issue in these proceedings, namely the activities of assisting the national administrations, technical standardisation and research and development and, second, the infringement of that provision by Eurocontrol

27 The Commission contends that the appeal should be dismissed but seeks an amendment of the grounds of the judgment under appeal rejecting the applicant's pleas relating to the activity of assisting the national administrations and that of technical standardisation.

28 While equally contending that the appeal should be dismissed, Eurocontrol also criticises the judgment under appeal for rejecting as inadmissible the plea that it enjoys immunity under international public law. It also submits that its immunity, which precludes the application of Community competition law to the activities in question, forms the basis a plea which must be considered by the Community judicature of its own motion and should be upheld by the Court in order to dismiss the appeal.

A – The pleas relating to the procedure before the Court of First Instance

29 The four pleas relating to the procedure before the Court of First Instance raised by Selex allege, respectively, infringement of Article 116(6) of the Rules of Procedure of the Court of First Intance, infringement of Article 48(2) of those rules (second and third pleas) and infringement of Article 66(1) of those rules.

1. The first plea, alleging infringement of Article 116(6) of the Rules of Procedure of the Court of First Instance

30 By this plea, Selex submits that, by permitting Eurocontrol to lodge a statement and to receive a copy of the pleadings in the case even though it had established that its application to intervene had been submitted after the six-week period prescribed in Article 115(1) of the Rules of Procedure of the Court of First Instance, that court infringed Article 116(6) of those rules. It maintains that the Court of First Instance could not rely on the provisions in Article 64 of its Rules of Procedure in order to 'circumvent the time-limits imposed for taking steps in proceedings'.

31 In response, the Commission and Eurocontrol submit that the Court of First Instance has a wide margin of discretion in exercising the power conferred on it by Article 64 of its Rules of Procedure, the provisions of which are unconnected with those in the Article 116(6), infringement of which is alleged, and that the appellant has failed to show that that power was exercised in those proceedings for a different purpose than that set out in Article 64(2) and has also failed to dem-

onstrate that, in the light of Article 58 of the Statute of the Court of Justice, the breach of procedure alleged has in fact adversely affected its interests. They point out that it has not been established in particular that that breach of procedure, or any of the other alleged irregularities, could have had any effect on the outcome of the proceedings.

32 According to Article 115(1) of the Rules of Procedure of the Court of First Instance, an application to intervene must be made either within six weeks of the publication in the Official Journal of the European Union of the notice of initiation of the action or, subject to Article 116(6) of those rules, before the decision to open the oral procedure.

33 Article 116(2) of the Rules of Procedure of the Court of First Instance provides that if an intervention for which application has been made within the period of six weeks prescribed in Article 115(1) is allowed, the intervener is to receive a copy of every document served on the parties.

34 Article 116(4) of the Rules of Procedure of the Court of First Instance states that, in the cases referred to in Article 116(2), the President is to prescribe a period within which the intervener may submit a statement in intervention containing a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, the pleas in law and arguments relied on by the intervener and, where appropriate, the nature of any evidence offered.

35 Article 116(6) of those rules provides that, where the application to intervene is made after the expiry of the period of six weeks prescribed in Article 115(1), the intervener may, on the basis of the Report for the Hearing communicated to him, submit his observations during the oral procedure.

36 It is apparent from those provisions that the intervener's procedural rights differ according to whether the application to intervene is made before the expiry of the period of six weeks prescribed in Article 115(1) of the Rules of Procedure of the Court of First Instance or after the expiry of that period but before the decision to open the oral procedure. Where the intervener has made his application before the expiry of that period, he is entitled to participate in both the written and the oral procedure, to receive a copy of the pleadings in the case and to submit a statement in intervention. On the other hand, where the intervener has made an application after the expiry of that period, he is entitled only to participate in the oral procedure, to receive a copy of the Report for the Hearing and to submit his observations on the basis of that report at the hearing.

37 In the present case, it is apparent from the indications given in the judgment under appeal and the documents on the case file that, although Eurocontrol was given leave by order of 25 October 2004 to intervene in the proceedings before the Court of First Instance in support of the form of order sought by the Commission pursuant to Article 116(6) of the Rules of Procedure of the Court of First Instance and was thus authorised only to submit its observations during the oral procedure in the light of the Report for the Hearing, it was subsequently invited, by decision of 5 April 2005, taken on the basis of Articles 49 and 64 of those rules, to submit a statement in intervention. Moreover, by decision of 4 May 2005, it was authorised to receive a copy of the application, the defence, the reply and the rejoinder. It is therefore apparent that, notwithstanding the fact that Eurocontrol intervened in the proceedings before the Court of First Instance after the expiry of the six-week period prescribed in Article 115(1) of those rules, it was ultimately permitted to participate in both the written and the oral procedure.

38 While, in accordance with Article 64 of the Rules of Procedure of the Court of First Instance, that court may, inter alia, by way of measures of organisation of procedure, invite the parties, including the intervener, to make written submissions on certain aspects of the dispute, that provision does not in any way contemplate the possibility that an intervener who has intervened in the proceedings after the aforementioned period should be invited to submit a statement in intervention or that he should be given access to the pleadings in the case, since such measures do not in any event correspond to the purpose of measures of organisation of procedure, as set out in Article 64(2) of those rules.

39 It follows that, by inviting Eurocontrol to submit a statement in intervention and authorising it to receive a copy of the pleadings in the case, the Court of First Instance failed to comply with the provisions in Article 116(6) of its Rules of Procedure and the judgment under appeal is, therefore, vitiated on account of a defect.

40 However, under Article 58 of the Statute of the Court of Justice, an appeal can succeed only if the breach of procedure committed by the Court of First Instance has adversely affected the appellant's interests. In the present case, Selex has failed to demonstrate that the breach on which it relies has adversely affected its interests. Moreover, there is absolutely no indication that that breach could have had any effect whatsoever on the outcome of the proceedings.

41 As a consequence, the plea in question cannot succeed.

2. The second and third pleas, alleging infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance

42 By its second plea, Selex submits that the Court of First Instance infringed Article 48(2) of its Rules of Procedure by distorting in a serious and manifest fashion the matters of fact which led it to reject as inadmissible the new pleas which the appellant introduced on the basis of the content of the letter of 3 November 1998 lodged by the Commission in the course of the proceedings. It maintains that, at paragraphs 12, 35 and 38 of the judgment under appeal, the Court of First Instance distorted the content of a letter of 12 November 1998 addressed by the Commission to the appellant, which did not make any reference at all to the letter of 3 November 1998, in order to assert that there was no justification for its submission that it was

only as a result of reading the letter from the Director of Eurocontrol of 2 July 1999 annexed to the defence that it had become aware of the fact that the letter of 3 November 1998 was not merely a cover note accompanying the dispatch of the complaint but also contained an analysis of the complaint signed by two Directors-General.

43 By its third plea, Selex complains that the Court of First Instance rejected its new pleas without taking account of the Commission's conduct during the administrative procedure and the procedure before the Court of First Instance, even though the introduction of the new pleas was the result of the Commission's refusal dutifully to produce all relevant documents, in particular the letter of 3 November 1998. The Court of First Instance therefore interpreted and applied Article 48(2) of its Rules of Procedure restrictively.

44 However, it is clear from reading the letter of 12 November 1998 referred to above that the Commission informed the appellant in that letter that, further to its complaint and a letter of 29 September 1998 from the appellant, it had assessed the legal and economic aspects raised in the complaint and, without prejudice to the application of Community competition rules, contact had been made with Eurocontrol in order to invite it to submit its comments on the facts and conclusions set out in the complaint. That letter stated that, by letter signed by two Directors-General, namely those of the Directorate-General for Competition and the Directorate-General for Transport, the Commission had drawn Eurocontrol's attention to certain aspects of its standardisation policy and that Eurocontrol had, in particular, been invited to define, in conjunction with Commission staff, a neutral and consistent approach to its relationships with undertakings.

45 While its letter of 12 November 1998 does not specify the date of the letter sent to Eurocontrol or refer to the contact made with that organisation, so that the appellant could not have been aware as a result of reading it that what was being referred to was the letter of 3 November 1998 and, while the letter of 12 November 1998 refers only to Eurocontrol's technical standardisation activity, it is none the less abundantly clear from that letter that, after assessing the complaint, the Commission had invited Eurocontrol to submit its comments on all the matters referred to in the complaint and had informed it in that letter of certain analytical data.

46 Therefore, after referring in particular to various factors set out at paragraphs 35 to 37 of the judgment under appeal, the Court of First Instance concluded, without distorting the content of the letter of 12 November 1998 or any other matters of fact, that the appellant was not justified in submitting that it was only as a result of reading the letter of 2 July 1999 that it had been able to be aware of the fact that the letter sent by the Commission to Eurocontrol was not merely a cover note accompanying the dispatch of the complaint but that it also contained an analysis of its complaint signed by two Directors-General.

47 In the absence of matters of law or of fact which came to light in the course of the procedure, the Court of First Instance therefore correctly rejected as inadmissible, pursuant to Article 48(2) of its Rules of Procedure, the pleas in law introduced by the appellant by means of a document lodged at the Registry of the Court of First Instance on 27 April 2005, that is, after the closure of the written procedure.

48 Moreover, in the absence of such matters, it cannot be maintained that the introduction of new pleas in the course of the proceedings was the result of a refusal or omission on the part of the Commission to communicate earlier the letters of 2 July 1999 and 3 November 1998 or any other document. Nor can the Court of First Instance be criticised for having applied Article 48(2) of its Rules of Procedure strictly, since the Rules of Procedure are mandatory.

49 Both the second and third pleas must therefore be rejected.

3. The fourth plea, alleging infringement of Article 66(1) of the Rules of Procedure of the Court of First Instance

50 In its fourth plea, Selex submits that, by giving its decision not by way of order but only in the judgment under appeal on the request for measures of inquiry which it made in the application and in the document lodged on 27 April 2005, the Court of First Instance infringed Article 66(1) of its Rules of Procedure.

51 It is sufficient to point out that that provision requires an order to be made to prescribe the measures of inquiry that the Court of First Instance considers appropriate but not to reject requests seeking an order for such measures, on which that court can therefore, in such a case, give a ruling in the final judgment in the proceedings (see, to that effect, the order of 12 January 2006 in Case C-162/05 P Entorn v Commission, paragraphs 54 and 55).

52 It follows that the fourth and last plea relating to the procedure before the Court of First Instance must also be rejected.

B – The plea alleging that Eurocontrol enjoys immunity

1. Whether the plea alleging immunity is inadmissible

53 Eurocontrol maintains that, contrary to the assessment made by the Court of First Instance, its plea claiming immunity does not constitute a new plea which alters the context of the dispute and it therefore complies with the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of the Court of First Instance. It states, first of all, that it had already raised that plea in its observations on the complaint of 2 July 1999 and that the Commission itself referred to the principle of immunity in the contested decision. Next, it submits, in essence, that the plea of immunity and the discussion concerning its standing as an undertaking have the same purpose and are based on the same matters of law and of fact, since its immunity simply forms the basis of a further legal argument in addition to those put for-

ward by the Commission in support of its submission that Article 82 EC does not apply to the activities in question and that the application should be dismissed.

54 However, as the Court of First Instance pointed out in the judgment under appeal, under Article 116(3) of the Rules of Procedure an intervener must accept the case as he finds it at the time of his intervention and, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, the submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties. According to established case-law, those provisions do not prevent an intervener from using arguments that are new or different to those used by the party it supports, provided the intervener seeks to support that party's submissions (see Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authorithy [1961] ECR 1, and Case C-245/92 P Chemie Linz v Commission [1999] ECR I-4643, paragraph 32).

55 In that regard, it should be borne in mind, first, that the Commission submitted before the Court of First Instance that Selex's action should be dismissed. Second, the contested decision concluded, at paragraphs 21 to 24 thereof, that Community law was applicable to Eurocontrol and rejected the complaint principally on the ground that the activities that were the subject of the complaint were not economic in nature, so that Eurocontrol could not be regarded as an undertaking for the purpose of Article 82 EC. The pleas put forward by the Commission before the Court of First Instance in support of its submission that Selex's action against that decision should be dismissed were based on the same grounds.

56 Accordingly, it is apparent that Eurocontrol's plea of immunity cannot be regarded as seeking to support the Commission's submissions since, in actual fact, that plea seeks a ruling that the activities of Eurocontrol are not subject to Community law and that that international organisation enjoys, in particular, immunity as regards investigations carried out by the Commission in competition matters. As the Advocate General observed at point 30 of her Opinion, acceptance of that plea would render the contested decision unlawful, which might lead to it being annulled but not to the action being dismissed, as the Commission contended it should be before the Court of First Instance.

57 The reasons set out above are sufficient to justify the conclusion arrived at by the Court of First Instance at paragraph 44 of the judgment under appeal that the plea raised by Eurocontrol was inadmissible in the light of the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of the Court of First Instance.

2. Eurocontrol's submissions that its plea of immunity is a plea which must be considered by the Community judicature of its own motion and should be upheld by the Court in order to dismiss the appeal

58 Eurocontrol considers that the appellant's complaint should in any event have been rejected since, under international public law, its activities are not subject to Community law and, in particular, enjoy immunity as regards investigations carried out by any contracting party in relation to competition matters. It points out that both it and the European Commission are international organisations whose members are States which are, to some extent, different and operate within two separate independent legal systems, so that, on the basis of the general principle par in parem non habet imperium (an equal has no authority over an equal), the Community does not have the power to make it subject to its own rules.

59 The Community, which approved the protocol on accession to Eurocontrol by Council Decision 2004/636/EC of 29 April 2004 on the conclusion by the European Community of the Protocol on the accession of the European Community to the European Organisation for the Safety of Air Navigation (OJ 2004 L 304, p. 209) and agreed with the other contracting parties to apply Articles 1 to 7 of the protocol on a provisional basis, must, in accordance with the principle of good faith recognised in Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties, refrain from any act which could defeat the object and purpose of the 'Eurocontrol' International Convention on Cooperation for the Safety of Air Navigation signed in Brussels on 13 December 1960, as revised and consolidated by the Protocol of 27 June 1997 ('the Convention on the Safety of Air Navigation'). Moreover, the Community can exercise its powers only in accordance with the limits imposed by international public law.

60 Eurocontrol submits that the same conclusion follows from the customary rule of international public law under which inter-governmental organisations enjoy immunity, which confers absolute protection and, at the very least, protects the activities in question in the present proceedings, since those activities form an essential part of Eurocontrol's institutional objectives and are not, in any event, acts of a commercial nature. Eurcontrol points out that, if the Community had the right to undertake investigations in competition cases concerning the exercise of Eurocontrol's public powers, it could, in point of fact, determine unilaterally the manner in which Eurocontrol pursues its institutional activities, disregard the principles laid down in the Convention on the Safety of Air Navigation concerning decision making and infringe the rights of the other contracting parties.

61 Eurocontrol considers that the question of its immunity, set out in such terms, falls within the same category as that of fundamental questions of public policy which the Community judicature must raise of its own motion. At the hearing, it presented that question expressly from the angle that the Commission lacked competence to give a substantive view on the measures sought by the appellant.

62 It should be noted that the Court held in SAT Fluggesellschaft that it had jurisdiction, under Article 234 EC, to rule on the interpretation of the Treaty provisions in a case involving a dispute before the national court between a private company and Eurocontrol concerning, inter alia, the application of Community

competition rules. In that judgment, the Court held that the question whether the rules of Community law may be relied upon as against Eurocontrol is connected with the substance of the case and has no bearing on the jurisdiction of the Court.

63 Since the Commission is required under Article 211 EC to ensure that the provisions of the Treaty are applied, it also acted within its powers in examining Selex's complaint and rejecting it by taking the view that Article 82 EC was not applicable to Eurocontrol.

64 Accordingly, there is no need for the Court to examine of its own motion the submissions made by Eurocontrol regarding its immunity.

C – The pleas relating to the substantive merits

65 As regards the substantive merits, Selex raises a number of pleas alleging errors of law made by the Court of First Instance relating to the applicability of Article 82 EC to the activities of Eurocontrol at issue, namely the activities of assisting the national administrations, technical standardisation and research and development, and to the infringement of that provision. The Commission contends that the appeal should be dismissed but seeks an amendment of the grounds of the judgment under appeal as regards the first two activities.

1. The pleas relating to the applicability of Article 82 EC to the activity of assisting the national administrations and alleging infringement of that provision

66 With regard to the assistance provided by Eurocontrol to the national administrations, Selex puts forward five pleas in law in support of its appeal, the first of which alleges distortion of the content of the contested decision, the second and third that the reasoning is contradictory, the fourth infringement of Community case-law on the limits of judicial review and the fifth manifest error of assessment as regards the infringement of Article 82 EC. Taking the view that the Court of First Instance erred in law by regarding the activity as an economic one, the Commission seeks an amendment of the grounds of the judgment under appeal, which would render the examination of the grounds of appeal nugatory, and, in the alternative, submits that those grounds should be rejected.

67 Clearly, if such an error in law had been made, the very premiss underlying the reasons on which the judgment under appeal is based, which are criticised in the five grounds of appeal under consideration, would be undermined. In that case, there would be absolutely no basis for that reasoning and the five grounds of appeal in question would therefore be redundant.

68 It follows that the Court cannot rule on the five pleas in question without considering whether or not the reasoning which led the Court of First Instance to consider that the assistance provided by Eurocontrol to the national administrations was to be regarded as an economic activity was incorrect.

69 It should be borne in mind in this regard, as the Court of First Instance observed at paragraph 87 of the judgment under appeal, that any activity consisting in offering goods or services on a given market is an economic activity (Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7; Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 75; and Case C-49/07 MOTOE [2008] ECR I-0000, paragraph 22).

70 It should also be borne in mind that, according to the case-law of the Court of Justice, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition (see, to that effect, Case 107/84 Commission v Germany [1985] ECR 2655, paragraphs 14 and 15; SAT Fluggesellschaft, paragraph 30; and MOTOE, paragraph 24)

71 In SAT Fluggesellschaft, the Court, while not specifically ruling on Eurocontrol's activity of assisting the national administrations, considered at paragraph 30 of that judgment that, taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space, which are typically those of a public authority and are not of an economic nature. The Court therefore held that Articles 86 and 90 of the Treaty (now Articles 82 EC and 86 EC) must be interpreted as meaning that an international organisation such as Eurocontrol is not an undertaking for the purposes of those provisions.

72 Contrary to what Selex maintains, that conclusion also applies with regard to the assistance which Eurocontrol provides to the national administrations, when so requested by them, in connection with tendering procedures carried out by those administrations for the acquisition, in particular, of equipment and systems in the field of air traffic management.

73 It is apparent from Article 1 of the Convention on the Safety of Air Navigation that, in order to achieve harmonisation and integration with the aim of establishing a uniform European air traffic management system, the purpose of Eurocontrol is to strengthen cooperation among the contracting parties and to develop their joint activities in the field of air navigation, making due allowance for defence needs and providing maximum freedom for all airspace users consistent with the required level of safety.

74 To that end, under Article 1(e), (f) and (h) of that convention, the functions of Eurocontrol are, inter alia, to adopt and apply common standards and specifications, to harmonise air traffic services regulations and to encourage common procurement of air traffic systems and facilities.

75 Article 2(2)(a) of the Convention on the Safety of Air Navigation provides that Eurocontrol may, at the request of one or more contracting parties and on the basis of a special agreement or agreements between it and the contracting parties concerned, assist such contracting parties in the planning, specification and setting up of air traffic systems and services.

76 It can be inferred from the Convention on the Safety of Air Navigation that the activity of providing assistance is one of the instruments of cooperation entrusted to Eurocontrol by that convention and plays a

direct role in the attainment of the objective of technical harmonisation and integration in the field of air traffic with a view to contributing to the maintenance of and improvement in the safety of air navigation. That activity takes the form, inter alia, of providing assistance to the national administrations in the implementation of tendering procedures for the acquisition of air traffic management systems or equipment and is intended to ensure that the common technical specifications and standards drawn up and adopted by Eurocontrol for the purpose of achieving a harmonised European air traffic management system are included in the tendering specifications for those procedures. It is therefore closely linked to the task of technical standardisation entrusted to Eurocontrol by the contracting parties in the context of cooperation among States with a view to maintaining and developing the safety of air navigation and is thus connected with the exercise of public powers.

77 The Court of First Instance therefore made an assessment that was erroneous in law in finding that the activity of assisting the national administrations was separable from Eurocontrol's tasks of air space management and development of air safety by considering that that activity had an indirect relationship with air navigation safety, on the ground that the assistance provided by Eurocontrol covered only technical specifications in the implementation of tendering procedures and therefore affected air navigation safety only as a result of those procedures.

78 The other grounds set out in the judgment under appeal in that connection, to the effect that Eurocontrol provides assistance to the national administrations only on their request and the activity is therefore not essential or indispensable to ensuring the safety of air navigation, are not capable of demonstrating that the activity in question is not connected with the exercise of public powers.

79 The fact that the assistance provided by Eurocontrol is optional and that, as the case may be, only certain Member States have recourse to it cannot preclude such a connection or alter the nature of the activity. Moreover, in order for there to be a connection with the exercise of public powers, it is not necessary for the activity concerned to be essential or indispensable to ensuring the safety of air navigation, since what matters is that the activity is connected with the maintenance and development of air navigation safety, which constitute public powers.

80 It follows from all the foregoing considerations that the Court of First Instance erred in law by regarding Eurocontrol's activity of assisting the national administrations as an economic activity and, as a consequence, on the basis of grounds that were erroneous in law, considering that Eurocontrol was, in the exercise of that activity, an undertaking within the meaning of Article 82 EC. Consequently, it erred in upholding, to that extent, the first plea in law expounded before it by the appellant alleging a manifest error of assessment as to the applicability of Article 82 EC to Eurocontrol.

81 However, it must be borne in mind that, if the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed (see, Case C-30/91 P Lestelle v Commission [1992] ECR I-3755, paragraph 28; Case C-210/98 P Salzgitter v Commission [2000] ECR I-5843, paragraph 58; and Case C-312/00 P Commission v Camar and Tico [2002] ECR I-11355, paragraph 57).

82 In the present case, it is apparent from the grounds set out at paragraphs 72 to 79 above that Eurocontrol's activity of assisting the national administrations is connected with the exercise of public powers and that, in any event, it is not in itself economic in nature, so that, in carrying out that activity, the organisation is not an undertaking within the meaning of Article 82 EC. The contested decision is not, therefore, vitiated by any error in that regard.

83 It follows that the operative part of the judgment under appeal, which dismissed the action, remains well founded in law and, accordingly, the fact that there is an error in law in the grounds of the judgment under appeal does not mean that it must be set aside.

84 The five pleas put forward by Selex relate to the grounds of the judgment under appeal by which the Court of First Instance, after concluding that Eurocontrol's activity of assisting the national administrations was an economic activity and Eurocontrol was therefore, in the exercise of that activity, an undertaking within the meaning of Article 82 EC, rejected the second plea relied on by the appellant in support of its action, alleging a manifest error of assessment on the part of the Commission as to the existence of an infringement of Article 82 EC.

85 It follows from the reasons set out above that, since Eurocontrol was not, in the exercise of its activity of assisting the national administrations, an undertaking within the meaning of Article 82 EC, that provision is not applicable to that activity. Therefore, the five pleas put forward by Selex criticising the grounds of the judgment under appeal relating to the alleged infringement of Article 82 EC must be rejected as they are redundant.

2. The pleas relating to the applicability of Article 82 EC to the activity of technical standardisation

86 With regard to the activity of technical standardisation exercised by Eurocontrol, Selex relies on four grounds in support of its appeal, alleging distortion of the content of the contested decision, the adoption of a concept of economic activity that is at variance with that established in Community case-law, misapplication of the case-law on social benefits and breach of the obligation to state adequate grounds. Taking the view that the distinction made in the judgment under appeal between the activity of adopting technical standards, which forms part of the task of managing air space and developing air safety, and that of the preparation and production of such standards, which does not form part of that task, was incorrect, the Commission seeks an amendment of the grounds on that point and, as to the

remainder, contends that the grounds of the appeal should be dismissed.

87 Clearly, if such an error had been made, the very premiss underlying some of the reasons on which the judgment under appeal is based, which are criticised in the plea alleging that a concept of economic activity was adopted that is at variance with that established in Community case-law, would be undermined. In such a case, there would be absolutely no basis for that reasoning and the plea in question would therefore be redundant.

88 In those circumstances, as stated at paragraph 68 above, the Court cannot rule on the plea in question without considering whether or not the reasoning which led the Court of First Instance to consider, in essence, that, unlike the activity of adopting technical standards, that of preparing and producing such standards was separable from the task of air space management and development of air safety, so that it could be regarded as an economic activity, was incorrect.

89 In order to draw the distinction complained of, the Court of First Instance first of all stated, at paragraph 59 of the judgment under appeal, that the adoption by the Council of Eurocontrol of standards drawn up by the executive organ of that organisation is a legislative activity, since the Council of Eurocontrol is made up of directors of the civil aviation administration of each contracting Member State, appointed by their respective States for the purpose of adopting technical specifications which will be binding in all those States. According to the grounds of the judgment under appeal, that activity is directly connected with the exercise by those States of their powers of public authority, Eurocontrol's role thus being akin to that of a minister who, at national level, prepares legislative or regulatory measures which are then adopted by the government. This activity therefore falls within the public tasks of Eurocontrol.

90 The Court of First Instance then stated, at paragraph 60 of the judgment under appeal, that the preparation and production of technical standards by Eurocontrol could, conversely, be separated from its tasks of managing air space and developing air safety. As justification for that assessment, it considered that the arguments advanced by the Commission to prove that Eurocontrol's standardisation activities were connected with that organisation's public service mission related, in fact, only to the adoption of those standards and not to the production of them, since the need to adopt standards at international level does not necessarily mean that the body which sets those standards must also be the one which subsequently adopts them.

91 However, Article 2(1)(f) of the Convention on the Safety of Air Navigation provides that Eurocontrol is responsible for developing, adopting and keeping under review common standards, specifications and practices for air traffic management systems and services. It is therefore clear that the contracting States entrusted Eurocontrol with both the preparation and production of standards and with their adoption, without separating those functions.

92 Moreover, the preparation and production of technical standards plays a direct role in the attainment of Eurocontrol's objective, defined in Article 1 of the Convention on the Safety of Air Navigation and referred to at paragraph 73 above, which is to achieve harmonisation and integration with the aim of establishing a uniform European air traffic management system. Those activities form an integral part of the task of technical standardisation entrusted to Eurocontrol by the contracting parties in the context of cooperation among States with a view to maintaining and developing the safety of air navigation, which constitute public powers.

93 It follows that the judgment under appeal is vitiated by an error in law in that it states that the preparation and production of technical standards by Eurocontrol can be separated from its task of managing air space and developing air safety. However, that error does not affect the Court of First Instance's conclusion, which is based on other grounds, that the Commission did not make a manifest error of assessment in taking the view that Eurocontrol's technical standardisation activities were not economic activities and that the competition rules of the Treaty did not apply therefore to them. It must therefore be held once again that the fact that there is an error of law in the grounds of the judgment under appeal does not mean that that judgment must be set aside.

a) The plea alleging that a concept of economic activity was adopted that is at variance with that established in Community case-law

94 Selex states, in support of this plea, that the Court of First Instance's assessment that it had failed to show that there was a market for technical standardisation services has no bearing on the assessment as to whether that is an economic activity and is inaccurate, since, in the contested decision, the Commission accepted its proposed definition of the market in question. It submits that, contrary to the finding of the Court of First Instance, Eurocontrol does indeed offer to the States an independent service for the production of technical standards. In any event, the fact that the activity in question does not entail offering goods or services on a given market is irrelevant in the light of the case-law and the Commission's practice. What matters is that the activity may be regarded intrinsically and objectively as an economic activity.

95 Moreover, the grounds set out at paragraph 61 of the judgment under appeal, by which the Court of First Instance held that the activity of producing standards was not an economic activity on the basis that those standards are subsequently adopted by the Council of Eurocontrol, contradict the grounds set out at paragraphs 59 and 60 of that judgment, by which that court made a distinction between the production of technical standards and their adoption.

96 It must be pointed out that it is apparent from the reasons given at paragraphs 91 and 92 above that Eurocontrol's technical standardisation activity, as a whole, is connected with the exercise of public powers and, consequently, is not economic in nature.

97 It follows that the plea under consideration, by which Selex criticises the grounds of the judgment under appeal which led the Court of First Instance to conclude that the appellant had failed to demonstrate that the activity of technical standardisation consisted in offering goods or services on a given market, is redundant.

b) The plea alleging distortion of the content of the contested decision

98 By this plea, Selex maintains that, by stating at paragraphs 15 and 48 of the judgment under appeal that the contested decision was based on the double finding that Eurocontrol was not an undertaking and that, in any event, the conduct complained of was not contrary to Article 82 EC, the Court of First Instance distorted the content of that decision, which is based solely on the assessment of the economic nature of the activity in question and does not contain any assessment as to whether there was abuse of a dominant position. What the Court of First Instance in fact did was to reproduce a stylistic formula used by the Commission, without considering whether such a formula contained even a basic statement of reasons, and substituted its own reasoning for that which had in fact been adopted by the Commission.

99 It is sufficient to state, in that regard, that this plea is invalid, since the Court of First Instance rejected the action on the ground that the Treaty rules on competition were not applicable to Eurocontrol's technical standardisation activity and it did not, therefore, consider the second plea put forward by the appellant, alleging a manifest error of assessment as to whether Eurocontrol infringed Article 82 EC.

100 The plea in question must, therefore, be rejected.

c) The plea alleging misapplication of the Community case-law on social benefits

101 By this plea, Selex submits that the Court of First Instance wrongly rejected its argument that the reasoning employed in FENIN v Commission could not be applied to the present case, in which there is no element of solidarity present in the activity in question. However, according to the case-law, that element may be decisive, depending on the extent to which it is present, for the purpose of determining whether the activity concerned is that of an undertaking.

102 However, first of all, the Court of First Instance did not err in law when it stated, at paragraph 65 of the judgment under appeal, referring to the judgment in FENIN v Commission, that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put and that the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity (see Case C-205/03 P FENIN v Commission [2006] ECR I-6295, paragraph 26). The Court of First Instance correctly concluded from this that the fact that technical standardisation is not an economic activity means that the acquisition of prototypes in connection with that standardisation is not an economic activity either.

103 Secondly, the Court of First Instance was also fully entitled to reject the appellant's argument that that reasoning could not be transposed to the present case. That reasoning can obviously be applied to activities other than those that are social in nature or are based on solidarity, since those factors do not constitute conditions for the purpose of determining that an activity is not of an economic nature but are simply factors to be taken into account, where appropriate, for the purpose of categorising an activity in accordance with the case-law cited at paragraphs 69 and 70 above.

104 It follows that the plea in question must be rejected.

d) The plea alleging breach of the obligation to state adequate grounds

105 Selex complains that adequate grounds are not given at paragraphs 59 to 62 of the judgment under appeal as regards the determination of the standardisation market. It observes that the Court of First Instance had available to it a definition of the market in question, proposed by the appellant and not challenged by the Commission in the contested decision, but disregarded that definition without providing any arguments in support of its own different assessment and without referring to the technical and legal aspects of the issue set out by the parties.

106 It must be pointed out that, contrary to what Selex maintains, the Commission did not, in the contested decision, express a view on the definition of the market that would be pertinent but it did consider, as it subsequently also maintained before the Court of First Instance, that the activity of technical standardisation was not an economic one. Reaching the same conclusion, the Court of First Instance set out, at paragraphs 59 to 62 of the judgment under appeal, the grounds which led it to consider that the appellant had failed to show that the activity of technical standardisation consisted in offering goods or services on a given market.

107 The Court of First Instance was thus able, without there being any need to set out all the technical aspects and the arguments put forward by the parties, to give sufficient reasons for its conclusion, enabling the parties to be apprised of those reasons and the Court to exercise its power of review and it therefore follows that the plea must be rejected.

3. The pleas relating to the applicability of Article 82 EC to the activity of research and development

108 With regard to Eurocontrol's research and development activities, Selex relies on three pleas in support of its appeal, alleging distortion of the content of the contested decision, the adoption of a concept of economic activity which is at variance with that established in Community case-law and distortion of the evidence produced by it concerning the economic nature of the management of the regime of intellectual property rights.

a) The plea alleging distortion of the content of the contested decision

109 By this plea, Selex submits that the judgment under appeal manifestly distorts the content of the contested decision in so far as it states that there is no basis in that decision for the assertion that the Commission did not dispute the economic nature of the acquisition of prototypes and the management of intellectual property rights, whereas a simple reading of the decision shows that the Commission never disputed that point but simply disputed the existence of an abuse of a dominant position. The Court of First Instance therefore ascribed to the contested decision a content that is not borne out by the facts and substituted its own reasoning for that in the decision.

110 It is sufficient to state that there is no basis for this plea, since the Commission expressly stated at paragraphs 28 and 29 of the contested decision that it considered Eurocontrol's activities that were the subject of the complaint not to be of an economic nature. That assessment is also apparent from paragraph 32 of the contested decision, which relates to the management of intellectual property rights.

111 Even if that plea had in fact been directed at a lack of reasoning in the contested decision, as the Commission observes, it is inadmissible since it was raised for the first time at the appeal stage.

112 That plea must therefore be rejected.

b) The plea alleging that a concept of economic activity was adopted that is at variance with that established in Community case-law

113 By this plea, Selex criticises, first, what is stated at paragraph 76 of the judgment under appeal, namely that the acquisition of prototypes is an activity which is subsidiary to their development, which is carried out by third parties. It points out that the activity in question is indeed that of acquiring prototypes, which precedes the definition of technical specifications, and it is therefore of little consequence that the development of prototypes is carried out by third parties.

114 It is clearly not on that ground that the Court of First Instance held that the Commission did not make a manifest error of assessment when it took the view that the research and development activity financed by Eurocontrol was not an economic activity and that the rules on competition were not applicable to it. Indeed, it is apparent from paragraph 75 of the judgment under appeal that the Court of First Instance considered that the acquisition of prototypes in the context of that activity and the related management of intellectual property rights did not make that activity an economic one, since the acquisition did not involve the offer of goods or services on a given market. Moreover, for the reasons set out at paragraph 102 above, that analysis is untainted by errors of law.

115 Next, Selex criticises the judgment under appeal for stating, at paragraph 77, that intellectual property rights were not acquired for the purpose of their commercial exploitation and that the licences were granted at no cost. Those assertions, even if they were true, are in conflict with the case-law which states that the fact that an entity does not seek to make a profit is irrelevant for the purpose of determining whether it is an undertaking.

116 Contrary to those submissions, it is apparent from the case-law that the fact that a body is non-profit-making is a relevant factor for the purpose of determining whether or not an activity is of an economic nature but it is not sufficient of itself (see, inter alia, to that effect, Case C-244/94 Fédération française des sociétés d'assurance and Others [1995] ECR I-4013, paragraph 21; Case C-67/96 Albany [1999] ECR I-5751, paragraph 85; and Case C-237/04 Enirisorse [2006] ECR I-2843, paragraph 31).

117 Accordingly, the Court of First Instance did not err in law when, after pointing out that, when assessing whether a given activity is an economic activity, the absence of remuneration is only one indication among several others and cannot by itself exclude the possibility that the activity in question is economic in nature, it considered that the fact that Eurocontrol granted licences relating to the prototypes at no cost indicated that the management of intellectual property rights was not an economic activity, an indication that was also supported by other evidence.

118 Lastly, according to Selex, it was contrary to the case-law to state, at paragraph 77 of the judgment under appeal, that the management of intellectual property rights is ancillary to the promotion of technical development, forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims, which excludes the possibility that the activity in question is economic in nature. Selex submits, first, referring to the judgment in Enirisorse, that it has already been held that the task of developing new technologies may be economic in nature and, second, referring to that judgment and to the judgment in Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 21, that the fact that an operator may have public service obligations does not prevent the activity in question from being regarded as an economic activity.

119 On that point, it must be noted that the grounds of the judgment under appeal that are the subject of criticism do not in any way preclude the possibility that technological development may be an economic activity and nor do they preclude the possibility that an entity which has public service obligations can pursue an activity of that nature. The Court of First Instance simply assessed the factors specific to the case and, without erring in law or falling foul of the case-law invoked, deduced from the fact that no charge was made for the management of intellectual property rights and the fact that Eurocontrol's mission was pursued purely in the interests of public service – the activity forming part of that mission and being ancillary to that of promoting technical development – that the activity was not economic in nature.

120 Since there is no foundation for any of the arguments put forward, this plea must also be rejected.

c) The plea alleging distortion of the evidence produced by the appellant concerning the economic

nature of the management of the regime of intellectual property rights

121 By this plea, Selex complains that, at paragraph 79 of the judgment under appeal, the Court of First Instance distorted assertions it made at the hearing concerning remuneration received by Eurocontrol when that court stated that those assertions were based on an internal Eurocontrol document entitled 'ARTAS Intellectual Property Rights and Industrial Policy', dated 23 April 1997, and sought to demonstrate that Eurocontrol received payment for the management of the licences. In point of fact, it referred to that document in its application simply to highlight the variety of roles played by Eurocontrol and the contradiction that exists between the system of managing intellectual property rights established by Eurocontrol and the content of that document. On the other hand, at the hearing, it referred to the most recent public version of that document, entitled 'ARTAS Industrial Policy', simply to point out that it had become obvious that the activity in question was an economic one. Accordingly, it submits that the Court of First Instance ascribed to its application a content that is not borne out by the facts.

122 It is sufficient to observe in that regard that, if the Court of First Instance understood that the appellant's assertion that the licences granted by Eurocontrol were not free of charge was based on the document referred to in its application and not on the document mentioned for the first time at the hearing, that does not in any way affect its assessment that those licences are free of charge or, ultimately, the conclusion it arrived at as a result of its examination of all the evidence relating to research and development.

123 The plea in question must therefore be rejected.

124 As a result of all the foregoing considerations, the appeal must be rejected.

V – Costs

125 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against Selex and the latter has been unsuccessful in its appeal, Selex must be ordered to pay its own costs and those incurred by the Commission.

126 Under the first subparagraph of Article 69(3) of those rules, which also applies to appeal proceedings, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. In the present case, the Court has decided that Selex must be ordered to pay half the costs incurred by Eurocontrol, which must therefore bear half its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;
2. Orders SELEX Sistemi Integrati SpA to pay, in addition to its own costs, those incurred by the Commission of the European Communities and half the costs incurred by the European Organisation for the Safety of Air Navigation (Eurocontrol);
3. Orders the European Organisation for the Safety of Air Navigation to pay half its own costs.

OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 3 July 2008 1(1)
Case C-113/07 P
SELEX Sistemi Integrati SpA
v
Commission of the European Communities
and
Eurocontrol
(Appeal – Competition law – Article 82 EC – Concept of 'undertaking' – Economic activity – Alleged abuse of a dominant position by Eurocontrol – Complaint – Rejection – Procedural status of the intervener – Substitution of grounds)

I – Introduction

1. In the present case the Court of Justice of the European Communities has to rule on an appeal lodged by SELEX Sistemi Integrati SpA (formerly Alenia Marconi Systems SpA) against the judgment of the Court of First Instance of the European Communities of 12 December 2006 in Case T-155/04 SELEX Sistemi Integrati SpA v Commission. (2)

2. The appellant and applicant at first instance ('the appellant') seeks the setting aside of that judgment, by which the Court of First Instance declared to be lawful the Commission's decision of 12 February 2004 ('the contested decision'), which essentially found that the European Organisation for the Safety of Air Navigation (Eurocontrol) was not an undertaking and that its activities did not constitute an abuse of a dominant position within the meaning of Article 82 EC and were therefore regarded as lawful, and consequently dismissed the appellant's action for annulment and/or amendment of that decision.

II – Legal framework

A – Legal bases of Eurocontrol

3. Eurocontrol, a regionally-oriented international air traffic organisation, was established by various European States, (3) both members and non-member countries of the European Community, under the International Convention relating to Cooperation for the Safety of Air Navigation of 13 December 1960, which has been amended on several occasions and was revised and consolidated by the Protocol of 27 June 1997 ('the Convention'), with the aim of strengthening cooperation among the Contracting States in the field of air navigation safety and developing joint activities in order to achieve the harmonisation and integration necessary to establish a uniform system of air traffic management ('ATM'). Whilst the Convention is not yet formally in force, since it has not been ratified by all the contracting parties, its provisions have been applied on a provisional basis since 1998 in accordance with a decision of the Permanent Commission of Eurocontrol

adopted in December 1997. Italy joined Eurocontrol on 1 April 1996. In 2002, the Community and its Member States signed a Protocol – which has not yet entered into force – on the accession of the European Community to Eurocontrol. The Community decided to approve that Protocol by Council Decision 2004/636/EC of 29 April 2004 on the conclusion by the European Community of the Protocol on the accession of the European Community to the European Organisation for the Safety of Air Navigation. (4) Since 2003, certain provisions of the Protocol have been implemented on a provisional basis, pending ratification by all the contracting parties.

B – Community law

4. Under Article 82 EC, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

5. In Council Directive 93/65/EEC of 19 July 1993 on the definition and use of compatible technical specifications for the procurement of air-traffic-management equipment and systems, (5) as amended by Commission Directive 97/15/EC of 25 March 1997 ('Directive 93/65'), (6) the Council of the European Union provided for the adoption of technical specifications in the field of ATM on the basis of corresponding technical specifications defined by Eurocontrol.

6. Articles 1 to 5 of Directive 93/65 are worded as follows:

'Article 1

This Directive shall apply to the definition and use of compatible technical specifications for the procurement of air-traffic-management equipment and systems, in particular:

– communications systems,
– surveillance systems,
– systems providing automated assistance to air-traffic control, and
– navigation systems.

Article 2

For the purposes of this Directive:

(a) technical specification shall mean the technical requirements included, in particular, in the tender documents defining the characteristics of a piece of work, a material, a product or a supply, and making it possible to describe a piece of work, a material, a product or a supply objectively in a manner such that it fulfils the use for which it is intended by the contracting entity. Such technical prescriptions may include quality, performance, safety and dimensions, as well as requirements applicable to the material, product or supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling;

(b) standard shall mean a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not in principle compulsory;

(c) Eurocontrol standard shall mean the mandatory elements of Eurocontrol specifications for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognised as essential for the implementation of an integrated air traffic services (ATS) system (the mandatory elements shall form part of a Eurocontrol standard document).

Article 3

1. The Commission shall, in accordance with the procedure laid down in Article 6, identify and adopt the Eurocontrol standards and subsequent Eurocontrol amendments to those Eurocontrol standards, in particular those relating to the areas listed in Annex I, that shall be made mandatory under Community law. The Commission shall publish the references of all technical specifications thus made mandatory in the Official Journal of the European Communities.

2. To ensure that Annex I, which lists Eurocontrol standards to be produced, is as complete as possible, the Commission, following the procedure laid down in Article 6 and in consultation with Eurocontrol, may, where appropriate, amend Annex I in accordance with amendments made by Eurocontrol.

…

Article 4

In order to complement, where necessary, the process of implementing Eurocontrol standards the Commission may give standardisation mandates to European standardisation bodies in accordance with Directive 83/189/EEC and in consultation with Eurocontrol.

Article 5

1. Without prejudice to Directives 77/62/EEC and 90/531/EEC the Member States shall take whatever steps are necessary to ensure that in the general documents or specifications relating to each contract the awarding civil entities defined in Annex II refer to the specifications adopted in accordance with this Directive when purchasing air-navigation equipment.

2. To ensure that Annex II is as complete as possible, the Member States shall notify the Commission of any changes made to their lists. The Commission shall amend Annex II in accordance with the procedure laid down in Article 6.'

III – Facts and procedure

A – Facts in the main proceedings

7. The appellant has been operating in the air traffic management sector since 1961. On 28 October 1997, it lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty, (7) in which it drew the Commission's attention to alleged infringements of the competition rules by Eurocontrol in carrying out its standardisation tasks in relation to ATM equipment and systems ('the complaint').

8. In that complaint, the appellant claimed that Eurocontrol had abused its dominant position. In particular, it alleged distortions of competition stemming from the management of intellectual property rights governing contracts concluded by Eurocontrol for the development and acquisition of prototypes and from

assistance provided by Eurocontrol, on request, to the national administrations.

9. By letter of 12 February 2004, the Commission rejected the complaint on the grounds that the activities which were the subject of the complaint were not of an economic nature, and, consequently, Eurocontrol could not be considered an undertaking within the meaning of Article 82 EC. It also stated that, even if those activities were considered to be the activities of an undertaking, they would not be contrary to Article 82 EC.

B – Procedure before the Court of First Instance and the judgment under appeal

10. By application lodged at the Registry of the Court of First Instance on 23 April 2004, the appellant brought an action against the Commission, claiming that that court should annul or amend the contested decision and order the Commission to pay the costs.

11. In its defence lodged on 23 July 2004, the Commission contended that the action should be dismissed and the appellant ordered to pay the costs.

12. By a document dated 1 September 2004, lodged at the Registry of the Court of First Instance on 2 September 2004, Eurocontrol sought leave to intervene in the proceedings in support of the Commission. By order of 25 October 2004, the President of the Second Chamber of the Court of First Instance granted Eurocontrol leave to intervene in the proceedings in accordance with Article 116(6) of the Rules of Procedure of the Court of First Instance.

13. By document lodged on 25 February 2005, the appellant requested that the Commission be invited, as a measure of organisation of procedure, to lodge with the Court of First Instance a letter of 3 November 1998, every other document produced by its staff, technical analyses, any correspondence between its staff and Eurocontrol and all documents provided by Eurocontrol during the administrative procedure. By letter of 11 March 2005, lodged on 18 March 2005, the Commission produced the letter of 3 November 1998. It stated that it did not have any other documents which were relevant for the purpose of the case-file.

14. By document lodged on 27 April 2005, the appellant made an application for witnesses to be heard and documents to be produced by the Commission by way of measures in inquiry.

15. By the judgment under appeal, the Court of First Instance dismissed the action and ordered the appellant to pay the costs.

C – Procedure before the Court of Justice and the forms of order sought by the parties

16. The appellant brought the present appeal by document dated 23 February 2007, lodged with the Registry of the Court of Justice on 27 February 2007, in which it claims that the Court should:

– set aside the judgment under appeal and refer the case back to the Court of First Instance for a ruling on the merits in the light of such guidance as the Court of Justice may provide;

– order the Commission to pay the costs of the appeal proceedings and the costs of the proceedings in Case T-155/04.

17. The Commission and Eurocontrol, in its capacity as intervener, lodged their responses on 29 May and on 1 June 2007 respectively. They contend that the Court should:

– dismiss the appeal as unfounded in its entirety and inadmissible in part, if necessary on the basis of a partial amendment of the grounds of the judgment of the Court of First Instance;

– order the appellant to pay the costs.

In its reply of 29 July 2007, the appellant clarified its claims, to the effect that the Court should:

– reject the plea of immunity raised by Eurocontrol as inadmissible;

– reject the Commission's request for amendment of the grounds of the judgment of the Court of First Instance;

– set aside the judgment under appeal and refer the case back to the Court of First Instance for a ruling on the merits in the light of such guidance as the Court of Justice may provide.

18. In their rejoinders of 12 and 9 October 2007 respectively, the Commission and Eurocontrol maintained their claims.

19. At the conclusion of the written procedure, a hearing took place on 8 May 2008 at which the parties presented oral argument.

IV – Examination of the appeal

A – Introductory remarks

1. Whether Eurocontrol can be regarded as an undertaking within the meaning of Article 82 EC

20. For the first time since the judgment in SAT Fluggesellschaft, (8) the Court of Justice is being called on to consider whether Eurocontrol is an 'undertaking' within the meaning of Article 82 EC. According to the settled case-law of the Court of Justice, (9) the concept of an undertaking in Community competition law encompasses any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

21. In that judgment, the Court first considered whether Eurocontrol's various fields of activity can be separated from its public powers, the most important of which relate to air traffic control, (10) and then went on to examine whether those activities were of an economic nature. (11) The Court found that Eurocontrol carries out, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety. (12) The Court thus concluded that, taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space, which are typically those of a public authority. The Court concluded from this that those activities are not of an economic nature justifying the application of the Treaty rules on competition. (13)

22. If, however, Eurocontrol were to be classified as an 'undertaking' within the meaning of Article 82 EC, logic dictates, as a preliminary point, that it must be perfectly possible for the rules of Community law to be invoked against it. Eurocontrol disputes such a classifi-

cation in its capacity as intervener in support of the Commission in the present case, expressly relying on its immunity under international public law on the basis of its status as an international organisation. In this connection, the question arises as to the extent to which the Community judicature is required to take into consideration, of its own motion, the immunity of a party for the purpose of examining the admissibility of proceedings.

2. Structure of the pleas in law

23. These questions form the thematic framework of the present case. The appellant bases its claims on a number of alleged procedural and substantive errors in law. In total, it raises 16 pleas in law against the judgment under appeal; the complaints based on substantive law can be divided into three categories, corresponding to Eurocontrol's different fields of activity: the assistance which Eurocontrol provides to the national administrations, its standardisation activities and, lastly, its activities in the field of research and development.

24. In the interests of clarity, these pleas in law will be considered in succession and in their respective thematic context.

B – The plea of immunity raised by Eurocontrol as intervener

25. However, it is necessary first of all to consider Eurocontrol's plea that the action before the Community courts is inadmissible on the basis of its immunity. Eurocontrol takes the view that the question of its immunity before the Community judicature should be examined by the courts of their own motion. Eurocontrol thus repeats the arguments it presented in the proceedings at first instance.

26. Its position is essentially based on the fact that it is an international organisation whose members are to some extent different from the States of the European Community and its legal order also differs from that of the European Community, with the result that, on the basis of the general principle par in parem non habet imperium (an equal has no authority over an equal), the Community does not have the power to make it subject to its own rules.

27. Furthermore, Eurocontrol highlights the fact that the Community has signed a protocol on accession to Eurocontrol with the result that, in accordance with the principle of good faith enshrined in Article 18 of the Vienna Convention on the Law of Treaties, it is obliged to refrain from any act which would defeat the object and purpose of the protocol on accession. This also follows from customary international law, which protects it comprehensively, at the very least in respect of all the activities at issue in the present case.

28. I believe that it must be borne in mind that Eurocontrol was originally an intervener in the proceedings at first instance and its current procedural status has not changed in the proceedings before the Court of Justice. Under the rule in Article 93(4) of the Rules of Procedure of the Court of Justice, in an appeal an intervener must accept the case as he finds it at the time of his intervention.

29. An intervener is accorded his own particular status as such in so far as, after being granted leave to intervene, he has the opportunity under Article 93(5) of the Rules of Procedure to submit a statement in intervention setting out the form of order sought, the arguments and pleas in law relied on and, where appropriate, any evidence. Nevertheless, his right to make submissions in the proceedings is limited in accordance with his role in so far as, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, his submissions must always be limited to supporting the form of order sought by one of the main parties. The intervener cannot therefore make submissions as part of his intervention which are different from or independent of the submissions made by one of the main parties or which alter the subject-matter of the dispute. Nor is the intervener permitted to alter the context of the dispute defined in the originating application by raising new pleas in law. (14) An intervener clearly does not have the right to raise a plea of inadmissibility which the defendant has not raised in his submissions. (15)

30. As the Court of First Instance rightly stated at paragraph 42 of the judgment under appeal, the plea of immunity raised by Eurocontrol alters the context of the dispute substantially. The purpose of such a position is not to support the form of order sought by the Commission, which was, in the proceedings at first instance, for the dismissal of the action for annulment of the contested decision and is in the proceedings before the Court of Justice, for the dismissal of the appeal. In fact, the opposite is the case. If Eurocontrol's submissions were considered to be essentially well founded, it would inevitably have to be concluded, as the appellant observes, that the Commission decision contested by the appellant was adopted in contravention of Eurocontrol's alleged immunity and is therefore unlawful.

31. The question of immunity has not been raised at any time by the Commission as a plea in defence. (16) This is common ground between the Commission and the appellant. It is apparent from the Commission's arguments that, when it adopted the contested decision, relying on SAT Fluggesellschaft, the Opinion of Advocate General Tesauro in that case and Höfner and Elser, (17) it acknowledged that, in principle, the Community rules on competition apply to international organisations, provided that they engage in an economic activity. (18) The fact that the Commission did not apply Article 82 EC to Eurocontrol was simply because that body does not engage in any economic activity and not on account of the immunity claimed by Eurocontrol.

32. Eurocontrol's argument that immunity is a matter which should be examined by the Community judicature of its own motion does not lead to any different conclusion. As Eurocontrol itself concedes, (19) there is nothing to support its position in the case-law of the Court. Furthermore, Eurocontrol's claims regarding the scope of its immunity have no connection with the present proceedings, which are solely concerned with whether the appeal is to be granted or dismissed. (20)

33. Since, in its capacity as intervener in support of the Commission, Eurocontrol has altered the subject-matter of the dispute by challenging the Court's jurisdiction to adjudicate on the case on the ground of its immunity and therefore does not support the form of order sought by Commission, this submission must be rejected as inadmissible.

C – Examination of the pleas in law

1. The pleas relating to procedure

34. The appellant criticises the Court of First Instance for the following alleged procedural defects:

– infringement of Article 116(6) of the Rules of Procedure of the Court of First Instance, in so far as Eurocontrol was authorised to receive a copy of the pleadings in the case and to lodge written pleadings;

– infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance, in so far as the facts on the basis of which the new pleas introduced by the appellant were ruled inadmissible were distorted;

– infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance by failing to take account of the Commission's conduct in relation to the facts on which the decision was based to reject the new pleas introduced by the appellant as inadmissible;

– infringement of Article 66(1) of the Rules of Procedure of the Court of First Instance, in so far as no order was made in relation to the request for measures of inquiry.

a) Infringement of Article 116(6) of the Rules of Procedure of the Court of First Instance, in so far as Eurocontrol was granted leave to intervene

The appellant alleges, first of all, an infringement of Article 116(6) of the Rules of Procedure of the Court of First Instance, in so far as Eurocontrol was authorised to receive a copy of the pleadings in the case and to lodge written pleadings even though its application to intervene was lodged after the expiry of the six-week period laid down in Article 115(1) of the Rules of Procedure. The appellant points out that the procedural rules are binding in nature and that the Court of First Instance cannot rely on Article 64 of its rules of procedure in order to circumvent the time-limits laid down in procedural law.

35. To this it must be answered that, having regard to the purpose of the measures of organisation of procedure as set out in Article 64(2) of the rules of procedure, the Court of First Instance must necessarily enjoy broad discretion in the exercise of the powers conferred on it by Article 64(2) of those rules. In order to be able to conclude that there has been an infringement of the procedural rules, the appellant would have to show that the Court of First Instance exercised its powers solely or, in any event primarily, for different purposes. (21) However, the appellant has not put forward any such argument.

36. Apart from that, it would have been incumbent on the appellant to show in what way any infringement of the Rules of Procedure of the Court of First Instance as a result of the fact that Eurocontrol was belatedly granted to intervene adversely affected its interests. Under Article 58 of the Statute of the Court of Justice, an appeal may lie only on the ground of an error in law which adversely affects the interests of the appellant. However, the appellant has failed to provide any such evidence. In particular, it is not apparent in what manner Eurocontrol's participation as an intervener could have had any effect whatsoever on the outcome of the proceedings, since the Court of First Instance did not accept its plea claiming immunity and rejected it as inadmissible.

37. This plea in law must therefore be rejected.

b) Infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance by distorting the facts on the basis of which the new pleas introduced by the appellant were rejected as inadmissible

38. The appellant also alleges infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance on the ground that that court rejected as inadmissible its new pleas, which are based on the letter of 3 November 1998 produced by the Commission in the course of the proceedings. The Court of First Instance is alleged to have distorted the content of a letter sent to the appellant by the Commission.

39. The appellant's argument clearly refers to a fact which has already been considered by the Court of First Instance in the proceedings before it. Having regard to the lengthy detailed submissions made by the appellant specifically concerning the correspondence which it exchanged with the Commission before and during the written procedure at first instance, I consider it necessary to point out that, under the second paragraph of Article 225(1) EC, appeals to the Court of Justice are limited to points of law. Article 58 of the Statute of the Court of Justice specifies that appeals may be based on grounds of lack of competence of the Court of First Instance, a breach of procedure or the infringement of Community law.

40. For the purpose of determining whether a plea of inadmissibility may be raised in an appeal, it must therefore be borne in mind that the purpose of appeal proceedings is to review the application of the law by the Court of First Instance and certainly not to repeat the proceedings at first instance. In addition, the assessment of the facts is in principle reserved to the Court of First Instance (22) and may be reviewed by the Court of Justice only where the material inaccuracy of the findings of fact is apparent from the documents on the case file. (23) If the evidence has been properly obtained and the general principles and provisions governing the burden of proof and the procedure for taking evidence have been observed, it is for the Court of First Instance alone to assess the evidence produced to it. (24)

41. Nevertheless, it is not clear what the error in law might be in the present case. As the Court of First Instance observed at paragraph 36 of the judgment under appeal, the letter from the director of Eurocontrol of 2 July 1999 did not contain any more information than the Commission's letter of 12 November 1998. For that reason, the appellant could not rely on the letter of 2 July 1999 as a matter of fact which came to light only

in the course of the procedure. The Court of First Instance was therefore entitled to find that that plea was out of time and rejected it as inadmissible.

42. Consequently, this plea in law must also be rejected.

c) Infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance, by failing to take account of the Commission's conduct in relation to the facts on which the decision was based to reject the new pleas introduced by the appellant as inadmissible

43. By this plea, the appellant submits that the Court of First Instance rejected the new pleas referred to above without taking account of the Commission's conduct during the administrative and judicial procedure. The appellant argues that the plea was introduced because of the Commission's refusal to produce the documents in question, in particular the letter of 3 November 1998. Those documents became available only at an advanced stage of the procedure, with the result that the appellant was able to familiarise itself with them and to raise a number of new pleas only at that stage.

44. However, in the proceedings at first instance it is clear that the appellant did not at any stage allege infringement of any obligation to produce the relevant documents. It must therefore be regarded as a new plea which must be rejected as inadmissible, since the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance expressly states that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

45. Since that procedural requirement was not satisfied in the present case, this plea must also be dismissed.

d) Infringement of Article 66(1) of the Rules of Procedure of the Court of First Instance, in so far as no order was made in relation to the request for measures of inquiry

46. The appellant also alleges infringement of Article 66(1) of the Rules of Procedure of the Court of First Instance which, in its view, stems from the fact that that court gave its decision to reject the request for measures of inquiry which it made in its application and in the document lodged on 27 April 2005 in the judgment rather than by way of an order. According to the appellant, where a request for measures of inquiry is rejected in the judgment concluding the proceedings, the effect of this is to deprive the parties of recourse to instruments available to them under procedural law, namely the possibility of reinforcing their claims on the basis of new and more convincing arguments.

47. As the Commission rightly observes, that argument is contradictory, in so far as, at paragraph 56 of its appeal, the appellant expressly recognises, by reference to the case-law of the Community judicature, the broad discretion enjoyed by the Court of First Instance in the application of Article 66(1) of its Rules of Procedure. It is clear from the Order of the Court in Entorn v Commission, (25) cited by the appellant itself, that it is unnecessary to give a decision by way of order or to hear the parties if the Court of First Instance considers that a request made by one of the parties for evidence to be taken serves no purpose.

48. This was the case in the proceedings at first instance, as can be seen from paragraphs 132 and 133 of the judgment under appeal. The Court of First Instance stated that the requests for measures of inquiry were to be rejected because the matter could be determined on the basis of the submissions and arguments presented during the written and oral procedure and in the light of the documents produced. In other words, the Court of First Instance did not consider the appellant's requests for measures of inquiry to be necessary.

49. Moreover, the appellant does not call into question the substantive accuracy of the decision, but only the form in which it was adopted. It is therefore unclear in what respect the appellant's own rights might have been adversely affected.

50. This plea in law must therefore also be rejected.

2. The pleas relating to the substance

a) The assistance given by Eurocontrol to the national administrations

51. The appellant alleges the following errors in law in relation to the applicability of Article 82 EC to the assistance given by Eurocontrol to the national administrations:

– distortion of the content of the contested decision;

– the contradictory nature of the reasons given for not annulling the contested decision in spite of the fact that the first plea in law in the appellant's application was upheld;

– the contradictory nature of the reasoning, in so far as the Court of First Instance substituted its own reasoning for that used by the Commission in the contested decision;

– failure to comply with established Community case-law concerning the limits of judicial review;

– manifest error of assessment as regards the infringement of Article 82 EC.

52. The Commission criticises the reasoning in the judgment under appeal and therefore requests that new grounds be substituted.

i) The Commission's request that new grounds be substituted

53. If the Commission's request that new grounds be substituted is justified, the possibility cannot be ruled out that this will affect the assessment of the other pleas in law. For reasons of practicality, before examining the pleas raised by the appellant, it is necessary to consider first the Commission's request.

– Scope of the Commission's request

54. It should first be noted that the request for substitution of grounds relates to the principal grounds of the judgment under appeal. The question therefore arises whether that request is to be regarded in procedural terms as a cross-appeal by the Commission. Under Article 117(2) of the Rules of Procedure, for a submission to be regarded as a cross-appeal it must seek to set aside, in whole or in part, the judgment un-

der appeal on a plea in law which was not raised in the appeal. Whether this is the case here is to be determined by reference to the wording, aim and context of the passage in question in the Commission's response to the appeal. (26)

55. It should be stressed that the term 'cross-appeal' is not used by the Commission anywhere in its pleadings. It is clear that, in its view, the purpose of its initiative is simply to draw attention to a matter that can be examined by the Court of its own motion. (27) Accordingly, it is to be assumed that the Commission's 'request' is not to be construed as a cross-appeal and that there is no need for the Court to give a separate decision on it.

56. Consequently, it is not necessary, in my view, to rule on the admissibility of such a 'request', as it is to be regarded simply as a suggestion made by the Commission to the Court to amend the grounds of the judgment in the manner advocated by it. (28)

– Examination of the Commission's suggestion

Positions of the parties

57. The Commission takes the view that the Court of First Instance erred in regarding Eurocontrol as an undertaking within the meaning of Article 82 EC on the basis of its activity of assisting the national administrations. It argues that that activity carried out by Eurocontrol cannot be severed from its tasks as a public authority. Nor, when careful consideration is given to the question, can that activity be regarded as an economic one. The Court of First Instance based its decision on a point of view which is incompatible with the judgment in SAT Fluggesellschaft v Eurocontrol, since it stated at paragraph 86 of the judgment under appeal that it was in no way an activity 'which is essential or even indispensable to ensuring the safety of air navigation'. Furthermore, the Court of First Instance failed to take account of the fact that that activity is directly connected with the powers typically exercised by a public authority and forms part of the fulfilment of Eurocontrol's objectives. In addition, the finding that the assistance constituted an offer of services on the market for advice, a market on which private undertakings specialising in this area could also very well offer their services, fails to recognise, on the one hand, the connection that exists between that activity and the public service tasks and, on the other, the particular nature of the advice offered by Eurocontrol.

58. Eurocontrol also criticises the Court of First Instance's assertions concerning the nature of the activity and reaches the same conclusion as the Commission. It claims that its assistance to the national administrations is entirely non-economic in nature, even though it is optional.

59. The appellant disputes the Commission's arguments, essentially submitting that the ruling of the Court of First Instance was consistent with the principle established in SAT Fluggesellschaft.

Legal assessment

60. As the appellant rightly states in its reply, in assessing whether Eurocontrol is an undertaking within the meaning of Article 82 EC, the Court of First Instance was guided by the judgment in SAT Fluggesellschaft in so far as it considered, first of all, whether the activity in question, namely assisting the national administrations, in particular in tendering procedures for the acquisition of prototypes of new ATM systems and sub-systems, is separable from Eurocontrol's tasks of air space management and maintaining the safety of air navigation.

61. That approach is to be found at paragraph 28 of the judgment in SAT Fluggesellschaft, where the Court of First Instance held that Eurocontrol's collection of route charges cannot be separated from the organisation's other activities. In addition, according to the case-law of the Community judicature, the Treaty provisions on competition are also applicable to the activities of an entity governed by public law which can be severed from those in which it engages as a public authority, with the result that the different activities of a public entity must be examined separately. (29) The approach taken by the Court of First Instance is not therefore legally objectionable.

62. Nevertheless, in my view, the correctness of the findings of the Court of First Instance at paragraphs 86 to 92 of the judgment under appeal is questionable, since the arguments which it puts forward militate, by and large, against regarding the assistance given by Eurocontrol as an economic activity. Eurocontrol rightly claims that the ground set out at paragraph 87 of the judgment under appeal contains the only argument which could in fact support that court's conclusion. That paragraph states, in relation to Eurocontrol's assistance to the national administrations in the form of advice, that this is a case of 'an offer of services on the market for advice, a market on which private undertakings specialised in this area could also very well offer their services'. It is unclear, however, what the basis is for that conclusion, since no evidence was adduced to support that view.

63. Furthermore, the Court of First Instance qualifies its own conclusion, when it acknowledges, at paragraph 89 of the judgment under appeal, that 'the services in question are not at the current time offered by private undertakings'. As Eurocontrol rightly states, in view of the very specific and highly technical nature of the advice which that organisation gives to the national administrations, it is simply not possible, solely on the basis of general knowledge, to assess whether private undertakings are also able to offer such services.

64. In addition, the Court of First Instance failed to take sufficient account of the fact that Eurocontrol is an international organisation which is financed by contributions from its Member States (30) and gives assistance in pursuit of a public service objective. First, it referred to the judgment in Höfner and Elser (31) and, taking the example of the employment procurement services of the German Federal Office for Employment, held that it does not necessarily follow from the fact that an organisation is financed by contributions that an activity is not economic in nature. Secondly, it drew a parallel with bodies managing

statutory social security schemes (32) in order to show that such a conclusion does not necessarily follow either from the fact that an activity is of a social character. Nevertheless, the Court of First Instance failed to assess those factors from a global perspective. (33) The analytical approach adopted by that court therefore corresponds to a process of exclusion, which means that it is not possible to state positively whether the contested activity is to be regarded as an economic activity.

65. It is not possible to concur with the Court of First Instance's statement at paragraph 86 of the judgment under appeal that the assistance provided to the national administrations has only an indirect relationship with the safety of air navigation. It justified that view on the ground that the assistance provided by Eurocontrol covers only technical specifications in the implementation of tendering procedures for ATM equipment and therefore only impacts on the safety of air navigation by means of those tendering procedures.

66. However, a counter-argument to this would be that, under Article 1(1)(h) of the Eurocontrol Convention, the contracting parties agree 'to encourage common procurement of air traffic systems and facilities'. Furthermore, Article 2(2)(a) of the Convention expressly states that 'at the request of one or more Contracting Parties and on the basis of a special agreement or agreements between the Organisation and the Contracting Parties concerned, the Organisation may assist such Contracting Parties in the planning, specification and setting up of air traffic systems and services'. As the Commission rightly argues, it follows that the assistance which Eurocontrol offers to the national administrations in connection with public procurement falls fully within the scope of that organisation's tasks and makes an important contribution to the attainment of the aims of the integration, harmonisation and convergence of national systems to maintain the safety of air navigation. (34)

67. It seems to me that, contrary to the view taken by the Court of First Instance, the fact that Eurocontrol offers its assistance solely at the request of the national administrations is not a decisive factor, since it is conceivable that some administrations are in a better position than others to prepare tenders which comply with Eurocontrol's technical specifications without being reliant on its assistance. In addition, the Court of First Instance overlooks the fact that the optional nature of such assistance cannot be a decisive factor, since, as the Court rightly stated in SAT Fluggesellschaft, (35) Eurocontrol also exercises powers which are typically those of a public authority, such as the operational control of air traffic, at the request of the Member States.

68. In the light of the foregoing, it is clear that the grounds set out at paragraphs 86 to 93 of the judgment under appeal reveal an infringement of Community law. The fact that the judgment under appeal is based on legally flawed reasoning is not, however, a ground for setting it aside, as the operative part is well founded on other legal grounds. (36) Even though it regarded the assistance provided by Eurocontrol as an economic activity and therefore classified Eurocontrol as an undertaking, the Court of First Instance ultimately rejected the first plea in law in the application. By way of explanation, it stated at paragraph 94 of the judgment under appeal that the finding that Eurocontrol is an undertaking could not lead to the annulment of the contested decision because that decision was also based on the Commission's finding that, even if Eurocontrol's activities are considered to be economic activities, they are not contrary to Article 82 EC.

69. I therefore recommend that the Court of Justice amend the grounds of the judgment accordingly.

ii) Distortion of the content of the contested decision

70. The appellant alleges distortion of the content of the contested decision at paragraphs 15 and 48 of the judgment under appeal. The Court of First Instance stated that the Commission based its decision on the double finding that Eurocontrol was not an undertaking and, in any event, the activities complained of were not contrary to Article 82 EC. In the view of the appellant, the Commission failed to investigate whether Eurocontrol's activities were contrary to Article 82 EC and merely ascertained whether the activities in question could be regarded as economic activities.

71. However, it is clear from paragraphs 28 and 29 of the contested decision that the Commission stated, first, that the activities of Eurocontrol in question were not of an economic nature and, secondly, that, 'in any event, even if those activities were considered to be the activities of an undertaking, they would not be contrary to Article 82 EC'. (37) It is thus apparent that the Commission had indeed defined its position on the question whether Eurocontrol's activities were contrary to Article 82 EC.

72. Consequently, the Court of First Instance did not distort the content of the contested decision. This plea in law must therefore be rejected.

iii) The contradictory nature of the reasons given for not annulling the contested decision despite the fact that the appellant's first plea in law was upheld

73. The appellant submits that the judgment under appeal is manifestly contradictory in the light of the distortion of the content of the contested decision, since that decision was not annulled even though the first plea in law was upheld.

74. As the appellant states in its appeal, that argument is 'the logical consequence of the distortion of the facts' by the Court of First Instance. (38) In other words, the plea in question is based on the notion that that court distorted the facts by making the assumption, at paragraphs 15 and 48 of the judgment under appeal, that the Commission concluded that none of Eurocontrol's activities, including the assistance provided to the national administrations, was contrary to Article 82 EC.

75. As we have already seen, (39) however, in the grounds of its judgment the Court of First Instance simply reproduces the content of the contested decision, with the result that there can be no question of any distortion.

76. Therefore, this plea in law must also be dismissed.

iv) The contradictory nature of the reasoning, in so far as the Court of First Instance substituted its own reasoning for that used by the Commission in the contested decision

77. In the view of the appellant, the grounds of the judgment are also contradictory in so far as the Court of First Instance, first, rejected as inadmissible its request for amendment of the contested decision on the ground that the Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them and, second, assumed the role of the Commission in examining the second plea in law in order to draw complex economic conclusions with regard to the possibility of abusive conduct by Eurocontrol, at paragraph 108 of the judgment under appeal, which are absent from the contested decision.

78. As the Commission rightly notes, however, the appellant fails in its arguments to refer to paragraph 104 of the judgment under appeal, from which it is apparent that the Court of First Instance based its legal assessment primarily on the Commission's statements in the contested decision ('[i]t should be pointed out, first of all, as the Commission correctly does'). The Commission reached the conclusion that the activities of Eurocontrol in connection with the assistance offered to the national administrations were not contrary to Article 82 EC.

79. At paragraphs 106 to 108, the Court of First Instance simply pointed out that, against the background of the facts set out at paragraph 104, which had led the Commission to conclude that there was no abuse of a dominant position, the appellant should have provided evidence to substantiate its claims regarding the existence of a dominant position and abuse of that position. The Court of First Instance has not therefore set out its own reasoning.

80. Accordingly, even though the findings set out at paragraphs 105 to 108 of the judgment under appeal are not replicated in the contested decision, that would not justify the setting aside of the judgment, as the Court of First Instance included those findings ad abundantiam ('[secondly], it should be recalled that') in relation to the considerations which are indisputably set out in the contested decision. Furthermore, in its final remark at paragraph 109 of the judgment, the Court of First Instance simply reproduces the conclusion of its assessment at paragraph 104 ('[T]he applicant has therefore failed to prove that the Commission committed a manifest error of assessment as regards the existence of a breach of Article 82 EC by Eurocontrol'). This shows that the considerations at paragraph 108 which are the subject of criticism do not form the principal grounds of the judgment. According to settled case-law, the Court can simply reject pleas directed against the grounds of a judgment of the Court of First Instance which are included purely for the sake of completeness, since they cannot lead to its being set aside. (40)

81. This plea in law must therefore be rejected.

v) Failure to comply with established Community case-law concerning the limits of judicial review

82. The appellant also alleges a failure to comply with Community case-law concerning the limits of judicial review. It refers essentially to Haladjian Frères v Commission, (41) in which the Court of First Instance found that 'the judicial review of Commission measures involving appraisal of complex economic matters, as is the case for allegations of infringements of Articles 81 EC and 82 EC, is limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers'.

83. It bases this ground of appeal on the argument that, at paragraph 109 of the judgment under appeal, the Court of First Instance did not simply examine whether the Commission had made an error of assessment but assumed the latter's role in order to conduct a complex appraisal of Eurocontrol's activities.

84. It should be noted that, with this plea, the appellant merely repeats the criticisms which it made with regard to the statements made by the Court of First Instance at paragraph 108 of the judgment under appeal and does not put forward any new arguments. Aside from the fact that it is not clear in what way the Court of First Instance is supposed to have exceeded the limits of its powers of review, since it merely stated that the appellant should have provided evidence to substantiate its claim regarding the existence of a dominant position and abuse of that position in order to contradict the Commission's assessment, (42) it should be reiterated that that the appellant's complaint is not directed at the principal grounds of that judgment.

85. Consequently, this plea must also be rejected.

vi) Error of assessment as regards the infringement of Article 82 EC

86. By this plea, the appellant alleges that the Court of First Instance made an error of assessment when it confirmed the lawfulness of the contested decision and ruled out the possibility that the activities of Eurocontrol to which the appellant objects might be abusive.

87. The appellant essentially claims that Eurocontrol's inability to influence the decisions of national administrations and the optional nature of the assistance – criteria on which the Court of First Instance based its decision at paragraph 104 of the judgment under appeal – are not relevant for the purpose of determining whether Eurocontrol engaged in abusive conduct. First of all, Article 82 EC does not require any systematic abusive conduct and, secondly, the lack of decision-making power is offset by the influence which that organisation exerts in practice through the services it provides.

88. In view of the lengthy explanations given by the appellant, it should be reiterated that the purpose of the appeal proceedings is to review the application of the law by the Court of First Instance and not to repeat the proceedings at first instance at second instance. The statements made by the appellant cannot therefore be

the subject of a re-assessment and may be reviewed by the Court of Justice only in so far as the review relates to their legal classification and the legal inferences which the Court of First Instance drew from them. (43)

89. Accordingly, it should be noted that the appellant relies partially on inadmissible submissions, since its statements amount to a re-statement of the facts of the case and are not simply directed at obtaining a judicial review of the grounds on which the Court of First Instance relied, and it does not fall within the jurisdiction of the Court of Justice as the appellate body to review the facts. This applies to the finding made by the Court of First Instance at paragraph 104 of the judgment under appeal that the appellant had failed to prove that in a specific case Eurocontrol had in fact influenced the decision to award a contract to a tenderer, and that Eurocontrol had done so on the basis of considerations other than those seeking the best technical solution at the best price.

90. As the Commission rightly notes, it is impossible to see how there might be an error of assessment in that appraisal. The appellant has not been able to put forward any arguments in support of its view. Rather, the Commission is to be endorsed in its view that simply dispensing advice can hardly be regarded as abusive exploitation of a dominant position as it is ultimately for the national administration to decide whether to act on the advice. As the Court of First Instance rightly stated at paragraph 104 of the judgment under appeal, Eurocontrol's contribution as an adviser is neither mandatory nor even systematic. On the contrary, it contributes only when expressly requested to do so by the relevant administrations under Article 2(2)(a) of the Convention. Any abusive conduct is ultimately to be attributed to the national administration concerned and not to Eurocontrol.

91. Contrary to the view taken by the appellant, (44) there is no obvious contradiction between the considerations set out at paragraph 104 and the following statement made by the Court of First Instance at paragraph 108 of the judgment under appeal:

'In particular, it is not apparent that Eurocontrol could have derived any competitive advantage from the fact of being able to influence, by dint of its advisory services offered to the national administrations, the administrations' choice as to their suppliers of ATM equipment in favour of certain undertakings.'

92. The statement at paragraph 108 of the judgment under appeal to the effect that Eurocontrol is able to influence the national authorities' decisions in selecting tenderers is not inconsistent with the finding at paragraph 104 that the applicant failed to prove that in a specific case Eurocontrol had in fact influenced the decision to award a contract to a tenderer. That argument must therefore be rejected.

93. Lastly, the appellant alleges distortion of the evidence in connection with the Commission's letter of 3 November 1998. In this regard, it refers to the considerations of the Court of First Instance set out at paragraphs 110 to 112 of the judgment under appeal.

94. It should be pointed out, first of all, that the Court of First Instance was not required to assess the appellant's arguments based on that letter because they were put forward in connection with new pleas in law which were rejected as inadmissible by that court. (45)

95. Furthermore, the Court of First Instance made an adequate assessment of the arguments put forward by the appellant. At paragraph 112 of the judgment under appeal, it correctly stated that the fact that the Commission made a number of critical observations in its letter regarding certain activities of Eurocontrol certainly did not show that the Commission was itself persuaded of the unlawfulness of Eurocontrol's behaviour in respect of the competition rules. In those circumstances, there can therefore be no question of distortion of evidence.

96. This plea must therefore be rejected.

b) Eurocontrol's standardisation activities

97. As regards the errors in law relating to the applicability of Article 82 EC to Eurocontrol's standardisation activities, the appellant alleges:

– distortion of the content of the contested decision;

– the adoption of a concept of economic activity that is incompatible with that established in Community case-law;

– misinterpretation and misapplication of the Community case-law concerning social benefits;

– breach of the obligation to provide a statement of reasons.

98. The Commission criticises the reasoning in the judgment under appeal and therefore requests an amendment of the grounds of that judgment.

i) The Commission's request for an amendment of the grounds of the judgment under appeal

99. In accordance with what has already been stated, (46) this 'request' on the part of the Commission is also to be construed as a simple invitation to the Court to amend the grounds of the judgment in the manner advocated by it.

– Arguments of the parties

100. The Commission requests that the Court substitute new grounds regarding the distinction made by the Court of First Instance at paragraphs 59 and 60 of the judgment under appeal between the preparation or production of standards and technical specifications, a task which is undertaken by the executive organ of Eurocontrol, and their adoption by the Council of Eurocontrol. The Commission considers this to be an artificial distinction. As with the assistance provided to the national administrations, the Court of First Instance applied incorrect criteria, which are inconsistent with the judgment in SAT Fluggesellschaft, in order to conclude that the activity in question can be separated from Eurocontrol's other public service tasks. The Commission also claims that the Court of First Instance incorrectly assessed the nature of that activity.

101. Eurocontrol also criticises the distinction made by the Court of First Instance in the judgment under appeal.

102. The appellant, on the other hand, takes the view that the Court of First Instance adhered to the principles set out in SAT Fluggesellschaft in this regard.

– **Legal assessment**

103. At paragraphs 59 and 60 of the judgment under appeal, the Court of First Instance justified that distinction on the ground that the adoption of standards by the Council of Eurocontrol is clearly a legislative activity. The Council of Eurocontrol is made up of directors of the civil aviation administration of each Member State of the organisation, appointed by their respective States for the purpose of adopting technical specifications which will be binding in all those States, an activity which directly concerns the exercise by those States of their powers of public authority. Eurocontrol's role is thus akin to that of a minister who, at national level, prepares legislative or regulatory measures which are then adopted by the government. In the view of the Court of First Instance, this activity therefore falls within the public tasks of Eurocontrol.

104. However, this does not apply to the preparation or production of technical standards by Eurocontrol. The arguments advanced by the Commission to demonstrate that Eurocontrol's standardisation activities are connected with that organisation's public service mission (47) refer only to the adoption of those standards and not to the production of them. Indeed, the need to adopt standards at an international level does not necessarily mean that the body which draws up those standards must also be the same as that which subsequently adopts them. The Court of First Instance concludes from this that that activity is separable from Eurocontrol's tasks of air space management and development of air safety.

105. In my opinion, this line of argument reveals a classification of the facts which must be regarded as legally incorrect.

106. It is apparent from Article 2(1)(f) of the Eurocontrol Convention that Eurocontrol is required, inter alia, 'to develop, adopt and keep under review common standards, specifications and practices for air traffic management systems and services'. Clearly, contrary to the view taken by the Court of First Instance, the Convention does not distinguish between the preparation or production of standards and their adoption. There is therefore no basis in the wording of that provision for the distinction made by the Court of First Instance.

107. Nor is the interpretation adopted by the Court of First Instance compatible with the purpose of that provision, since the preparation and production of standards and technical specifications are important means by which Eurocontrol can attain the objective laid down in Article 1(1) of the Convention, namely 'to achieve harmonisation and integration with the aim of establishing a uniform European air traffic management system'. (48)

108. It is also unclear on what factual basis the Court of First Instance concluded that the task of preparing and producing standards and technical specifications entrusted to Eurocontrol by the Member States could also be carried out by another entity or undertaking. That court should have made investigations to ascertain whether that is in fact the case. Instead, it simply stated, at paragraph 60 of the judgment under appeal, that the Commission 'has not established in the present case that those two activities must necessarily be carried out by one and the same entity rather than by two different entities'.

109. Furthermore, the Court of First Instance qualified its own conclusions, when, at paragraph 61 of the judgment under appeal, it ruled out any possibility that that activity may be of an economic nature on the ground that it had not been shown that there was 'a market for "technical standardisation services in the sector of ATM equipment"'. It acknowledged that the reason why there is no market for technical standardisation services in this sector is because the only customers for such services are the States in their capacity as air traffic control authorities. However, they chose to draw up those standards themselves, in the context of international cooperation, through Eurocontrol. In the field of standardisation, Eurocontrol is therefore simply a forum for concerted action which those States established in order to coordinate the technical standards of their ATM systems.

110. In my view, the partially contradictory statements made by the Court of First Instance clearly show that, at least as far as the present case is concerned, the preparation and production of standards and technical specifications are to be regarded as the fulfilment a public service mission (49) and cannot be separated from Eurocontrol's regulatory activities since they entail the exercise of public powers. (50) The standards produced by the Eurocontrol Agency are adopted by the Council of Eurocontrol and are binding on the Member States. As a sui generis subject of international public law, Eurocontrol therefore exercises those powers on a mandate from its Member States on the basis of the powers accorded to it. (51) Where an activity entailing the exercise of public powers is delegated by its Member States to an international organisation, that activity is carried out in an international public law context. The comparison with private standardisation organisations is therefore inappropriate. If the Member States had intended to allow participation by private standardisation organisations in the preparation of standards and technical specifications in the field of air navigation safety, they would have had to lay down a derogation for that purpose in the Eurocontrol Convention.

111. As the Court of First Instance therefore rightly states in its conclusion, Eurocontrol's standardisation activity cannot be regarded as an economic activity.

112. I therefore recommend that the Court amend the grounds of the judgment under appeal accordingly.

ii) Distortion of the content of the contested decision

113. By this plea in law, the appellant (52) again alleges distortion of the content of the contested decision at paragraphs 15 and 48 of the judgment under appeal. It submits that the Commission failed to examine whether there was abuse of a dominant position. The

Court of First Instance did so in the Commission's place and thus distorted the Commission's decision.
114. As has already been stated above, (53) the Commission certainly ruled out the existence of an abuse of a dominant position. This plea in law must therefore be rejected.

iii) The definition of economic activity adopted is incompatible with that established in the Community case-law

115. In the view of the appellant, the conclusion of the Court of First Instance that it had not shown that there was a market for technical standardisation services is irrelevant for the purpose of determining whether the activity in question is an economic activity, or, at the very least, imprecise. Contrary to the findings of the Court of First Instance, Eurocontrol does provide a service of its own, consisting in the production of technical standards. The fact that the activity in question does not consist in offering goods or services on a given market is, in any event, immaterial in the light of case-law and the practice of the Commission. The important factor is whether the activity may be regarded as an economic activity.
116. As we have already seen, (54) the concept of an undertaking within the meaning of Article 82 EC is a concept which has its own independent meaning in Community-law. It covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. An economic activity is any activity which is directed at the exchange of services and goods on the market. (55)
117. As the Commission rightly states, an economic activity necessarily implies the existence of a 'market' in the sense of a supply and demand in relation to certain goods or services. (56) The Court of First Instance made reference to this at paragraphs 61 and 62 of the judgment under appeal, and not to the 'relevant market' in question, as the appellant obviously understands it.
118. The Court of First Instance rightly stated that it had not been shown that there is a market for technical standardisation services in the ATM equipment sector. It considered whether there was supply and demand in that sector and, in the absence of conclusive specific evidence, found that not to be the case. Consequently, the Court of First Instance was able to take the view that Eurocontrol's standardisation activity was not economic in nature.
119. Consequently, this plea in law must also be rejected.

iv) Misinterpretation and misapplication of the Community case-law concerning social benefits

120. The appellant alleges that the Court of First Instance wrongly rejected its arguments concerning the applicability of the principles established in FENIN v Commission to the present case.
121. It should be noted, first of all, as the Commission rightly observes, (57) that this plea is directed essentially at the statements made by the Court of First Instance concerning the non-economic nature of Eurocontrol's acquisition of prototypes and not at that organisation's standardisation activity, which is at issue here. To that extent, the appellant's arguments are misplaced.
122. Furthermore, the plea is inadmissible. The appellant uses statements made by the Court of First Instance in FENIN v Commission, which were made in a different context, as an opportunity to raise complaints which it did not raise in the proceedings at first instance. At first instance, the appellant did not in fact claim that consideration had not been given to whether the service was provided in accordance with the principle of solidarity.
123. Should the Court of Justice nevertheless reach the conclusion that the plea is admissible, regard should be had to the following considerations as regards the substance.
124. It is clear from the appeal that the appellant evidently understands this case-law as meaning that the principles underlying it can be applied only to cases in which an organisation carries out tasks which are exclusively social in nature. (58)
125. For the purpose of clarification, it should be pointed out, first of all, that the statements made by the Court of First Instance at paragraphs 65 to 69 of the judgment under appeal, to which the appellant refers, related to the question whether or not Eurocontrol's standardisation activity was to be regarded as an economic activity.
126. As the Court of First Instance stated at paragraph 61, with reference to the abovementioned Community case-law, (59) any activity consisting in offering goods or services on a given market is an economic activity. It also rightly pointed out that the concept of economic activity under Community law is connected with the offer and not the acquisition of such goods and services. Accordingly, it also referred to FENIN v Commission (60) and expressly stated that the mere fact that an organisation purchases goods – even in great quantity – in order to use them in the context of a different activity of a purely social nature is not sufficient in itself for it to be possible to describe the organisation as an undertaking. It is not possible as a result of the simple fact that that organisation operates on the market as a purchaser to classify that activity as an economic one because the essential criterion of the offer of goods and services is not fulfilled.
127. The appellant does not contest the correctness of that case-law. However, its understanding of the judgment in FENIN v Commission is based on an excessively narrow, and thus incorrect, interpretation. As has already been shown, in that judgment the Court of First Instance's primary intention was to point out that only an activity which is geared towards the offer of goods and services may be regarded as an economic activity. (61)
128. Therefore, the Court of First Instance rightly rejected the appellant's submissions.
129. This plea in law must therefore also be rejected.

v) Breach of the obligation to provide a statement of reasons

130. I do not consider the plea alleging breach of the obligation to provide a statement of reasons to be suffi-

ciently substantiated, since, at paragraph 59 et seq. of the judgment under appeal, and at paragraph 61 in particular, the Court of First Instance sets out the reasons for its conclusion that the activity of producing standards cannot, in its view, be deemed to be an economic activity.

131. This plea must therefore be rejected.

c) Eurocontrol's research and development activities

132. In support of its claim that the Court of First Instance erred in law as regards the applicability of Article 82 EC to Eurocontrol's research and development activities (in particular, the acquisition of prototypes and the management of intellectual property rights), the appellant alleges the following:

– distortion of the contested decision;

– the adoption of a definition of economic activity that is incompatible with that established by the case-law;

– distortion of the evidence adduced by the appellant concerning the economic nature of Eurocontrol's management of the regime of intellectual property rights.

i) Distortion of the contested decision

133. The appellant alleges that the Court of First Instance distorted the facts of the case when it attributed to the Commission's decision a meaning that is not borne out by the facts.

134. The allegation relates specifically to the finding that the acquisition of prototypes and management of intellectual property rights is not an economic activity. The appellant claims that, in the contested decision, the Commission did not dispute the economic nature of that activity but simply disputed the existence of an abuse of a dominant position.

135. However, as the Court of First Instance pointed out at paragraph 74 of the judgment under appeal, a simple reading of the contested decision is sufficient to establish that there is no basis for that claim. At paragraph 28 of its decision, the Commission stated without any ambiguity that, in its view, the contested activities are not of an economic nature, a statement which it also confirmed at paragraphs 29 and 30 of that decision.

136. This plea must therefore be rejected.

ii) The adoption of a definition of economic activity that is incompatible with that established in Community case-law

137. By this plea, the appellant objects to the conclusions made by the Court of First Instance regarding the non-economic nature of Eurocontrol's activity in the field of the acquisition of prototypes and the management of intellectual property rights.

138. It calls into question the assertion made by the Court of First Instance at paragraph 76 of the judgment under appeal that it is irrelevant that the development of prototypes is not carried out by Eurocontrol itself but by undertakings in the relevant sector, since the activity at issue in the present case is the acquisition of prototypes.

139. The appellant's argument is clearly based on a misunderstanding of the judgment under appeal. The Court of First Instance did not find that the acquisition of prototypes is not an economic activity on the ground that prototypes are developed by third parties but, as is clear from paragraph 75 of the judgment, primarily because the acquisition of prototypes does not involve the offer of goods or services on a given market. An essential criterion for the classification of an activity as an economic activity is therefore lacking.

140. As Eurocontrol convincingly argues in this respect, it neither uses prototypes as an input in the production of another commercial product nor places the developed prototypes on the market. Rather, its work in connection with the acquisition of prototypes is aimed at the creation of a uniform European system of air traffic management. (62) In my opinion, this confirms the finding of the Court of First Instance that Eurocontrol's activity in this sphere cannot be regarded as economic.

141. Furthermore, the appellant submits that the Court of First Instance attaches importance to the fact that the organisation is non-profit-making, even though, according to Community case-law, that is not a decisive factor. It considers the fact that Eurocontrol is non-profit-making and grants licences in connection with development at no cost to be irrelevant, since the fact that the organisation does not seek to make a profit is, in any event, immaterial.

142. However, to that submission it must be objected that the case-law of the Community judicature does attach importance not only to the fact that an organisation is non-profit-making (63) but also to the fact that an undertaking may seek to make a profit, for the purpose of determining whether an activity is economic in nature. Even though it is not a decisive factor in itself that an organisation is non-profit-making, it is at least an indicator which may be confirmed by other evidence. (64) The appellant's arguments in this regard must therefore be rejected.

143. Moreover, the appellant considers the following assertions made by the Court of First Instance at paragraph 77 of the judgment under appeal to be legally incorrect:

'However, in the present case, the fact that the licences for the property rights acquired by Eurocontrol in the context of the development of the prototypes are granted at no cost adds to the fact that this activity is ancillary to the promotion of technical development, forming part of the aims of Eurocontrol's public service tasks and not being pursued in its own interest, separable from those aims, which excludes the possibility that the activity in question is economic in nature'.

144. In support of its complaint, the appellant submits that that finding is based on the assumption that no activity pursued in the field of technical development can be economic in nature. However, this runs counter to the case-law of the Community judicature, which has recently recognised that the task of technical development can be economic in nature.

145. The appellant is correct in its view that, according to the case-law of the Community judicature, (65) the development of new technologies can, under certain

conditions, also constitute an economic activity. Nevertheless, first of all, it overlooks, as the Commission rightly observes, the fact that the Court of First Instance did not refer to an 'activity of technical development', but to an activity 'ancillary to the promotion of technical development'. Secondly, it must be noted that this does not apply in general but, at best, may be one indicator among many, with the result that it must always be ascertained in each specific case whether the promotion of technical development by an organisation, having regard to other aspects such as the fact that the organisation is non-profit-making and that the activity may be ancillary, can reasonably lead to the conclusion that the activity is economic in nature. The Court of First Instance did this in such a way that no legal objection can be raised against it.

146. This plea must therefore be rejected.

iii) Distortion of the evidence adduced by the appellant concerning the economic nature of Eurocontrol's management of the regime of intellectual property rights

147. By this plea in law, the appellant alleges distortion of the evidence produced by it at the hearing before the Court of First Instance regarding payments received by Eurocontrol. The appellant claims that it wished to draw attention not to remuneration, but to the diversity of Eurocontrol's activities and the contradiction which exists between Eurocontrol's management of the regime of intellectual property rights, on the one hand, and the content of the internal Eurocontrol document entitled 'ARTAS Intellectual Property Rights and Industrial Policy', on the other.

148. The Commission disputes that this document was contained in the application or in the defence. It takes the view that, even though the appellant relied on that document at the hearing before the Court of First Instance, its argument is in any case out of time and thus inadmissible.

149. With regard to this plea, it must be stated that the appellant's argument is evidently intended to call into question retrospectively the findings of fact made by the Court of First Instance at paragraph 79 of the judgment under appeal and the appellant has not shown to any adequate degree the precise manner in which the evidence has been distorted. Clearly, the Court of First Instance made an adequate evaluation of the evidence available to it. It examined Eurocontrol's management of the regime of intellectual property rights under the ARTAS system and rightly found that the licence fee for use of that system was one ECU, which is equivalent to no charge at all.

150. This plea must therefore also be rejected.

V – Result of my analysis

151. In the light of all the above considerations, the appeal is unfounded. It must therefore be dismissed in its entirety.

152. I suggest that the grounds of the judgment under appeal be amended in the light of the foregoing considerations. (66)

VI – Costs

153. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful in its appeal, it must be ordered to pay the costs in accordance with the form of order sought by the Commission.

154. Under the third paragraph of Article 69(4) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the Court may order an intervener other than those mentioned in the first and second subparagraphs of that provision to bear his own costs. Eurocontrol must therefore be ordered to bear the costs which it has incurred as intervener.

VII – Conclusion

155. In the light of the foregoing considerations, I propose that the Court of Justice:

– dismiss the appeal in its entirety;
– order the intervener to bear its own costs; and
– order the appellant to pay the remainder of the costs.

1– Original language: German.

2 – Case T-155/04 SELEX Sistemi Integrati v Commission [2006] ECR II-4797 ('the judgment under appeal').

3 – Originally Belgium, France, Germany, Luxembourg, the Netherlands and the United Kingdom. The following are currently members of Eurocontrol (listed in alphabetical order based on their names in English): Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom.

4 – OJ 2004 L 304, p. 209.

5 – OJ 1993 L 187, p. 52.

6 – OJ 1997 L 95, p. 16.

7 – OJ, English Special Edition 1959-1962, p. 87.

8 – Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43.

9 – Case C-280/06 ETI and Others [2007] ECR I-0000, paragraph 38; Case C-205/03 P FENIN v Commission [2006] ECR I-6295, paragraph 25; Case C-237/04 Enirisorse [2006] ECR I-2843, paragraph 28; Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraph 107; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I-5425, paragraph 112; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK-Bundesverband and Others [2004] ECR I-2493, paragraph 46; Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 74; and Case

C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21.

10 – Under Article 1 of the 1944 Chicago Convention (UN Treaty Series Vol. 15, No 105), the contracting States recognise that 'every State has complete and exclusive sovereignty over the airspace above its territory'. That Convention is based on the principle that the safety of air navigation is the responsibility of each individual Member State (Majid, A., Legal status of international institutions: SITA, INMARSAT and Eurocontrol examined, Aldershot 1996, p. 91). However, this does not prevent the States transferring that competence to an international organisation. Eurocontrol was established to monitor air space in Europe. However, that objective was not in fact realised. In reality, until the conclusion of the amending protocol of 12 February 1981, Eurocontrol simply monitored the safety of air space navigation from its centres in Karlsruhe and Maastricht. Under the amended convention, Eurocontrol's tasks were extended to many other areas, but only the regional centre in Maastricht now monitors traffic in the air space of northern Germany, Belgium, the Netherlands and Luxembourg (Seidl-Hohenveldern, I., 'Eurocontrol und EWG-Wettbewerbsrecht', Völkerrecht zwischen normativem Anspruch und politischer Realität, Berlin 1994, p. 252).

11 – Idot, L., 'Retour sur la notion d'entreprise', Europe, February 2007, No 68, p. 25, describes the individual study of a range of activities as the application of the 'principle of separability' ('principe de dissociation').

12 – SAT Fluggesellschaft (cited in footnote 8, paragraph 27).

13 – Ibid., paragraph 30.

14 – See Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority [1961] English Special Edition, p. 1, 37; Case C-313/90 CIRFS and Others v Commission [1993] ECR I-1125, paragraph 22; Case C-245/92 P Chemie Linz v Commission [1999] ECR I-4643, paragraph 32; Case T-459/93 Siemens v Commission [1995] ECR II-1675, paragraph 21; Joined Cases T-371/94 and T-394/94 British Airways and Others v Commission [1998] ECR II-2405, paragraph 75; Joined Cases T-125/96 and T-152/96 Boehringer v Council andCommission [1999] ECR II-3427, paragraph 183; Case T-395/94 Atlantic Container Line and Others v Commission [2002] ECR II-875, paragraph 382; and Case T-114/02 BaByliss v Commission [2003] ECR II-1279, paragraph 417. Rengeling, H.-W./Middeke, A./Gellermann, M., Handbuch des Rechtsschutzes in der Europäischen Union, Munich 2003, § 22, paragraph 40, p. 405.

15 – Case C-13/00 Commission v Ireland [2002] ECR I-2943, paragraphs 3 to 6; CIRFS and Others v Commission, paragraphs 21 and 22; and Case C-225/91 Matra v Commission [1993] ECR I-3203, paragraphs 11 and 12.

16 – See SAT Fluggesellschaft, paragraph 41.

17 – The Commission refers to Höfner and Elser, paragraph 24. In that judgment the Court held that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest, such as those envisaged in Article 3 of the German Law on the promotion of employment (Arbeitsförderungsgesetz) is subject to the competition rules pursuant to Article 90(2) of the Treaty unless and to the extent to which the application of that provision is incompatible with the discharge of the particular duties entrusted to it.

18 – See paragraph 3 of the Commission's rejoinder.

19 – See paragraph 56 of Eurocontrol's response.

20 – This finding is also consistent with the Court's conclusions in SAT Fluggesellschaft (paragraphs 10 and 11), in which the Court raised the objection to the plea alleging lack of jurisdiction (as a result of immunity) relied on by Eurocontrol that the question referred under Article 234 EC concerned the interpretation of the Community competition rules and not the interpretation of the Convention establishing Eurocontrol. Consequently, the question whether the rules of Community law may be relied upon against Eurocontrol is connected with the substance of the case and has no bearing on the jurisdiction of the Court. The immunity of international organisations is explained first and foremost in terms of its function: immunity serves to ensure that they have the independence which they require to fulfil their tasks and to achieve their aims (see Wenckstern, M., Handbuch des Internationalen Zivilverfahrensrechts, Die Immunität internationaler Organisationen, Vol. II/1, Tübingen 1994, paragraph 44, p. 13). However, the present proceedings are not directed against Eurocontrol itself. In this case, the Court is called upon solely to decide whether to grant or dismiss an appeal against a judgment of the Court of First Instance, which, as with the abovementioned case, concerns solely the interpretation of Community competition rules. Eurocontrol as an international organisation is not therefore affected in the performance of its tasks.

21 – The Court of Justice has held that a misuse of powers exists when an institution exercises its powers with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. See Case C-407/04 P Dalmine v Commission [2007] ECR I-829, paragraph 99; Case C-342/03 Spain v Council [2005] ECR I-1975, paragraph 64; and Case C-48/96 P Windpark Groothusen v Commission [1998] ECR I-2873, paragraph 52.

22 – Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 48, and Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 33. Lenaerts, K./Arts, D./Maselis, I., Procedural Law of the European Union, 2nd edition, London 2006, p. 453, paragraph 16-003, states that the Court of Justice has no jurisdiction to establish the facts. Because an appeal is limited to points of law, the Court of Justice has sole jurisdiction in this regard. It follows that an appellant may neither challenge the findings of fact made by the

Court of First Instance nor rely on facts which were not established by that court.

23 – Aalborg Portland and Others v Commission, paragraph 48. See also my Opinion in Case C-204/07 P CAS v Commission [2008], currently pending before the Court of Justice, point 84.

24 – See the Opinion of Advocate General Ruiz-Jarabo Colomer in Aalborg Portland and Others v Commission, point 38; Joined Cases C-280/99 P to C-282/99 P Moccia Irme and Others v Commission [2001] ECR I-4717, paragraph 78; and Case C-185/95 P Baustahlgewerbe v Commission [1998] ECR I-8417, paragraph 24.

25 – Order of the Court of Justice of 12 January 2006 in Case C-162/05 P Entorn v Commission, paragraphs 54 and 55.

26 – See, to that effect, the Opinion of Advocate General Kokott in Case C-413/06 P Bertelsmann and Sony Corporation of America v Impala [2007], currently pending before the Court, point 283.

27 – See the Opinion of Advocate General Mengozzi in Case C-71/07 P Campoli v Commission, currently pending before the Court, point 41.

28 – See the Opinion of Advocate General Kokott in Bertelsmann and Sony Corporation of America v Impala, point 286, in which the Advocate General considered the Commission's 'additional observations' relating to the amendment of the grounds of the judgment not to be a cross-appeal, but supplementary points which were intended only to achieve a better understanding of the Commission's substantive arguments in response to the appeal.

29 – See, to that effect, Case 107/84 Commission v Germany [1985] ECR 2655, paragraphs 14 and 15, and Case T-128/98 Aéroports de Paris v Commission [2000] ECR II-3929, paragraph 108.

30 – Eurocontrol is financed mainly by contributions from Member States. The contributions are based on a budget worked out by the Agency's Committee of Management and approved by the Eurocontrol Commission, which sets a contribution scale for the individual Member States. It is determined by the gross national product of the individual Member States, as defined in the relevant OECD statistics. The annual draft budget is drawn up by the Committee of Management and approved by the Eurocontrol Commission (see Schwenk, W./Giemulla, E., Handbuch des Luftverkehrsrechts, 3rd edition, Cologne/Berlin/Munich 2005, p. 96).

31 – Höfner and Elser, paragraph 22.

32 – Case C-244/94 Fédération française des sociétés d'assurances and Others [1995] ECR I-4013, paragraph 22, and Case C-67/96 Albany [1999] ECR I-5751, paragraphs 84 to 87.

33 – According to Mestmäcker/Schweitzer, Wettbewerbsrecht (edited by Ulrich Immeng and Ernst-Joachim Mestmäcker), 4th edition, Munich 2007, Article 86, paragraph 18, the examination of whether an activity is that of a public authority must be based on an overall assessment. Accordingly, in the judgment in SAT Fluggesellschaft (cited in footnote 8, paragraph 30) the Court considered the nature, the aim and the rules to which the activity in question are subject.

34 – Prompl, W., Luftverkehr – Eine ökonomische und politische Einführung, 5th edition, Berlin/Heidelberg 2007, p. 23, illustrates in a persuasive manner the extent of the need to harmonise air safety systems in Europe. Thus, the 'European Air Traffic Control Harmonisation and Integration Programme' (EATCHIP) seeks to harmonise and make compatible the very large number of different air safety systems (49 air safety agencies use 31 different computer systems with 22 different operating systems and 30 programming languages).

35 – Case C-364/92 SAT Fluggesellschaft (cited in footnote 8, paragraph 24).

36 – In Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 120, and Case C-30/91 P Lestelle v Commission [1992] ECR I-3755, paragraph 28, the Court held that if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed.

37 – See paragraph 51 of the Commission's response.

38 – See paragraph 73 of the appeal.

39 – See point 71 of this Opinion.

40 – From the now extensive case-law in this field, reference can be made to the judgments in Case C-35/92 P Parliament v Frederiksen [1993] ECR I-991, paragraph 31; Case C-362/95 P Blackspur DIY and Others v Council and Commission [1997] ECR I-4775, paragraphs 18 to 23; Joined Cases C-403/04 P and C-405/04 P Sumitomo Metal Industries v Commission [2007] ECR I-729, paragraph 106; and the Order in Case C-467/00 P Staff Committee of the ECB and Others v ECB [2001] ECR I-6041, paragraphs 34 to 36.

41 – Case T-204/03 [2006] ECR II-3779, paragraph 30.

42 – See point 79 of this Opinion.

43 – If the Court of First Instance has established or assessed the facts, the Court of Justice has the power, under Article 225 EC, to review the legal classification of those facts and the legal inferences which the Court of First Instance drew from them (see Lenaerts, K./Arts, D./Maselis, I., loc. cit. [footnote 22], p. 457, paragraph 16-007). As the Court of Justice has ruled on several occasions, that classification is a point of law which may be subject to review by the Court of Justice in an appeal. See, as such, Case C-499/03 P Biegi Nahrungsmittel and Commonfood [2005] ECR I-1751, paragraph 41; Case C-19/93 P Rendo and Others v Commission [1995] ECR I-3319, paragraph 26; and Case C-470/00 P Parliament v Ripa di Meana and Others [2004] ECR I-4167, paragraph 41.

44 – See paragraphs 92 and 93 of the appeal.

45 – Judgment under appeal, paragraphs 33 to 40.

46 – See points 54 to 56 of this Opinion.

47 – The German version of the judgment under appeal refers to 'der Aufgabe dieser Organisation als öffentliche Anstalt'. The Italian version, on the other hand, refers to 'missione di servizio pubblico di tale organizzazione'. The French version is similar: 'mis-

sion de service public de cette organisation'. The English version refers to 'that organisation's public service mission'.
48 – Former Secretary General of the International Civil Aviation Organisation (1976-1988) and former Director General of Eurocontrol (1994-2000), Yves Lambert points out in his report 'Eurocontrol et l'OACI', Annals of air and space law/Annales de droit aérien et spatial, Vol. 19 (1994), p. 360, that the preparation and production of standards and technical specifications must be regarded as important means for attaining the aims of harmonisation and integration pursued by the agency.
49 – The concept of 'public service mission' is a broad one which generally refers to the social importance of an activity but it is also used as a legal term. Where an activity is said to have a public service function, this does not necessarily mean that it is also a public mission of the State. As Raschauer, B., rightly states in Allgemeines Verwaltungsrecht, Vienna/New York 1998, p. 358, paragraph 722, public-service missions can also be performed by private individuals (e.g. the activities carried out by associations providing social rehabilitation assistance or AIDS support, which are the responsibility of the State).
50 – 'Public' covers the field which relates specifically to that which comes from the state, authority, that which is unilaterally ordered and decreed: the state as the agent of its own 'imperium' (see Raschauer, B., loc. cit. [footnote 49], p. 357, paragraph 720). An example of public authority or 'imperium' is the legislative power exercised by state bodies. However, it is not reserved solely to the States as the entities at which international public law is primarily directed, but may also be transferred to and exercised by international organisations (see Schliesky, U., Souveränität und Legitimität von Herrschaftsgewalt, Tübingen 2004, p. 336, which cites the European Community as an example of a supranational law-making body which replaces national legislation).
51 – For some time now, states have not been the only actors on the international scene. Since the beginning of the 20th century, they have been replaced by an ever-growing number of international organisations. The reason for the rise in the number of international organisations is because international trade is less and less imaginable without institutionalised forms of cooperation. International organisations are therefore the key element in this process of institutionalisation, as they can be created by their members for almost any purpose and are endowed with powers commensurate with their functions. Given a strengthened internal structure and independent decision-making powers, it is largely possible to ensure that tasks are performed on an ongoing basis (see Klein, E., 'Die Internationalen und Supranationalen Organisationen als Völkerrechtssubjekte', Völkerrecht [edited by Wolfgang Graf Vitzthum], Berlin/New York 1997, p. 273, paragraph 1).
52 – See paragraphs 104 and 105 of the appeal.
53 – See points 71 and 72 of this Opinion.
54 – See point 20 of this Opinion.
55 – Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7; Case C-343/95 Diego Cali & Figli [1997] ECR I-1547, paragraph 16; Pavlov and Others, paragraph 75; Cassa di Risparmio di Firenze, paragraph 108; Enirisorse, paragraph 29; and Aéroports de Paris v Commission, paragraph 107.
56 – Arcelin, L., 'Être ou (et?) ne pas être une entreprise. C'est la question…', Revue Lamy de la Concurrence, 2007 No 11, p. 22, points out that the 'market' is traditionally defined as the interaction of supply and demand. There can therefore be no supply without demand.
57 – See paragraph 101 of the Commission's response.
58 – See paragraph 122 of the appeal.
59 – See point 116 of this Opinion and the case-law cited in footnote 55.
60 – Case T-319/99 FENIN v Commission [2003] ECR II-357, paragraph 37. The Court of First Instance stated: 'Consequently, an organisation which purchases goods ─ even in great quantity ─ not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC'.
61 – This was confirmed by the Court of Justice in an appeal brought against the judgment in FENIN v Commission (see judgment of the Court cited in footnote 9, paragraph 25). The Court of Justice found that the Court of First Instance had correctly stated, at paragraph 36 of the judgment under appeal, that it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity. The Court of First Instance rightly deduced that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. In the view of Prieto, C., in 'Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes', Journal du droit international, 2007, p. 670, the Court of Justice thereby wished to make it clear that the characteristic feature of the offer of goods and services must always be present. To that effect, see also Kovar, J.-P., 'Le Tribunal précise la notion d'activité économique et confirme la jurisprudence Fenin sur la qualification de l'acte d'achat', Concurrences, 2007, No 1, p. 168, 170 and Arcelin, L., loc. cit. (footnote 56), p. 22, who considers the ruling in FENIN to be confirmed in the judgment under appeal.

62 – See paragraph 102 of Eurocontrol's response. In the view of Idot, L., loc. cit. (footnote 11), p. 25, as regards the aspects that have been examined, what matters is not so much whether there is a market as the political decision to prioritise public research over private research.

63 – See, with regard to the relevance of the fact that an organisation is non-profit-making in assessing the economic nature of an activity, Case C-159/91 Poucet and Pistre [1993] ECR I-637, paragraph 10, concerning the functions of a social security scheme; Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraph 37, concerning the activity of customs agent; and Pavlov and Others, paragraphs 76, 77, concerning the activity of self-employed medical specialists. Prieto, C., loc. cit. (footnote 61), p. 670, refers to the case-law cited above and states that the fact that an organisation participates in a market for no consideration must always be taken into consideration.

64 – In FENIN v Commission, paragraph 39, the Court of First Instance examined whether the organisation in question was, in pursuing its activity, non-profit-making. In Enirisorse, paragraph 31, the Court of Justice stated that the specific activity of an undertaking – in that case developing new technologies for the use of coal and providing technical assistance for authorities, public bodies and companies interested in the development of those technologies – constitutes its economic activity. The Court also considered whether the undertaking in question was run for profit.

65 – See Enirisorse, paragraph 31, in connection with the activity of technical development.

66 – See points 53 to 69 and points 98 to 110 of this Opinion.