JUDGMENT OF THE COURT (Sixth Chamber)
24 October 2002 *

In Case C-82/01 P,

Aéroports de Paris, established in Paris, represented by H. Calvet, avocat, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 12 December 2000 in Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by L. Pignataro, acting as Agent, and B. Geneste, avocat, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

and

Alpha Flight Services SAS, established in Paris, represented by L. Marville and A. Denantes, avocats, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, acting for the President of the Sixth Chamber, V. Skouris, F. Macken, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 17 February 2001, Aéroports de Paris ('ADP') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 12 December 2000 in Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929 ('the contested judgment'), in which the Court of First Instance dismissed ADP's application for annulment of Commission Decision 98/513/EC of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 — Alpha Flight Services/Aéroports de Paris) (OJ 1998 L 230, p. 10, 'the contested decision').

Facts giving rise to the dispute in the main proceedings

2 It is stated in the contested judgment that:

'1 The applicant, ADP, is a public corporation governed by French law and enjoying financial independence which, pursuant to Article L. 251-2 of the French Civil Aviation Code, is "responsible for the planning, administration and development of all the civil air installations which are centred in the Paris

region and which seek to facilitate the arrival and departure of aircraft, to control traffic and to load, unload and groundhandle passengers, goods and mail carried by air, and also of all associated installations".

2 ADP is responsible for the running of Orly and Roissy-Charles-de-Gaulle (hereinafter 'Roissy-CDG') airports.

3 During the 1960s, aircraft catering services were provided at Orly airport by four companies: Pan Am, TWA, Air France and the Compagnie Internationale des wagons-lits (hereinafter 'CIWL'). The first three in reality, and Air France almost exclusively, were involved in self-handling, that is to say, in supplying their own flights. Following the construction of Roissy-CDG airport during the 1970s, TWA and Pan Am transferred their activities there.

4 It was during that period that ACS, a subsidiary of Trust House Forte, which later became THF, whose successor in title is Alpha Flight Services (hereinafter 'AFS'), began to provide aircraft catering services at Orly airport.

5 Following a call for tenders by ADP in 1988, AFS was chosen as the only aircraft catering service provider at Orly airport other than Air France, which only supplied a groundhandling service for its own aircraft.

6 The financial terms required by ADP provided only for the periodic payment of a fee based on the groundhandler's turnover. In its tender, AFS proposed

an average fee of [...]% of turnover (varying from [...]%); it also proposed to erect a new building and to purchase CIWL's buildings for [...] French francs (FRF).

7 On 21 May 1992, ADP and AFS signed a 25-year concession agreement, taking effect retroactively on 1 February 1990, under which AFS was authorised to provide airline catering services at Orly airport and to occupy a range of buildings within the perimeter of the airport and an area of [...], and to build on it at its own expense the installations necessary for its activities.

8 According to Article 23 of the agreement, the fee payable by AFS was determined as follows:

(i) no State fee (*redevance domaniale*) was charged;

(ii) a commercial fee was calculated as a proportion of turnover (total annual turnover achieved by AFS, excluding the turnover corresponding to the supply of kosher dishes from Rungis (outside the airport perimeter) to companies providing air catering services at ADP airports. The turnover on the services provided in the premises at Rungis and supplied directly to any other customer situated on ADP's airports, whether airlines or not, remained subject to the fee);

(iii) last, the supplier was to pay ADP the sum of FRF [...] in addition to the above fee.

9 On [...], a new groundhandler, Orly Air Traiteur (hereinafter 'OAT'), began to provide airline catering services at Orly airport. OAT is a subsidiary of Groupe Air France, whose majority stake is held through its subsidiary Servair, which also provides groundhandling services at Roissy-CDG. OAT gradually took over the airline catering services previously provided by Air France at Orly airport.

10 On [...], ADP granted OAT a 25-year concession, [...] and relating to licences to supply catering services at Orly airport and to occupy premises within the airport perimeter. OAT was thus authorised to occupy an area of [...] and to build the necessary installations there at its own expense. Article 26 of the concession agreement, on the financial conditions, provided for separate remuneration for each of the two licences, as follows:

— first, in exchange for a site-occupancy licence, the beneficiary undertook to pay ADP an annual State fee in proportion to the surface area occupied [...],

— second, in exchange for a licence to operate, the beneficiary undertook to pay ADP a commercial fee consisting of:

(i) [...]% of total turnover achieved through its business with Compagnie Nationale Air France and the subsidiaries of the Air France group, Air Charter, Air Inter (OAT services provided to subsidiaries or sub-

subsidiaries of Servair, the holders of a commercial operating licence from ADP, being excluded from the turnover);

(ii) [...]% of total turnover resulting from business with any other airline.

11 At the end of 1992, following the arrival of OAT on the market and a dispute between ADP and AFS concerning the remuneration payable by the latter, AFS's fee was reduced to [...]%.

12 On 29 December 1993, AFS informed ADP that it considered that the rate of its fee and the rates applied to the turnover of its competitors at Orly airport were not equivalent, even allowing for any differences in the State fee, and that that discrepancy gave rise to discrimination between suppliers. AFS therefore requested that the rates of the fees be aligned.

13 ADP refused on the ground that the reduction of the rate previously obtained by AFS meant that the fees of the various concessionaires, allowing for the land charges, were equivalent.

14 On 22 June 1995, AFS lodged a formal complaint with the Commission about ADP on the ground that the latter was imposing discriminatory fees on airline catering firms, contrary to Article 86 of the EC Treaty (now Article 82 EC).

15 On 1 February 1996, the Commission sent ADP a request for information pursuant to Article 11 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1962, p. 87) in order to obtain details of the identity of the groundhandling firms licensed by ADP to operate at Orly and Roissy-CDG airports and the fees imposed on such firms. It is apparent, in particular, from ADP's reply that the categories of handling services subject to a fee based on turnover included catering, aircraft cleaning and cargo services.

16 The Commission sent ADP a statement of objections dated 4 December 1996, under Article 86 of the Treaty, in which it stated that the bases of the commercial fees applied by ADP differed according to the identity of the licensed undertakings, without those differences being objectively justified. In accordance with Article 7(1) of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963, p. 47), ADP was given the opportunity to put forward oral argument at a hearing on 16 April 1997.

17 On 11 June 1998, the Commission adopted [the contested decision], which states:

"*Article 1*

[ADP] has infringed Article 86 of the EC Treaty by using its dominant position as manager of the Paris airports to impose discriminatory commercial fees in the Paris airports of Orly and Roissy-Charles de Gaulle on

suppliers or users engaged in groundhandling or self-handling activities relating to catering (including the loading and unloading of food and beverages on aircraft), to the cleaning of aircraft and to the handling of cargo.

Article 2

[ADP] shall put an end to the infringement referred to in Article 1 by applying to the suppliers of groundhandling services concerned a non-discriminatory scheme of commercial fees within two months of the date of notification of this Decision."'

The contested judgment

3 On 7 August 1998, ADP brought an action for annulment of the contested decision before the Court of First Instance.

4 By the contested judgment, the Court of First Instance rejected ADP's various pleas in law alleging, first, procedural irregularity; second, breach of the rights of defence; third, failure to comply with the obligation to state reasons; fourth, infringement of Article 86 of the EC Treaty; fifth, infringement of Article 90(2) of the EC Treaty (now Article 86(2) EC); sixth, infringement of Article 222 of the EC Treaty (now Article 295 EC) and seventh, misuse of powers.

The appeal

5 In its appeal, ADP claims that the Court should:

— primarily:

— set aside the contested judgment;

— allowing ADP's claim at first instance, annul the contested decision;

— order the Commission to pay all costs borne by the applicant in the proceedings before the Court of First Instance and in the present appeal;

— order AFS to bear its own costs in the proceedings before the Court of First Instance and, should it submit a statement in intervention in the present appeal, to bear its own costs in that regard and also those incurred by ADP in connection with that intervention;

— in the alternative:

— set aside the contested judgment and refer the case back before a chamber of the Court of First Instance composed of different Judges from those composing the chamber that delivered the judgment under appeal;

— reserve the costs and refer the question of costs to the chamber of the Court of First Instance that will adjudicate in the case.

6 The Commission contends that the Court should:

— declare the appeal inadmissible for infringement of Article 112 of the Rules of Procedure;

— in the alternative, declare inadmissible and, in any case, reject the second, third, and fifth to ninth pleas in law and reject the first, fourth and tenth pleas in law;

— accordingly, dismiss the appeal and

— order the appellant to pay the costs.

7 AFS contends that the Court should:

— dismiss the application for annulment of the contested decision brought by ADP;

— order ADP to bear all costs of the present proceedings.

Admissibility

8 The Commission submits that the appeal is inadmissible in its entirety on the ground that ADP refers on several occasions to documents which, whilst annexed to the application lodged before the Court of First Instance, were not annexed to the appeal. That being so, ADP failed to comply with Articles 112 and 37 of the Rules of Procedure of the Court of Justice.

9 On that point, it should be noted that Article 112(1) and (2) of the Rules of Procedure set out the requirements to be complied with on an appeal. The second subparagraph of Article 112(1) provides in particular for the application of Article 37, the second subparagraph of paragraph (1) of which provides, *inter alia*, that every pleading must be 'accompanied by all annexes referred to therein' and paragraph (4) of which provides that '[t]o every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them'.

10 However, nowhere do the Rules of Procedure provide that failure to comply with the requirements of Article 37(1) and (4) thereof renders the appeal inadmissible.

11 Moreover, no evidence has been adduced before the Court to show that the Commission or AFS have been prejudiced by the fact that the documents to which the appeal refers were not annexed to it, and it is common ground that those documents were known to the parties since they were annexed to the application lodged before the Court of First Instance.

12 The defect pleaded by the Commission is not therefore sufficient to render the appeal inadmissible (see, to that effect, Case C-91/95 P *Tremblay and Others* v *Commission* [1996] ECR I-5547, paragraph 11).

13 For those reasons the Commission's claim that the Court should dismiss the appeal as being inadmissible in its entirety is rejected.

Substance

The first plea in law, alleging infringement of Regulation No 17 and Regulation (EEC) No 3975/87

14 ADP submits that the Court of First Instance erred in law in holding, at paragraphs 34 to 52 of the contested judgment, that the Commission had been right in finding that Regulation No 17 and not Council Regulation (EEC)

No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1) applied in the present case. ADP claims that none of the grounds of the contested judgment justifies calling into question the removal of the whole of the transport sector from the scope of Regulation No 17 and the correlative application of Regulation No 3975/87 to that sector.

15 ADP bases that plea, first, on the judgment in Case C-264/95 P *Commission* v *UIC* [1997] ECR I-1287, in which the Court of Justice held, at paragraph 44, that 'the whole of the transport sector' had been removed from the scope of Regulation No 17 by Regulation No 141 of the Council of 26 November 1962 exempting transport from the application of Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291). Consequently, Regulation No 3975/87, which replaced Regulation No 141, applies to the whole of the transport sector, of which ADP's activity undeniably forms part.

16 In that regard, it should be noted that, at paragraph 44 of the judgment in *Commission* v *UIC*, cited above, the Court examined the question whether a clause prohibiting travel agents from favouring, in their advertising, proposals or advice to the public, means of transport in competition with rail fell within the scope of Regulation No 17 or of Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302), Article 1 of which refers, *inter alia*, to all agreements 'which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets'. In holding that such a clause concerning the detailed rules applicable to the marketing of transport services by travel agents falls within Regulation No 1017/68 and not Regulation No 17, the Court pointed out that the whole of the transport sector had been removed from the scope of Regulation No 17 by Regulation No 141.

17 It cannot therefore be inferred from paragraph 44 of the judgment in *Commission* v *UIC*, cited above, that the activity of an airport manager such as that carried out by ADP necessarily falls within the transport sector in the sense contemplated in that judgment.

18 Moreover, the interpretation that the activity carried on by ADP is not excluded from the scope of Regulation No 17 by Regulation No 141 is supported by the express wording of the latter regulation. Thus, in the first place, as the Court of First Instance noted at paragraph 56 of the contested judgment, the third recital of the preamble to Regulation No 141 explains that the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices 'directly relating to the provision of transport services'. Second, Article 1 of Regulation No 141 precludes the application of Regulation No 17 only in respect of agreements 'which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets'.

19 The Court of First Instance was therefore right to reject, at paragraph 52 of the contested judgment, ADP's arguments based on the judgment in *Commission* v *UIC*, cited above.

20 Second, ADP complains that the conclusion of the Court of First Instance that Regulation No 3975/87 did not apply in the present case was based on an incorrect analysis of that regulation.

21 In that regard, it must be stated that the Court of First Instance could properly find that Regulation No 3975/87 only applies to activities directly relating to the supply of air transport services, which is not the case as regards the activities carried out by ADP.

22 In that context, the Court of First Instance correctly referred, at paragraph 41 of the contested judgment, to the title of Regulation No 3975/87, which states that it determines the procedure for the application of the rules on competition to 'entreprises de transports aériens'. Whilst it is true, as ADP points out, that the English-language version of that title refers to 'undertakings in the air transport

sector', the fact remains that Article 1(1) of that regulation, which states that that regulation 'lays down detailed rules for the application of Articles 85 and 86 of the Treaty to air transport services', confirms that an activity falls within the scope of that regulation only if it is directly linked to the supply of air transport services. That is not so in the case of activities such as those carried on by ADP which, as was found pointed out at paragraph 46 of the contested judgment, do not consist of the supply of groundhandling services, but in the offer of services to undertakings which themselves supply groundhandling services to airlines.

23 Contrary to ADP's contention, Article 4a(1) of Regulation (EEC) No 3975/87, as amended by Council Regulation (EEC) No 1284/91 of 14 May 1991 (OJ 1991 L 122, p. 2), cannot disturb that conclusion. As is rightly stated in paragraph 42 of the contested judgment, that provision only applies to practices susceptible of 'directly jeopardising the existence of an air service', which presupposes a direct link with the supply of air transport services.

24 The Court of First Instance also rightly observed at paragraph 40 of the contested judgment that the conclusion that Regulation No 17 applies to conduct other than that directly relating to the supply of air transport services is supported by the first recital in the preamble to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ 1987 L 374, p. 9), which states that Regulation No 17 of the Council lays down the procedure for the application of the rules on competition to agreements, decisions and concerted practices 'other than those directly relating to the provision of air transport services'.

25 Even though Regulation No 3976/87 concerns the application of Article 85(3) of the Treaty (now Article 81(3) EC) relating to certain agreements, whilst the contested decision concerns an abuse of a dominant position, the fact remains that Regulation No 3975/87 and Regulation No 3976/87 were adopted on the

same day and concern the application of the competition rules to air transport services. Nor is there any basis for concluding that the scope of Regulation No 17 depends on whether it is being applied to agreements covered by Article 85(3) of the Treaty or abuses of a dominant position.

26 Furthermore, at paragraph 50 of the contested judgment, the Court of First Instance rightly rejected ADP's argument that, in its proposal for a Council Directive on access to the groundhandling market at Community airports (95/C 142/09) (OJ 1995 C 142, p. 7), the Commission had indicated that groundhandling services formed an integral part of the air transport system. As the Court of First Instance found, that particular view was not expressed by the Council in its Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36) and that, in any event, the contested decision does not apply to groundhandling services but to ADP's activities as manager of the Paris airports, carried out on a market upstream of those services.

27 It follows from the foregoing considerations that the Court of First Instance rightly held that ADP's activities, although falling within the transport sector, do not constitute air transport services within the meaning of Regulation No 3975/87.

28 Consequently, the first plea in law must be rejected as unfounded.

The second plea in law, alleging breach of the Court of First Instance's obligation to state reasons

29 ADP claims that the grounds of the Court of First Instance's judgment are contradictory. On the one hand, at paragraphs 65 to 67 of the contested

judgment, the Court of First Instance accepted that the contested decision does not require that the same fees be charged to providers of self-handling and third-party handling services, whilst on the other hand, at paragraph 206 of the same judgment, the Court of First Instance required that the same fees be charged to those two categories of supplier on the basis that ADP supplied the same services to each of them. ADP claims that the Court of First Instance therefore failed to comply with the obligation to state reasons, and that, as a consequence of this, the contested judgment must be set aside.

30 The Commission challenges the admissibility of that plea on the ground that it merely reproduces the second and third pleas put forward before the Court of First Instance, by which ADP complained that the Commission failed to comply with its obligation to state reasons for the contested decision, in that it did not adopt the same position in the statement of objections and in that decision.

31 According to the case-law of the Court of Justice (see, in particular, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34), an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal. As may be seen from paragraph 29 of the present judgment, that requirement is satisfied in the present case and therefore the second plea is admissible.

32 As to the substance of the plea, it should be noted that, at paragraphs 65 to 67 of the contested judgment, the Court of First Instance found that neither the contested decision nor the statement of objections required that the same fees be charged for self-handling and for handling for third parties and that the Commission required merely that those fees be non-discriminatory.

33 That finding does not contradict the conclusion at paragraphs 206 to 210 of the contested judgment that in the present case the suppliers of groundhandling

services for third parties and the suppliers of self-handling services receive the same management services from ADP and that the different treatment, in terms of fees charged, of those two categories of suppliers was not justified.

34 As is clear from paragraphs 65 to 67 and 206 to 210 of the contested judgment, the statement that fees must be non-discriminatory does not imply that they must necessarily be the same for the two categories of supplier in question, but that any difference be objectively justified. In the present case the Court of First Instance found at paragraph 210 of the contested judgment that there was no justification for the difference between the fees imposed on the two categories of supplier, in view, in particular, of the fact, noted at paragraph 206 of the same judgment, that the services supplied by ADP to those two categories were the same.

35 Since the grounds of the contested judgment are not contradictory as alleged by ADP, the second plea in law must be rejected as unfounded.

The third plea in law, alleging infringement of the rights of defence by the Court of First Instance

36 ADP claims that the Court of First Instance infringed its rights of defence in that it stated, at paragraph 126 of the contested judgment, that HRS's activity as a provider of groundhandling services in the airports of Paris should also be subject to a commercial fee, and that the fact that it does not pay such a fee constituted a further instance of discrimination, even though not expressly raised in the contested decision. In those circumstances, the Court of First Instance made a finding of infringement by ADP of the law of competition, and did so in breach of the procedural rules laid down by Community law for the purposes of such

findings, since no such complaint had been raised in the statement of objections or in the contested decision and, as a result, ADP was not in a position to defend itself against that complaint.

37 The Commission contends that the plea alleging infringement of the rights of defence cannot be raised as such against the Court of First Instance and that, accordingly, it must be rejected as clearly inadmissible.

38 As regards the admissibility of the third plea, as ADP rightly points out, it is clear from the case-law of the Court of Justice (see, in particular, Case C-64/98 P *Petrides* v *Commission* [1999] ECR I-5187, paragraphs 31 to 34) that failure by the Court of First Instance to have due regard for the rights of defence may be pleaded on appeal to the Court of Justice. The third plea is therefore admissible.

39 As regards the substance of the plea, the Court of First Instance explained at paragraphs 120 to 124 of the contested judgment the reasons which led it to find, at paragraph 125 of the same judgment, that ADP's activities do not form part of the performance of a task conferred by public law and that they are economic activities for the purposes of Article 86 of the Treaty, even though carried out on publicly-owned property.

40 The Court of First Instance added at paragraph 126 of the contested judgment that the fact, pointed out by ADP with a view to proving the exclusively public-law nature of the fees in question, that HRS operates from outside the airport perimeter without paying a fee to ADP, cannot alter the finding at paragraph 125 of that judgment, inasmuch as HRS must in any case use the airport facilities since, by definition, groundhandling services are provided within the airport. The Court of First Instance was entitled to find that that fact could not alter the nature of the fees in question or of the services for which they constituted remuneration.

41 The statement in paragraph 126 of the contested judgment that the fact that HRS does not pay a fee is a further instance of discrimination is included merely for the sake of completeness. Complaints directed against the grounds of a judgment of the Court of First Instance included merely for the sake of completeness must be rejected outright since such grounds cannot provide any basis for setting that judgment aside (see, in particular, the order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 47).

42 Consequently the third plea in law must be rejected.

The fourth plea in law, alleging failure to address a plea in law raised by ADP

43 According to ADP, the contested decision states that ADP's different treatment of third-party handling and self-handling resulted in discrimination on the market for air transport. ADP points out in this connection that, according to the last sentence of paragraph 123 of the grounds of the contested decision, the non-self-handling airlines are 'compelled to use more expensive third-party groundhandlers and thus suffer the discriminatory effect of the commercial fees charged by ADP'.

44 ADP claims that the Court of First Instance did not address its argument challenging that statement by pointing out the differences between the position of a self-handling carrier and one who uses third-party services.

45 It should be noted, first, that contrary to ADP's contention, the Court of First Instance did address that argument at paragraph 218 of the contested judgment in the following terms:

'Last, the applicant's argument that there is no discrimination on the market in air transport itself, since there is no restriction on self-handling in the Paris airports, must also be rejected. First, that argument, even supposing it to be well founded, does not call in question the existence of the discrimination between those providing groundhandling services for third parties and those providing their own groundhandling services. Second, it is inaccurate, since, as pointed out in recital 123 to the contested decision, only the large airlines with a large volume of traffic in the Paris airports are in practice able to develop and operate profitably a self-handling service, while the others are obliged to use third-party groundhandlers.'

46 Moreover, as the Commission rightly submits, that argument advanced at first instance rests on a false premiss in that it considers that the contested decision is directed to discrimination between airlines. It is clear from the express wording of Article 1 of that decision that '[ADP] has infringed Article 86 of the EC Treaty by using its dominant position as manager of the Paris airports to impose discriminatory commercial fees in the Paris airports of Orly and Roissy-Charles de Gaulle on suppliers or users engaged in groundhandling or self-handling activities..., to the cleaning of aircraft and to the handling of cargo.' Consequently, the contested decision is not directed to discrimination between airlines but rather, as is also clear from the grounds of that decision, to the different tariffs applied to suppliers or users supplying the same type of groundhandling services.

47 That finding is not disturbed by the last sentence of recital 123 of the contested decision, which merely points out in passing that discriminatory fees on the

market for airport management services affect non-self-handling airlines which are compelled to use more expensive third-party groundhandling services.

48 In those circumstances, the fourth plea in law must be rejected.

The fifth plea in law, alleging distortion of the clear sense of the evidence

49 ADP claims that, at paragraph 117 of the contested judgment, the Court of First Instance seriously distorted the clear sense of the evidence by drawing a distinction between the occupation of the land, buildings and facilities within the airport perimeter, in consideration for which groundhandlers pay a State fee, and the airport management services and the licensing of the supply of groundhandling services, in return for which groundhandlers pay a commercial fee.

50 In support of its analysis the Court of First Instance referred to the agreements between ADP and AFS, on the one hand, and OAT on the other, whereas in fact those agreements established an overall fee as consideration for the private use of publicly-owned property.

51 First, the alleged 'management services' which ADP provides to the suppliers are not covered by those agreements. Second, ADP claims that those agreements were expressly entered into under the system of temporary site-occupancy licences for land in public ownership. In accordance with French law on publicly-owned property, only the private occupation of publicly-owned property by suppliers of groundhandling services can give rise to a fee.

52 ADP adds that, as was clearly explained before the Court of First Instance, the overall fee charged for the private occupation of publicly-owned property may be determined either on the basis of the variable component alone, or on the basis of the fixed and variable components. Those two components are thus inseparable in so far as they constitute the means by which a single overall fee is determined.

53 The Commission contends that the plea now under consideration must be declared clearly inadmissible for three reasons. First, the applicant omitted to append various annexes to the appeal. Next, that plea merely reproduces the first part of the fourth plea raised before the Court of First Instance. Finally, the agreements entered into by ADP and AFS, on the one hand, and OAT, on the other, are not evidence but merely facts. Even if they were evidence, the Court of Justice is not, in principle, competent to review the evidence accepted in support of the facts by the Court of First Instance.

54 As regards, first, the Commission's objection of inadmissibility based on the failure, on appeal, to lodge documents already lodged during the proceedings before the Court of First Instance, it follows from paragraphs 9 to 12 of this judgment that such a failure cannot render pleas raised in support of the appeal inadmissible.

55 Next, as regards the complaint based on the alleged repetition of a plea already put forward before the Court of First Instance, it need merely be observed that the present plea indicates precisely the criticised elements of the contested judgment, and also the legal arguments specifically advanced in support of the application to annul that judgment, in accordance with the requirements set out in the case-law referred to at paragraph 31 of the present judgment.

56 Finally, in response to the third objection as to the admissibility of the fifth plea, it must be pointed out that, according to the case-law of the Court of Justice, complaints based on findings of fact and on the assessment of those facts in the contested judgment are admissible on appeal where the appellant contends that the Court of First Instance has made findings which the documents in the file show to be substantially incorrect or that it has distorted the clear sense of the evidence before it (see, in particular, Case C-237/98 P *Dorsch Consult* v *Commission* [2000] ECR I-4549, paragraphs 35 and 36). That is precisely the situation in the present case.

57 The plea in law is therefore admissible.

58 As regards the substance of the plea, the Court of First Instance did not distort the clear sense of the evidence before it in distinguishing, in its analysis of the relevant fees, between the State fee as consideration for a site-occupancy licence of publicly-owned property, on the one hand, and the commercial fee as consideration for the management services provided by ADP and the operating licence, on the other.

59 As the Advocate General has demonstrated at paragraphs 107 to 113 of his Opinion, which relate to the agreement between ADP and AFS, that distinction may, *inter alia*, be based, in addition to the wording of the title of that agreement, on Article 17 thereof defining its purpose, and on Article 23 of that agreement, which provides that a 'commercial' fee calculated as a proportion of turnover is payable to ADP, whilst no 'State' fee is payable. The same finding is called for as regards the agreement between ADP and OAT, which clearly distinguishes between a 'State' fee and a 'commercial' fee.

60 Accordingly, in rejecting ADP's contention that the fees paid to it by AFS and OAT were financial consideration solely for the private use of publicly-owned property, the Court of First Instance did not in any way distort the clear sense of the evidence before it, and the fifth plea must therefore be rejected as unfounded.

The sixth plea in law, alleging perverse interpretation of national law

61 ADP submits that the Court of First Instance clearly interpreted national law perversely in holding, at paragraph 125 of the contested judgment, that 'the activities in question carried out by ADP are economic activities, and although those activities are carried out on publicly-owned property, they do not for that reason form part of the performance of a task conferred by public law.'

62 The Commission submits that that plea is clearly inadmissible, first, because ADP did not annex to the appeal a judgment on which it relies and which had been annexed to the application for annulment lodged before the Court of First Instance; second, because, by that plea, ADP merely repeats the first part of the fourth plea in law raised before the Court of First Instance and third, because the Court of First Instance's interpretation of national law cannot be challenged on appeal.

63 None of those objections to admissibility can be upheld. First, as is made clear in paragraph 54 of the present judgment, failure to annex to an appeal a document already produced before the Court of First Instance cannot render pleas raised in support of appeal inadmissible. Second, the plea now under consideration indicates precisely the criticised elements of the contested judgment, and also the legal arguments specifically advanced in support of the application to annul that judgment, and so satisfies the requirements set out in the case-law cited at

paragraph 31 of the present judgment. Third, it follows from the case-law cited at paragraph 56 of the present judgment that a complaint alleging misinterpretation of national law is admissible where, as in the present case, the Court of First Instance is alleged to have interpreted that law perversely.

64 The sixth plea is therefore admissible.

65 As regards the substance of the plea, the conclusion arrived at by the Court of First Instance at paragraph 125 of the contested judgment is not based on an analysis of French law, which was analysed merely for the sake of completeness, at paragraph 129 of the same judgment, but results from a characterisation, in paragraphs 119 to 124 of the contested judgment, of the activities of ADP in question in the light of Community law.

66 Whether the airport infrastructure management activities carried out by ADP constitute a business activity for the purposes of Article 86 of the Treaty is a question to be determined in the light of Community law. Thus, contrary to ADP's contention, the reasoning at paragraph 129 of the contested judgment was included for the sake of completeness, as the Court of First Instance rightly pointed out.

67 In so far as the sixth plea is thus directed against a ground of the contested judgment which was included for the sake of completeness, it cannot, according to the case-law cited at paragraph 41 of the present judgment, result in that judgment being set aside and must therefore be rejected as irrelevant.

The seventh plea in law, alleging infringement of Article 86 of the Treaty by the Court of First Instance in characterising ADP as an undertaking

68 By its seventh plea in law, ADP submits that the Court of First Instance infringed Article 86 of the Treaty in characterising, at paragraphs 120 to 126 of the contested judgment, ADP as an undertaking within the meaning of that provision. The administration of publicly-owned property, the only activity in issue in the present case, involves the exercise of official powers and therefore cannot constitute a business activity for the purposes of Article 86 of the Treaty.

69 ADP states in that connection that, according to the case-law of the Court, the activities of public bodies which depend on the exercise of their official powers are not undertakings (see, *inter alia*, Case 30/87 *Bodson* [1988] ECR 2479). Applying that case-law, the Court of First Instance ought to have found that ADP was not an undertaking within the meaning of Article 86 of the Treaty.

70 ADP further submits that the case-law cited by the Court of First Instance at paragraph 123 of the contested judgment cannot, on any view, alter the fact that the administration of publicly-owned property involves the exercise of official powers and does not therefore constitute a business activity within the meaning of Article 86 of the Treaty. First, the judgment in Case 41/83 *Italy* v *Commission* [1985] ECR 873 concerned telecommunications services, matters unrelated to the administration of publicly-owned property, and the judgment in Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689 concerned the supply of locomotives and rail services, and did not address the question whether the administration of publicly-owned property constitutes an economic activity.

71 Furthermore, since the sole point of importance is to determine whether the administration of publicly-owned property involves the exercise of official powers, the Court of First Instance's observation that the fact that an activity may be exercised by a private undertaking amounts to further evidence that the activity in question may be described as a business activity is irrelevant.

72 The Commission contends that that plea merely repeats the first part of the fourth plea in law raised by ADP before the Court of First Instance. It must therefore be declared inadmissible.

73 However, since the seventh plea raised in support of the appeal indicates precisely the contested elements of the judgment which it is sought to have set aside, and also the legal arguments specifically advanced in support of that application, it is admissible.

74 As regards the substance of the plea, as the Commission rightly submits, the fact that, for the exercise of part of its activities, an entity is vested with official powers does not, in itself, prevent it from being characterised as an undertaking within the meaning of Article 86 of the Treaty.

75 In that regard, it must be borne in mind that, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, *inter alia*, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 17). In order to determine whether the activities in question are those of an undertaking within the meaning of Article 86 of the Treaty, it is necessary to establish the nature of those activities (see, *inter alia*, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 19).

76 At paragraph 112 of the contested judgment the Court of First Instance drew a distinction between, on the one hand, ADP's purely administrative activities, in particular supervisory activities, and, on the other hand, the management and operation of the Paris airports, which are remunerated by commercial fees which vary according to turnover.

77 At paragraph 120 of the contested judgment the Court of First Instance pointed out that the activity as manager of the airport infrastructures, through which ADP determines the procedures and conditions under which suppliers of groundhandling services operate, cannot be classified as a supervisory activity. Nor has ADP raised any argument on the basis of which it could be concluded that relations with suppliers of groundhandling services fall within the exercise by ADP of its official powers as a public authority or that those relations are not separable from ADP's activities in the exercise of such powers.

78 The Court of First Instance was thus entitled to find, at paragraph 121 of the contested judgment, that the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP, constitutes an economic activity.

79 It is settled case-law that any activity consisting in offering goods and services on a given market is an economic activity (see, *inter alia*, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36 and Case C-475/99 *Glöckner* [2001] ECR I-8089, paragraph 19).

80 Contrary to ADP's contention, the Court of First Instance could properly refer to the judgments in *Italy* v *Commission* and *Deutsche Bahn* v *Commission*, cited above, which also concerned the provision of infrastructures by entities responsible for their management.

81 In *Bodson*, cited above, the Court of Justice did not refer specifically to the existence of official powers precluding the applicability of Article 86 of the Treaty. In its judgment in *SAT Fluggesellschaft*, cited above, the Court held that, taken as a whole, the various activities of the entity concerned, by their nature, their aim and the rules to which they were subject, were connected with the exercise of powers which are typically those of a public authority and that none of those activities were separable from the others. That is not so in the present case.

82 Furthermore, contrary to ADP's argument, the Court of First Instance was right to point out, at paragraph 124 of the contested judgment, that according to the case-law of the Court of Justice, the fact that an activity may be exercised by a private undertaking amounts to further evidence that the activity in question may be described as a business activity.

83 Consequently, the seventh plea in law must be rejected as unfounded.

The eighth plea in law, alleging infringement, in relation to the definition of the market, of Article 86 of the Treaty

84 ADP claims that in so far as the commercial fees in question are not consideration for the private occupation of publicly-owned property, which is not a prerequisite for the provision of groundhandling services, the Court of First Instance wrongly found the relevant market to be that for 'management services in the Paris airports'. ADP's grant of site-occupancy licences in respect of the restricted area of the airport perimeter is not limited to suppliers occupying publicly-owned property as private persons and does not, as such, give rise to the right to charge a fee. It follows that, in relation to definition of the market, there has been an infringement of Article 86 of the Treaty.

85 ADP submits in this connection that the Court of First Instance erred in law in misapplying the case-law of the Court of Justice. In the situation in point in Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263 it was necessary to obtain a certificate of conformity in order to register imported vehicles, whereas, in the present case, although fees are charged as consideration for the private occupation of publicly-owned land, such occupation is not a prerequisite for carrying on an activity in the form of the provision of groundhandling services, as is shown by the case of HRS, which, whilst engaging in that activity, does not occupy publicly-owned property and does not pay any fee.

86 As regards the changes brought in by ADP, after the statement of objections, under the new arrangements for access to the airport facilities introduced with effect from 1 March 1999, referred to by the Court of First Instance at paragraph 127 of the contested judgment, they prove that, at the material time, the mere access to airport facilities could not, as such, give rise in law to the charging of a fee.

87 ADP submits that, in any event, in so far as the fees concerned were charged as consideration for the private occupation of publicly-owned property, the Court of First Instance infringed Article 86 of the Treaty in refusing to include, in its definition of the geographical dimension of the relevant market, all areas and buildings in the Paris region equivalent to ADP's publicly-owned property, on which a supplier of groundhandling services may carry on his business.

88 The Commission submits that that plea merely repeats the second part of the fourth plea raised before the Court of First Instance. Accordingly, it must be declared inadmissible.

89 The first part of the eighth plea concerning the definition of the product market is admissible. In that regard, ADP indicates precisely the contested elements of the judgment which it is sought to have set aside, and also the legal arguments specifically advanced in support of that application.

90 As regards the substance of that part of the plea, it is clear from the examination of the fifth plea that the Court of First Instance properly found that the commercial fees in issue constituted consideration for ADP's services as manager of the airport facilities.

91 The Court of First Instance could properly conclude, at paragraph 137 of the contested judgment, that the market to be taken into consideration is that for management services in the Paris airports, on which ADP, as manager of those airports, is the supplier, while the groundhandlers, who need the licence issued by ADP and the airport facilities in order to carry out their activity, constitute the demand side of that market.

92 Contrary to ADP's assertions on this point, the Court of First Instance properly compared the situation in the present case with that in *British Leyland* v *Commission*, cited above, which concerned British Leyland plc's monopoly in issuing the certificates of conformity required in order for a vehicle of that make to be registered. In its judgment in that case the Court of Justice held that the relevant market was that for the services which were in practice indispensable for dealers who wished to sell the vehicles manufactured by British Leyland plc. In the same way, in the present case, the relevant market is that for the management of airport facilities, which are indispensable for the provision of groundhandling services and to which ADP provides access, as the Court of First Instance found at paragraph 138 of the contested judgment.

93 That definition of the relevant product market is not cast in doubt by the fact that one of the groundhandlers, namely HRS, carries out its activity without occupying publicly-owned property as a private person and without paying a fee. In that instance a licence from ADP is also a prerequisite for access to the market for the services offered by ADP and such access is indispensable for the supply of groundhandling services to airlines. As the Court of First Instance rightly points out, at paragraph 139 of the contested judgment, it is common ground that no undertaking may have access to, let alone provide services in, the airports managed by ADP without being authorised by the latter. Furthermore, the fact that no fee is charged to suppliers who have no need of sites located within the airport perimeter cannot, in any case, affect the definition of that market.

94 In so far as ADP criticises the Court of First Instance for basing its decision, at paragraph 127 of the contested judgment, on the system of access to airport facilities introduced with effect from 1 March 1999, it is sufficient to observe that it is undisputed that that ground was included for the sake of completeness. Consequently, in accordance with the case-law referred to at paragraph 41 of the present judgment, it cannot in any event result in the contested judgment being set aside.

95 As regards the second part of the eighth plea, concerning the determination of the geographical market, even if it were admissible to the extent that it does not merely repeat the argument put forward by ADP before the Court of First Instance and considered at paragraph 141 of the contested judgment, it is in any event unfounded.

96 As paragraphs 91 to 93 of the present judgment make clear, the relevant market is that for airport facilities in which, by definition, groundhandling services must be supplied. Thus the Court of First Instance properly found, at paragraph 141 of the contested judgment, that what was at issue was the terms, determined by

ADP, on which access is granted to the airport premises for the purpose of supplying groundhandling services, which can be provided only in the airport and with ADP's authorisation. It correctly inferred from this that the land and buildings in the Paris region cannot be taken into consideration since they do not in themselves enable those services to be provided.

97 Accordingly, the eighth plea in law must also be rejected.

The ninth plea in law, alleging infringement, in relation to ADP's dominant position, of Article 86 of the Treaty

98 ADP submits that the rights enjoyed over its publicly-owned property are equivalent to proprietary rights and that, contrary to the Court of First Instance's findings at paragraphs 149 and 151 of the contested judgment, it therefore no more has a 'monopoly' over that property than does any other owner over his property. The publicly-owned property in question does not constitute a market for the purposes of competition law.

99 According to ADP, the relevant market includes all the land and buildings in the Paris region capable of being used by groundhandlers in the same way as the land and buildings situated on ADP's publicly-owned property for the use of which the fees in issue constitute the consideration. It is clear that the applicant does not occupy a dominant position on the market thus defined, since ADP's publicly-owned property represents a very small part indeed of the land and buildings in question.

100 As for the licence, which ADP issued at the time for access to the restricted area of the airport perimeter, ADP claims that it was not in the least restricted to suppliers occupying the publicly-owned property as private persons and that the issue of such a licence did not *per se* give rise to a fee.

101 ADP claims that the Court of First Instance therefore infringed Article 86 of the Treaty by holding that ADP occupied a dominant position on the market.

102 The Commission contends that, in so far as that plea reproduces the third part of the fourth plea raised before the Court of First Instance, it must be declared clearly inadmissible.

103 However, since ADP indicates precisely the contested elements of the judgment which it is sought to have set aside, and also the legal arguments specifically advanced in support of that application, the plea is admissible.

104 As regards the substance of the plea, it must be observed at once that it is clear from the examination of the eighth plea in law that the Court of First Instance rightly held that the market for management services in respect of the facilities of the Paris airports constitutes the relevant market in the present case.

105 ADP's assertion that the powers it enjoys over its publicly-owned property are the same as those of any other owner over his property cannot alter the finding that ADP occupies a dominant position in the relevant market.

106 In the present case, ADP, as the owner of the airport facilities, is alone in being able to authorise access. As the Court of First Instance rightly found at paragraph 149 of the contested judgment, ADP indisputably enjoys a legal monopoly, under Article L. 251-2 of the French Civil Aviation Code, to manage the airports concerned and is alone able to grant authorisation to carry out groundhandling activities there and to determine the terms on which those activities are carried out.

107 In those circumstances, the Court of First Instance could properly conclude, at paragraph 150 of the contested judgment, that ADP wields economic power which enables it to prevent effective competition from being maintained in the relevant market by giving it the opportunity to act independently.

108 Consequently, the ninth plea in law must be rejected as unfounded.

The tenth plea in law, alleging infringement of Article 86 of the Treaty as regards the comparison between the fees paid by AFS and OAT

109 ADP claims, first, that by holding that the fees it charged AFS and OAT were discriminatory, the Court of First Instance seriously misrepresented the function of those fees.

110 Thus, in refusing to take into account the fixed component of the fee in comparing the situations of AFS and OAT, the Court of First Instance failed to have regard to the fact that the two components of the fee are inseparable because they constitute the single overall fee paid as consideration for the private occupation of publicly-owned land.

111 By that argument, ADP is repeating its contention that the two components of the fee in question are inseparable and constitute remuneration solely for the private occupation of publicly-owned land. That contention was rejected when the fifth plea was examined, so that the tenth plea, in that it alleges a misrepresentation of the function of the fees, must also be rejected.

112 Next, ADP claims that the Court of First Instance infringed Article 86 of the Treaty in holding that, in comparing the fees paid to ADP by AFS and OAT, account had to be taken of OAT's turnover in respect of self-handling. For the purpose of establishing whether competition law has been infringed, it is necessary to examine solely the question whether the fees paid to ADP by AFS and OAT for the only activity in respect of which those two companies were in competition, namely third-party services, are discriminatory or not. In so far as the fees paid by those two undertakings correspond to the same percentage, in practice, of the turnover from the activities in respect of which those undertakings are in competition, there is no discrimination. Accordingly, the considerations set out by the Court of First Instance concerning the possible impact of the rate of fee ('nil or very low') for self-handling on the market for third-party services are wholly irrelevant.

113 That argument cannot be accepted.

114 As noted in recital 84 of the grounds of the contested decision, under subparagraph (c) of the second paragraph of Article 86 of the Treaty, an undertaking holding a dominant position on the common market or a substantial part thereof may not 'apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

115 The Court of First Instance found, at paragraph 206 of the contested judgment, that the providers of third-party and self-handling services receive the same management services from ADP. From that it correctly inferred, at paragraphs 214 to 216 of the same judgment, that it is necessary to take account of both types of groundhandling services for the purpose of ascertaining whether the fees are discriminatory.

116 Contrary to ADP's contribution, in those circumstances the Court of First Instance rightly considered the effects of the self-handling rate of fee on the market for third-party services. Thus, at paragraph 215 of the contested judgment, the Court of First Instance pointed out that the fact that self-handling is subject to a nil or very low rate of fee means that those authorised to provide both categories of services are able to write off their investments and are able to offer better terms for services provided for third parties. As the Court of First Instance also pointed out, that nil or very low rate of fee may encourage certain airlines to take up self-handling rather than employ the services of a third party.

117 Finally, ADP claims that the Court of First Instance distorted the clear sense of the evidence placed before it, in so far as it failed to take account of the fact that AFS challenged, in its complaint, only the rate of fee for third-party services, which proves that, from AFS's point of view, only that rate is relevant as a matter of law in determining the existence of discrimination between competitors on the market for third-party services.

118 On that point, it need only be observed that, as the Commission pointed out, that institution may in any event, upon its own initiative, find that there is an infringement of Articles 85 and 86 of the Treaty (see, *inter alia*, Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 18).

119 Accordingly, the tenth plea in law must be rejected as unfounded.

120 It follows from all the foregoing considerations that the appeal must be dismissed.

Costs

121 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since ADP has been unsuccessful, and the Commission and AFS have applied for costs, ADP must be ordered to pay the costs of this appeal.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Aéroports de Paris to pay the costs.**

Gulmann Skouris Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 24 October 2002.

R. Grass J.-P. Puissochet

Registrar For the President of the Sixth Chamber