JUDGMENT OF THE COURT (Sixth Chamber)
29 March 2001 *

In Case C-163/99,

Portuguese Republic, represented by L. Fernandes, M.L. Duarte and F. Viegas, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by K. Leivo and M. Afonso and subsequently by M. Afonso and M. Erhart, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

APPLICATION for annulment of Commission Decision 1999/199/EC of 10 February 1999 relating to a proceeding pursuant to Article 90 of the Treaty (IV/35.703 — Portuguese airports) (OJ 1999 L 69, p. 31),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: J. Mischo,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 September 2000,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 May 1999, the Portuguese Republic brought an action under the first paragraph of Article 230 EC for the annulment of Commission Decision 1999/199/EC of 10 February 1999 relating to a proceeding pursuant to Article 90 of the Treaty (IV/35.703 — Portuguese airports) (OJ 1999 L 69, p. 31, hereinafter 'the contested decision').

Portuguese law

2 Article 18 of Decreto-Lei (Decree-Law) No 102/90 of 21 March 1990 (*Diário da República* I, Series A, No 67, 21 March 1990) provides that airport charges are to be determined, at airports administered by Aeroportos e Navegação Aérea — Empresa Publica (the public undertaking responsible for airports and air navigation, hereinafter 'ANA-EP'), by ministerial order. Article 18(3) states that the charges may differ according to the category, function and utilisation of the airport in question.

3 Decreto Regulamentar (Implementing Decree) No 38/91 of 29 July 1991 (*Diário da República* I, Series A, No 172, 29 July 1991) lays down the conditions governing landing charges. Article 4(1) thereof provides that a landing charge is to be paid for each landing and is to be calculated on the basis of the maximum take-off weight stated in the airworthiness certificate. Article 4(5) provides that domestic flights are to be allowed a reduction of 50%.

4 Every year the government issues an order updating the charges. Under a system of discounts introduced by Portaria (Implementing Order) No 352/98 of 23 June 1998 (*Diário da República* I, Series B, No 142, 23 June 1998), which was adopted pursuant to Article 3 of Decree-Law No 102/90, a 7.2% discount is allowed at Lisbon Airport (18.4% at other airports) after 50 landings each month. After 100 and 150 landings discounts of 14.6% and 22.5% respectively are allowed at Lisbon Airport (24.4% and 31.4% at other airports). A discount of 32.7% is allowed after 200 landings (40.6% at other airports).

5 ANA-EP is a public undertaking responsible for administering the three mainland airports (Lisbon, Faro and Oporto), the four airports in the Azores, aerodromes and air traffic control services. The airports of the Madeiran archipelago are administered by another public undertaking.

6 Article 3(1) of Decree-Law No 246/79 of 25 July 1979 (*Diário da República* I, Series A, No 170, 25 July 1979) creating ANA-EP makes that body responsible for operating and developing civil aviation support services on a public-service basis, as a commercial undertaking with responsibility for directing, guiding and controlling air traffic movements, and providing for the departure and arrival of aircraft, the boarding, disembarkation and transport of passengers, and the loading, unloading and transport of freight and mail.

Background to the action and the contested decision

7 By letter of 2 December 1996, the Commission informed the Portuguese Republic that it had begun an investigation into the way in which discounts were allowed

on landing charges at the airports of the Member States. It asked the Portuguese authorities to send it all the information available on the Portuguese legislation on landing charges so that it could determine whether the discounts were compatible with the Community rules on competition.

8 Having acquainted itself with the information supplied by the Portuguese authorities, the Commission warned them, in a letter dated 28 April 1997, that it considered that the system of discounts on landing charges at Portuguese airports administered by ANA-EP was discriminatory. The Commission requested the Portuguese Government to inform it of the measures it intended to take in this connection and to submit its observations. The contents of the letter were communicated to ANA-EP and to the Portuguese airlines TAP and Portugalia so they could also submit their observations.

9 In its reply dated 3 October 1997, the Portuguese Republic asserted, first, that the differentiation of the charges according to the origin of the flight was justified by the fact that some domestic flights served island airports, for which there was no alternative to air transport, and that the other domestic flights involved very short distances and low fares. Secondly, the current system of landing charges was designed to meet overriding needs of economic and social cohesion. Lastly, for international flights the Portuguese airports were in competition with airports at Madrid and Barcelona (Spain), which employed the same type of charging mechanism. The current system was also intended to achieve economies of scale as a result of more intensive use of Portuguese airports and to promote Portugal as a tourist destination.

10 In its reply to the Commission, ANA-EP contended that the system of charges in question was justified by the need to apply a pricing policy similar to those in

operation at Madrid and Barcelona airports, and the desire to reduce operating costs for the most frequent and regular users of the airports it administered.

11 Following a further exchange of letters between the Portuguese Republic and the Commission, the Commission adopted the contested decision, in which it made essentially the following points:

— ANA-EP is a public undertaking within the meaning of Article 90(1) of the EC Treaty (now Article 86(1) EC), which enjoys the exclusive right to administer the airports of Lisbon, Oporto and Faro and the four airports in the Azores;

— ANA-EP's pricing policy is based on legislative and regulatory provisions which constitute a State measure within the meaning of Article 90(1) of the Treaty;

— the relevant markets are those in services linked to access to airport facilities at each of the seven airports administered by ANA-EP;

— as the great majority of the traffic at the three mainland airports (Lisbon, Oporto and Faro) is between Portugal and the other Member States, the charging system in question affects trade between Member States; however,

this is not the case as regards the four airports in the Azores, where traffic is either entirely domestic or from third countries;

— the three mainland airports have a considerable volume of traffic and cover the whole of mainland Portugal, so that, taken together, the three airports which operate intra-Community services can be regarded as a substantial part of the common market;

— since ANA-EP holds an exclusive right in respect of each airport it administers it occupies a dominant position in the market for aircraft landing and take-off services, for which a charge is levied;

— the system of landing charges in question has the effect of applying dissimilar conditions to airlines for equivalent operations, thereby placing them at a competitive disadvantage;

— on the one hand, the system of discounts based on landing frequency gives the Portuguese companies TAP and Portugalia an average discount of 30% and 22% respectively on all their flights, whilst that rate varies between 1% and 8% for companies of other Member States. There is no objective justification for this difference in treatment, since aircraft require the same landing and take-off services regardless of the airline to which they belong and how many aircraft belong to the same company. Moreover, neither the fact that the competing airports at Madrid and Barcelona have themselves implemented this type of system, nor the objective of encouraging more intensive use of

facilities and promoting tourism in Portugal can justify discriminatory discounts;

— on the other hand, the 50% reduction enjoyed by domestic flights places airlines operating intra-Community services at a disadvantage which cannot be justified either by the objective of providing support for the flights between the Azores and the mainland or by the short distance of domestic flights. First, the contested decision does not apply to flights in or out of the Azores in any case. Second, the charge is calculated on the basis of the weight of the aircraft rather than the distance, although short-haul international flights do not enjoy the reduction in question;

— for an undertaking occupying a dominant position like ANA-EP to apply the abovementioned conditions with regard to its trading partners constitutes abuse of a dominant position within the meaning of subparagraph (c) of the second paragraph of Article 86 of the EC Treaty (now subparagraph (c) of the second paragraph of Article 82 EC);

— the derogation provided for in Article 90(2) of the Treaty, which was not in any case invoked by the Portuguese authorities, does not apply;

— since the charging system in question is imposed on ANA-EP by a State measure, that measure, as applied in the mainland Portuguese airports, constitutes an infringement of Article 90(1) of the Treaty read in conjunction with Article 86.

12 The Commission therefore decided that the system of discounts on landing charges differentiated according to the origin of the flight, provided for at the airports of Lisbon, Oporto and Faro by Decree-Law No 102/90, Implementing Decree No 8/91 and Implementing Order No 352/98, constituted a measure incompatible with Article 90(1) of the Treaty read in conjunction with Article 86 (Article 1 of the contested decision). The Portuguese Republic was directed to terminate the infringement and inform the Commission within two months of the date of notification of the contested decision of the measures it had taken to that end (Article 2 of the contested decision).

13 On 26 February 1999 the Commission brought an action against the Portuguese Republic before the Court of Justice concerning two other airport taxes, the passenger service tax and the security tax, which are higher for international flights than for domestic flights. The Commission considers that the difference between the two rates infringes the provisions of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community airlines to intra-Community air routes (OJ 1992 L 240, p. 8), and Article 59 of the EC Treaty (now, after amendment, Article 49 EC). That case was registered at the Court Registry as Case C-70/99.

Pleas in law relied on by the Portuguese Republic

14 The Portuguese Republic relies on four pleas in support of its application for annulment. The first is that the contested decision is vitiated by the Commission's failure to provide reasons, inasmuch as it does not state why it resorted to its powers under Article 90(3) of the Treaty instead of instituting proceedings for failure to act. The second is that the contested decision infringes the principle of proportionality in that the Commission, which had several courses of action open to it, opted for the one which was the least appropriate and the most onerous. The third is that the Commission committed an abuse of process by taking action against the Portuguese Republic on the basis of Article 90(3) of the Treaty rather

than bringing proceedings for failure to act. The fourth is that the requirements for the existence of a breach of Article 90(1) read in conjunction with Article 86 of the Treaty are not met. The Portuguese system of landing charges does not discriminate on the ground of nationality, nor does it constitute abuse of a dominant position.

15 It is necessary first of all to consider the pleas alleging infringement of the principle of proportionality and abuse of process before considering, if appropriate, the allegation that the contested decision does not contain adequate reasons and the final plea submitted by the Portuguese Republic.

Infringement of the principle of proportionality

16 The Portuguese Republic contends that the Commission infringed the principle of proportionality laid down in the third paragraph of Article 3b of the EC Treaty (now the third paragraph of Article 5 EC) by choosing from among the courses of action open to it that which was the least appropriate and the most onerous. Since the majority of Member States differentiate between domestic and international flights when calculating their airport charges, the Commission should encourage the Council to adopt Proposal for a Council Directive 97/C 257/02 of 20 June 1997 on airport charges (OJ 1997 C 257, p. 2), based on Article 84(2) of the EC Treaty (now, after amendment, Article 80(2) EC). A directive of that kind is the only instrument that could have brought about the necessary simultaneous harmonisation of the relevant national laws.

17 If the Court considers that the Commission was entitled to have recourse to Article 90(3) of the Treaty, the Portuguese Republic submits in the alternative that the Commission should, for the same reasons, have chosen a directive as the appropriate instrument.

18 The Commission for its part notes that the Court of Justice has held that under Article 90(3) of the Treaty the Commission has the power to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565). The exercise of that power and the conditions for its use lie within the Commission's exclusive discretion.

19 It should be observed that Article 90(3) of the Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 90(1) and expressly empowers it to take action for that purpose by way of directives and decisions. The Commission is thus empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (see *Netherlands and Others* v *Commission*, cited above, paragraphs 25 and 28, and Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, paragraph 23).

20 It is, moreover apparent from the wording of Article 90(3) and from the scheme of Article 90 as a whole that the Commission enjoys a wide discretion in the matters covered by paragraphs (1) and (3) as regards both the action which it considers necessary to take and the means appropriate for that purpose (*Netherlands and Others* v *Commission*, paragraph 27, and *Bundesverband der Bilanzbuchhalter*, paragraph 27).

21 That power of the Commission is in no way affected by the fact that in this case the Council could have adopted a directive on airport charges under Article 84(2) of the Treaty.

22 In the first place, the Portuguese Republic's argument that a directive of this type was the only way to bring about the simultaneous harmonisation of national systems of airport charges similar to the Portuguese system is immaterial. The effect of that argument is merely to deny that that Member State has an obligation to amend its system of landing charges to bring it into conformity with the Treaty whilst systems of a similar type remain in force in other Member States. It is settled law, however, that a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaty. In the Community legal order established by the Treaty, the implementation of Community law by the Member States cannot be made subject to a condition of reciprocity. Articles 226 EC and 227 EC provide the appropriate remedies in such cases (see Case C-38/89 *Blanguernon* [1990] ECR I-83, paragraph 7).

23 In the second place, the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission (Joined Cases 188/80 to 190/80 *France and Others* v *Commission* [1982] ECR 2545, paragraph 14, and Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 26).

24 As for the Portuguese Republic's alternative argument to the effect that the Commission should have adopted a directive under Article 90(3) rather than a decision, it must be rejected from the outset for the reasons stated in paragraph 22 of this judgment.

25 It should also be noted that in *Netherlands* v *Commission*, cited above, the Court of Justice drew a distinction between the powers the Commission may exercise by means of directives and those it may exercise by means of decisions under Article 90(3).

26 With regard to directives, the Court noted that in Case C-202/88 *France* v *Commission*, cited above, it held that the Commission was empowered to specify in general terms the obligations arising for Member States under the Treaty with regard to the undertakings referred to in Article 90(1) (*Netherlands and Others* v *Commission*, paragraph 26).

27 With regard to the powers which Article 90(3) authorises the Commission to exercise by means of decisions, the Court of Justice also held that they differ from those which it may exercise by means of directives. A decision is adopted in respect of a specific situation in one or more Member States and necessarily involves an appreciation of that situation in the light of Community law; it specifies the consequences arising for the Member State concerned, regard being had to the requirements which the performance of that particular task assigned to an undertaking imposes upon it if it is entrusted with the operation of services of general economic interest (*Netherlands and Others* v *Commission*, paragraph 27).

28 It is clear from the foregoing that the choice offered by Article 90(3) of the Treaty between a directive and a decision is not determined, as the Portuguese Republic contends, by the number of Member States which may be concerned. The choice depends on whether the Commission's objective is to specify in general terms the obligations arising under the Treaty, or to assess a specific situation in one or more Member States in the light of Community law and determine the consequences arising for the Member State or States concerned.

29 It is common ground in this case that the contested decision was meant to indicate that the particular system of discounts on landing charges at some airports in Portugal, and the differentiation of those charges according to the origin of the flight, was incompatible with the Treaty and that the Portuguese Republic was to put an end to that infringement. The Commission cannot therefore be criticised for choosing to adopt a decision.

30 The Portuguese Republic's plea alleging infringement of the principle of proportionality must therefore be rejected.

Abuse of process

31 The Portuguese Republic contends that the Commission committed an abuse of process by taking action against it on the basis of Article 90(3) of the Treaty instead of instituting proceedings for failure to act. Admittedly, the Court of Justice has acknowledged that the Commission has power under Article 90(3) of the Treaty to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law. However, the Commission is required to have recourse to proceedings for failure to act where, as in this case, the alleged infringement is common to more than one Member State.

32 According to the Commission, however, this last point cannot deprive it of the power which the Court of Justice has recognised that it has to assess, by means of a decision adopted under Article 90(3) of the Treaty, whether measures which States enact or maintain in force as regards the undertakings referred to in Article 90(1) are in compliance with that Treaty.

33 As was noted in paragraph 19 of this judgment, the Commission has power under Article 90(3) of the Treaty to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law.

34 Consequently, the Commission does not commit an abuse of process where it assesses, by way of a decision, the compatibility with the Treaty of measures enacted or maintained in force by States as regards the undertakings referred to in Article 90(1) (see *Netherlands and Others* v *Commission*, paragraphs 34 to 37).

35 The Portuguese Republic's plea alleging abuse of process must therefore be rejected.

Failure to state adequate reasons

36 The Portuguese Republic argues that the contested decision is vitiated by failure to state adequate reasons. The Commission should first and foremost have stated its reasons for acting in this case on the basis of Article 90(3) of the Treaty when, as regards the passenger service tax and the security tax, which like landing charges are also airport taxes, it opted for proceedings for failure to act. Secondly, it was incumbent on the Commission to explain why, in the contested decision, it considered the matter from the standpoint of the rules on competition and not from that of freedom to provide services, as would be the case in proceedings for failure to act. Similarly, the Commission was not entitled to disregard the situation at the airports of the other Member States. Lastly, since Article 90(3) of the Treaty provides that the Commission should address appropriate directives or decisions to Member States, as necessary, the Commission was required to justify the need for action on its part and its choice of instrument for so doing.

37 The Commission replies that when it has recourse to Article 90(3) of the Treaty it need only state the reasons for which it considers that the conditions laid down in Article 90(1) are met. It is not required to state reasons for either the need to

resort to that provision or the choice of instrument used, which lie entirely within its discretion.

38 It is settled case-law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable those concerned to ascertain the reasons for the measure and the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 65).

39 Consequently, where the Commission adopts a decision based on Article 90(3) of the Treaty it must make sufficiently clear why it considers that the State measure in question infringes the provisions of Article 90(1) and cannot enjoy (if such is the case) the benefit of any of the derogations under Article 90(2).

40 The Commission cannot, however, be required to state why it considered it necessary to adopt a decision of that kind when as regards other rules adopted by the same Member State it opted for proceedings for failure to act, thus adopting a different legal approach. Nor can the Commission be required to give details in its decision of the situation existing in other Member States and any action it may have taken against them. Moreover, no specific reasons need be given for the

choice of a decision as the appropriate instrument since, as the Court noted in paragraph 28 of this judgment, that choice is determined by the Commission's objective.

41 In this case, it is plain that the grounds stated for the contested decision show sufficiently clearly why the Commission considered that the system of discounts on landing charges at some of Portugal's airports and of varying those charges according to the origin of the flight constituted a measure which was incompatible with Article 90(1) read in conjunction with Article 86 of the Treaty. The Portuguese Republic does not, moreover, dispute the existence of that statement of reasons.

42 Consequently, the Portuguese Government's plea alleging failure to state adequate reasons must be rejected.

Absence of the conditions required in order to establish the existence of an infringement of the provisions of Article 90(1) read in conjunction with Article 86 of the Treaty

Absence of discrimination on grounds of nationality

43 The Portuguese Republic contends that Article 90(1) of the Treaty refers more particularly to Article 6 of the EC Treaty (now, after amendment, Article 12 EC), concerning the prohibition of discrimination on grounds of nationality, and to the rules on competition laid down in Chapter 1 of Title V in Part Three of the Treaty. It denies that the system of discounts at issue infringes the principle that there must be no discrimination on grounds of nationality. The distinction drawn by Portuguese law between domestic and international flights for the purpose of

calculating landing charges is not dependent on the nationality or origin of the aircraft. First, under Article 3(1) of Regulation No 2408/92, air carriers of other Member States are permitted to operate on Portuguese national routes and thus to enjoy the favourable arrangements applying to domestic flights. Second, the system of discounts based on the number of landings does not discriminate on grounds of nationality either.

44 The Commission replies that it has never claimed that the contested system of discounts creates direct discrimination based on the nationality of the aircraft. It notes, however, that application of Article 90(1) of the Treaty is not limited to cases where the State measure at issue infringes Article 6 of the Treaty. Article 90(1) also refers expressly to Article 86 of the Treaty, which does not make any reference to the existence of discrimination on grounds of nationality, since the discriminatory provisions referred to in subparagraph (c) of the second paragraph of Article 86 cover all the differences in treatment that may be imposed, without objective justification, by an undertaking in a dominant position. However, the graduated discounts and the reduction for domestic flights in practice favour the national airlines TAP and Portugalia.

45 It should be noted that the Portuguese Republic does not dispute the points made by the Commission in paragraphs 11 to 23 of the grounds of the contested decision to the effect that ANA-EP is the holder of an exclusive right, within the meaning of Article 90(1) of the Treaty, in respect of each of the airports it administers and therefore occupies a dominant position in the market for aircraft landing and take-off services.

46 It should also be noted that subparagraph (c) of the second paragraph of Article 86 of the Treaty prohibits any discrimination on the part of an undertaking in a dominant position which consists in the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, irrespective of whether such discrimination is linked to nationality.

47 Consequently, since the measures in question are capable of falling within the combined provisions of Article 90(1) and Article 86 of the Treaty, the Portuguese Republic's argument that the discounts do not discriminate on grounds of nationality (it should be noted that the Commission did not in any event state such discrimination as a ground for the contested decision) does not make it possible, even if that argument is proved correct, to rule on the validity of that decision at this particular stage. It is necessary, however, to consider whether the various discounts at issue lead to the application of dissimilar conditions to equivalent transactions with other trading parties within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty.

The absence of abuse of a dominant position with regard to discounts granted on the basis of the number of landings

48 The Portuguese Republic contends that its system of discounts linked to the number of landings does not constitute abuse of a dominant position. First, allowing quantity discounts is a commercial practice which undertakings in a dominant position are perfectly entitled to employ. Second, in order to recoup the heavy investment made by airports, it is in their interest to encourage airlines to use their facilities to the maximum, in particular for refuelling stops. Last, the discounts are open to all Community carriers and no airline of any other Member State has complained to the Commission about it.

49 The Commission accepts that an undertaking in a dominant position is entitled to grant quantity discounts. Such discounts must, however, be justified on objective grounds, that is to say, they should enable the undertaking in question to make economies of scale. The Portuguese authorities have not mentioned any economy of scale in this case. It is common ground that aircraft require the same landing and take-off services, regardless of how many aircraft belong to the same company.

50 An undertaking occupying a dominant position is entitled to offer its customers quantity discounts linked solely to the volume of purchases made from it (see *inter alia* Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 71). However, the rules for calculating such discounts must not result in the application of dissimilar conditions to equivalent transactions with other trading parties within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty.

51 In that connection, it should be noted that it is of the very essence of a system of quantity discounts that larger purchasers of a product or users of a service enjoy lower average unit prices or — which amounts to the same — higher average reductions than those offered to smaller purchasers of that product or users of that service. It should also be noted that even where there is a linear progression in quantity discounts up to a maximum discount, initially the average discount rises (or the average price falls) mathematically in a proportion greater than the increase in purchases and subsequently in a proportion smaller than the increase in purchases, before tending to stabilise at or near the maximum discount rate. The mere fact that the result of quantity discounts is that some customers enjoy in respect of specific quantities a proportionally higher average reduction than others in relation to the difference in their respective volumes of purchase is inherent in this type of system, but it cannot be inferred from that alone that the system is discriminatory.

52 None the less, where as a result of the thresholds of the various discount bands, and the levels of discount offered, discounts (or additional discounts) are enjoyed by only some trading parties, giving them an economic advantage which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors, a system of quantity discounts leads to the application of dissimilar conditions to equivalent transactions.

53 In the absence of any objective justification, having a high threshold in the system which can only be met by a few particularly large partners of the undertaking

occupying a dominant position, or the absence of linear progression in the increase of the quantity discounts, may constitute evidence of such discriminatory treatment.

54 In this case, the Commission has established that the highest discount rate (32.7% at Lisbon Airport and 40.6% at other airports) was enjoyed only by the airlines TAP and Portugalia. The figures given by the Commission in the contested decision also show that the increase in the discount rate is appreciably greater for the highest band than for the lower bands (except for the lowest band for all airports apart from Lisbon Airport), which, in the absence of any specific objective justification, leads to the conclusion that the discount for the highest band is excessive in comparison with the discounts for the lower bands.

55 It is apparent that, in order to justify the system in question, the Portuguese Republic has submitted only general arguments relating to the advantage for airports of operating a system of quantity discounts on landing charges and has done no more than claim that the system was open to all airlines.

56 In a situation where, as the Commission has observed, the system of discounts appears to favour certain airlines, in this case *de facto* the national airlines, and where the airports concerned are likely to enjoy a natural monopoly for a very large portion of their activities, such general arguments are insufficient to provide economic reasons to explain specifically the rates chosen for the various bands.

57 In such circumstances the conclusion must be that the system in question discriminates in favour of TAP and Portugalia.

58 The Portuguese Republic maintains, however, that the contested decision infringes the principle of neutrality as regards property ownership in the Member States contained in Article 222 of the EC Treaty (now Article 295 EC). In its view, the contested decision precludes undertakings which operate franchises or enjoy exclusive rights, or are responsible for running public services, from employing the sales strategies normally used by other undertakings.

59 The Commission replies, quite correctly, that the provisions of Article 86 of the Treaty apply to all undertakings occupying a dominant position, irrespective of whether they belong to public or private entities, and that in this case it has in no way infringed the principle of neutrality as regards property ownership in the Member States by applying those provisions in respect of ANA-EP.

60 In the light of the foregoing, the plea concerning the absence of abuse of a dominant position with regard to discounts granted on the basis of the number of landings must be rejected.

The 50% reduction for domestic flights as opposed to international flights

61 The Portuguese Republic challenges the contested decision in this respect only in its arguments seeking to demonstrate the absence of discrimination on the ground of nationality. To that end, it submits that the reduction for domestic flights is allowed irrespective of the nationality or origin of the aircraft and that, according to Article 3 of Regulation No 2408/92, the airlines of other Member States are entitled to operate on Portuguese national routes and thus enjoy the favourable arrangements applying to domestic flights.

62 As noted in paragraph 46 of this judgment, it is not necessary for a measure to involve discrimination on grounds of nationality for it to be caught by the prohibition on abuse of a dominant position contained in Article 86 of the Treaty, in particular where it leads to discrimination between trading partners.

63 The Commission referred in the contested decision to Case C-18/93 *Corsica Ferries* [1994] ECR I-1783 ('*Corsica Ferries II*'), in which the Court held that the provisions of Article 90(1) and Article 86 of the Treaty prohibit a national authority from inducing an undertaking which has been granted the exclusive right to provide compulsory piloting services in a substantial part of the common market, by approving the tariffs adopted by it, to apply to maritime transport undertakings tariffs which differ depending on whether they operate transport services between Member States or between ports situated on national territory, in so far as trade between Member States is affected. The Commission transposed that assessment to airports, concluding that the direct effect of the system of reductions for domestic flights at issue is to place companies which operate intra-Community flights at a disadvantage by artificially modifying undertakings' costs depending on whether they operate on domestic or international routes.

64 The Commission also referred to the Opinion in *Corsica Ferries II*, cited above, of Advocate General Van Gerven, who stated that since piloting services were identical whether vessels came from another Member State or from a domestic port, the application of different tariffs for the same service meant that dissimilar conditions were being applied to equivalent transactions with other trading parties, which is prohibited under Article 86 of the Treaty since it places the maritime transport undertakings concerned at a competitive disadvantage.

65 In its application the Portuguese Republic did not deny that that approach could be transposed to the reduction of landing charges specifically for domestic flights

and not international flights; it merely put forward arguments alleging the absence of discrimination on grounds of nationality in order to dispute the existence of discrimination.

66 In that connection, the Court of Justice has expressly held that where national legislation, though applicable without discrimination to all vessels whether used by national providers of services or by those from other Member States, operates a distinction according to whether those vessels are engaged in internal transport or in intra-Community transport, thus securing a special advantage for the domestic market and the internal transport services of the Member State in question, that legislation must be deemed to constitute a restriction on the freedom to provide maritime transport services (Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 21). There is no disputing that a measure of this type also confers an advantage on carriers who operate more than others on domestic rather than international routes and so leads to dissimilar treatment being applied to equivalent transactions, thereby affecting free competition. In this case, the discrimination results from the application of a different tariff system for the same number of landings of aircraft of the same type.

67 However, the Portuguese Republic has put forward arguments which in its view justify treating airlines differently in this way.

68 The arguments to justify the reduction for links with airports in the Azores should be examined as regards the charges paid on movements at the airports of Lisbon, Oporto or Faro in connection with flights to and from the Azores, since, although the operative part of the contested decision does not concern charges applied at airports in the Azores, it does concern without distinction all discounts on

landing charges and the differentiation of those charges according to the origin of the flight applying at Lisbon, Oporto and Faro.

69 In that connection, the Portuguese Government has argued both during the administrative procedure and in the application that for political, social and economic reasons the cost of air links with the Azores should be adjusted to take account in particular of the absence of an alternative to air transport because they are islands.

70 In paragraphs 20 and 36 of the grounds of the contested decision the Commission stated that, since it excluded the airports in the Azores from the scope of its decision due to the absence in its view of any sufficiently appreciable effect on trade between Member States of the charges applied there, there was no need to formulate a response to that argument.

71 It appears, however, that the Portuguese Government's argument applies both to charges levied at airports in the Azores and to those that may be charged on flights to or from the Azores at the airports of Lisbon, Oporto or Faro.

72 The Commission was therefore wrong to maintain that there was no need to reply to the Portuguese Government's argument concerning the discounts in question. That error cannot, however, affect the legality of the contested decision on that point.

73 As can be seen *inter alia* from paragraph 66 of this judgment and as the Commission stated in the contested decision, the application of different tariffs

for the same number of landings constitutes in itself a type of discrimination referred to in subparagraph (c) of the second paragraph of Article 86 of the Treaty. Consequently, since all the conditions mentioned in Article 86 are met, any justification there may be for applying such a system can only be made under Article 90(2) of the Treaty, which provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them and provided any derogation from the rules of the Treaty does not affect the development of trade to such an extent as to be contrary to the interest of the Community.

74 However, in this case, as the Commission noted in paragraph 41 of the grounds of the contested decision, the Portuguese Republic has not relied on the exception provided for in Article 90(2) of the Treaty.

75 Consequently, the contested decision must be upheld in so far as it relates to the reductions in landing charges linked to the domestic nature of the flights applying at the airports of Lisbon, Oporto and Faro on flights to or from the Azores.

76 As regards domestic links other than those with the Azores, the Portuguese Republic contends that the reductions linked to the domestic nature of the flights are justified by the short distance involved and the need to avoid burdening such flights with the proportionally over-high costs connected with the landing charges, which would make their total cost excessive in relation to the distance. The Portuguese Republic refers in that connection to the objective of economic and social cohesion laid down in Article 3(j) of the EC Treaty (now, after amendment, Article 3(k) EC).

77 The Commission replies that if the distance factor were to be taken into account international flights of the same distance as domestic flights, such as those between Portugal and Seville, Madrid and Malaga or Santiago de Compostella, should enjoy the same reductions, and it points out that at any event the landing charges are calculated on the basis of the weight of the aircraft and not the distance.

78 It is not necessary to go further into that line of argument, it being sufficient to note that, on the same grounds as those set out in paragraphs 73 and 74 of this judgment, the contested decision should also be upheld in so far as it relates to reductions on landing charges linked to the domestic nature of the flights applying to the airports of Lisbon, Oporto and Faro and concerning flights other than those to and from the Azores.

79 It follows from all the foregoing considerations that the action must be dismissed.

Costs

80 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Portuguese Republic to pay the costs.**

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 29 March 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber