JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
12 December 2000 *

In Case T-128/98,

Aéroports de Paris, established in Paris (France), represented by H. Calvet, of the Paris Bar, with an address for service in Luxembourg at the Chambers of A. May, 398 Route d'Esch,

applicant,

v

Commission of the European Communities, represented initially by J.F. Crespo Carrillo and G. Charrier, of its Legal Service, and subsequently by L. Pignataro, of its Legal Service, acting as Agents, and B. Geneste, of the Hauts-de-Seine Bar, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

Alpha Flight Services, established in Paris, represented by L. Marville and A. Denantes, of the Paris Bar, and V. De Meester, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of V. De Meester, 5 Place du Théâtre,

intervener,

APPLICATION for annulment of the Commission Decision 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 COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 16 May 2000,

gives the following

Judgment

Facts of the dispute

1 The applicant, Aéroports de Paris (hereinafter '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 [...]% [1] 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;

1 Confidential information omitted.

(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 its decision 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, hereinafter '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.'

Procedure

18 By application lodged at the Registry of the Court of First Instance on 7 August 1998, ADP brought the present action for annulment of the contested decision.

On the same day, ADP requested the Court, pursuant to Article 185 of the EC Treaty (now Article 242 EC), to order that application of Article 2 of the contested decision be suspended. On 21 September 1998, ADP withdrew that request.

19 By order of 17 December 1998, the President of the Third Chamber granted AFS leave to intervene in support of the form of order sought by the defendant, and granted a request for confidential treatment *vis-à-vis* AFS of certain information contained in the application and the defence. By order of 1 December 1999, the confidential treatment *vis-à-vis* AFS was also ordered in respect of certain information contained in the reply and the rejoinder.

20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. As measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure, the Court requested the applicant to reply to certain written questions. The applicant complied with that request within the prescribed period.

21 On 15 May 2000, the applicant sent the Registry of the Court of First Instance, by fax, a judgment of the Tribunal des Conflits (Jurisdiction Court) of the French Republic of 18 October 1999.

22 The parties presented oral argument and replied to the Court's questions at the hearing on 16 May 2000. At the hearing, the applicant lodged a copy of the abovementioned judgment of the Tribunal des Conflits.

Forms of order sought by the parties

23 ADP claims that the Court should:

— annul the contested decision finding that it infringed Article 86 of the Treaty and ordering that it put an end to the infringement within two months of the date of the decision;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the action;

— order ADP to pay the costs.

25 AFS, intervener, contends that the Court should:

— dismiss the action;

— order ADP to pay the costs.

Law

26 In support of its action, ADP relies on seven pleas in law alleging, first, a procedural irregularity, second, breach of the rights of the defence, third, breach of 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.

1. *First plea, alleging a procedural irregularity*

Arguments of the parties

27 ADP maintains that the application of Regulation No 17 is unlawful as the present case comes under the air transport sector, which was removed from its scope by Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17 (Official Journal, English Special Edition 1962, p. 291). Regulation No 141 has been replaced by three sectoral regulations, including 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).

28 The applicant observes, first, that the Commission takes the view in the contested decision that 'the... fees [paid by the providers of groundhandling services] affect competition between... flights' (recital 128) and that '[g]roundhandling services at Orly and [Roissy-CDG] are essential to the smooth running of air transport services' (recital 64).

29 The applicant points out, second, that in the proposal for a directive on access to the groundhandling market at Community airports which it presented on 10 April 1995, the Commission had stated that 'groundhandling services form an integral part of the air transport system'. Furthermore, Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36) was adopted within the framework of the transport policy on the basis of Article 84(2) of the EC Treaty (now, after amendment, Article 80(2) EC), and recital 4 to that directive states that 'groundhandling services are essential to the proper functioning of air transport'.

30 The present case is therefore exclusively concerned with activities which form an integral part of the air transport sector and therefore necessarily fall within the scope of Regulation No 3975/87. In that regard, the applicant observes that the Court of Justice has held that 'the whole of the transport sector... was removed from the scope of... [Regulation No 17] by Regulation No 141, which was subsequently replaced by the three sectoral regulations on land, sea and air transport' (Case C-264/95 P *Commission* v *UIC* [1997] ECR I-1287, paragraph 44), the air transport sector being subject to Regulation No 3975/87.

31 Furthermore, the applicant alleges, the wrongful application of the provisions of Regulation No 17 constitutes a substantive procedural defect, since it had the

effect that the mandatory consultation by the Commission of a committee composed of officials competent in the sphere of air transport, provided for in Article 8 of Regulation No 3975/87, did not take place.

32 In the alternative, the applicant maintains that, should Regulation No 3975/87 not be applicable, the case would, by virtue of Regulation No 141, still be outside the scope of Regulation No 17 and the Commission's powers would be circumscribed by Article 89 of the EC Treaty (now, after amendment, Article 85 EC), which provides that, on application by a Member State or on its own initiative, the Commission is to investigate cases of suspected infringement and propose appropriate measures to bring such infringement to an end. The contested decision is therefore affected by a substantive defect in that the Commission investigated a complaint by a private person and required ADP to bring the alleged infringement to an end within two months without first proposing 'appropriate measures to bring it to an end', when Article 89 of the Treaty requires it to make such a proposal.

33 The Commission, supported by the intervener, maintains that it was correct to apply Regulation No 17.

Findings of the Court

34 The applicant's main contention is that the Commission should have applied Regulation No 3975/87, not Regulation No 17.

35 Article 1 of Regulation No 141 provides that 'Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector 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; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the Treaty, within the transport market'.

36 According to the third recital in the preamble to Regulation No 141, 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.

37 Since Regulation No 141 constitutes a derogation from Regulation No 17, its scope must be given a restrictive interpretation. In *Commission* v *UIC*, cited above (paragraphs 28 to 31), the Court of Justice none the less held that that factor could not justify a restrictive construction 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), on the ground that the Commission had not established continuity of intention on the part of the legislature between Regulation No 141 and Regulation No 1017/68.

38 It is therefore necessary to consider whether the intention expressed by the legislature in Regulation No 141 to exempt from the application of Regulation No 17 only activities directly relating to the provision of transport services in the strict sense was still present in Regulation No 3975/87 or whether, on the other hand, the legislature intended that activities associated or connected with the air transport sector should also be subject to the exceptional arrangements provided for in Regulation No 3975/87.

39 Regulation No 141 does not provide that the inapplicability of Regulation No 17 to the air and marine transport sectors, pursuant to Article 1 of that regulation, is to be limited until a given date. Consequently, unlike the situation as regards

transport by rail, road and inland waterway, in respect of which, according to Article 3 of Regulation No 141, as amended, Regulation No 17 was to be inapplicable only until 30 June 1968, that is to say, until a date prior to the adoption of Regulation No 1017/68, the inapplicability of Regulation No 17 pursuant to Article 1 of Regulation No 141 was, as regards air transport, still in force when Regulation No 3975/87 was adopted in December 1987.

40 Next, 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 was adopted on the same date as Regulation No 3975/87, 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'.

41 It is also clear from the title of 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', unlike that of Regulation No 1017/68 'applying rules of competition to transport by rail, road and inland waterway', that there must be a direct link between an activity and air transport if that activity is to fall within the scope of Regulation No 3975/87.

42 Last, Article 1(2) of Regulation No 3975/87, as amended by Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ 1992 L 240, p. 18), provides: 'This Regulation shall apply only to international air transport between Community airports'. Likewise, Article 4a of Regulation No 3975/87, inserted by Council Regulation (EEC) No 1284/91 of 14 May 1991 amending Regulation No 3975/87 (OJ 1991 L 122, p. 2), applies only to practices susceptible of 'directly jeopardising the existence of an air service'.

43 It follows from the foregoing factors that there is a continuity of intention on the part of the legislature, that Regulation No 3975/87, which is specific in nature, applies only to activities directly relating to the supply of air transport services, and that activities that do not directly relate to such services fall within the scope of Regulation No 17, which is general in nature.

44 In the present case, it is common ground that the applicant is not in the business of air transport and, in that sense, is not an 'undertaking in the air transport sector'. Accordingly, Regulation No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector does not apply to the applicant.

45 It is likewise common ground that the applicant does not provide air transport services, whereas pursuant to Article 1(2) Regulation No 3975/87 is to apply 'only to international air transport between Community airports'.

46 Nor, last, does the applicant provide groundhandling services of the type referred to in the contested decision; it is situated in the market upstream of that activity, namely the market in airport management. The contested decision concerns the commercial fees charged by the applicant to suppliers of groundhandling services in return, *inter alia*, for making airport infrastructures and management services available to them. Those activities inherent in the management of the Paris airports have only an indirect link with air transport, since they constitute neither transport services nor even activities directly relating to the supply of air transport services.

47 It follows that Regulation No 3975/87 does not apply to airport management activities such as those provided by ADP and to which the contested decision applies.

48 None of the arguments put forward by the applicant is of such a kind as to call in question that finding.

49 As regards, first, the argument that in the contested decision, and in particular in recital 134 thereto, the Commission finds that the commercial fees affect competition between the suppliers of the handling services concerned and, indirectly, between airlines, it has been established above that Regulation No 3975/87 applies only to activities directly relating to air transport. It is therefore not the case that all the practices carried out on all the markets upstream of the market in air transport must be included within the scope of Regulation No 3975/87 merely because they might have certain indirect repercussions on the market in air transport. In the present case, the commercial fees constitute only one element of the costs borne by the groundhandlers, in the same way, for example, as staff costs or the costs of obtaining raw materials, just as the amount paid for their services forms only one element of the costs borne by air transporters.

50 As regards, second, the argument that in the proposal for a directive on access to the market in groundhandling in Community airports the Commission had stated that groundhandling services formed an integral part of the air transport system, it is sufficient to state, first, that that particular view was not expressed by the Council in Directive 96/67 and, second, that in any event the contested decision does not apply to groundhandling services but to the applicant's activities as manager of the Paris airports, which are carried out on a market upstream of those services.

51 It follows from the foregoing that the applicant's principal argument, that the Commission should have applied Regulation No 3975/87, is unfounded.

52 The applicant is incorrect to maintain that that approach is contrary to the position adopted by the Court of Justice in *Commission* v *UIC*. In that judgment, the Court of Justice held that Regulation No 1017/68 was applicable because the agreement in question had as its object or effect 'fixing transport rates or limiting or controlling the supply of transport', activities expressly referred to in Article 1 of Regulation No 1017/68. In the present case, on the other hand, the conduct on the part of ADP which is called in question in the contested decision relates solely to the management of the airport installations and the fixing of the conditions of access to those installations. Those activities do not involve the supply of air transport and therefore do not fall within the scope of Regulation No 3975/87, which, pursuant to Article 1(2), is to 'apply only to international air transport between Community airports'.

53 In the alternative, the applicant maintains that, even if Regulation No 3975/87 were not applicable to the present case, the activities referred to in the contested decision would, by virtue of Regulation No 141, be covered not by Regulation No 17 but by Article 89 of the Treaty.

54 That alternative argument must also be rejected.

55 First, in *Commission* v *UIC* (paragraph 44) the Court of Justice held that 'it was the whole of the transport sector which was removed from the scope of [Regulation No 17] by Regulation No 141, which was subsequently replaced by the three sectoral regulations' and, in particular, by Regulation No 3975/87 in the case of transport by air. Since, as regards the air transport sector, Regulation No 141 was replaced by Regulation No 3975/87, all the activities in the air transport sector not falling within the scope of Regulation No 3975/87 are necessarily covered by Regulation No 17, not Article 89 of the Treaty.

56 Second, even though 'the whole of the transport sector' was removed from the scope of Regulation No 17, Regulation No 141, it is clear, in particular, from the third recital of the preamble to Regulation No 141 that that regulation only stated that Regulation No 17 was inapplicable to activities directly relating to the provision of transport services. It has been held that the activities to which the contested decision applies do not directly relate to the provision of such services.

57 Third, even disregarding the requirement of a direct link with the provision of transport services set out in the third recital of the preamble to Regulation No 141, the statement that Regulation No 17 is not to apply to the transport sector, even on a broad interpretation, cannot in any event apply to the activities of ADP referred to in the contested decision, since those activities do not relate to air transport but to the definition of the conditions of access to activities situated upstream of the market in air transport.

58 It follows that the Commission was correct to apply Regulation No 17 and that the first plea in law must be rejected as unfounded.

2. *Second plea in law, alleging breach of the rights of the defence*

Arguments of the parties

59 ADP maintains that at the hearing on 16 April 1997 the Commission explained categorically that its statement of objections, particularly point 80 thereof, concerning the treatment of self-handling and handling for third parties, was to be understood in the sense that the fees applied to both types of handling did not have to be similar. However, it is clear from recitals 117 and 122 to the contested

decision and from the press release of 18 June 1998 that the Commission now considers that the rates should be the same. The formulation of the objections in the administrative procedure is therefore different from that in the contested decision, which constitutes a breach of the applicant's rights of defence.

60 The applicant emphasises that in its defence the Commission has not denied that in the contested decision it required that the fees be at the same rate. It points out in that regard that, on the contrary, the Commission stated in point 197 of its defence that 'by applying, for the same airport management services, different financial conditions to suppliers of groundhandling services depending on whether or not they were engaged in self-handling — the rates of commercial fees vary individually according to the suppliers of services [...] —, ADP is infringing Article 86 of the Treaty.'

61 The distinction suggested by the Commission in the course of the procedure before the Court between the 'same rates of fees' and the 'same application of the fees scheme' is an exercise in hair-splitting.

62 The defendant denies that there is any contradiction between the contested decision and the position which it expressed at the hearing on 16 April 1997.

Findings of the Court

63 First, according to the applicant, the contested decision is inconsistent not with the statement of objections but with the way in which the Commission interpreted the statement of objections at the hearing on 16 April 1997.

Consequently, that argument, even on the assumption that it is well founded, is not capable of demonstrating that there has been a breach of the rights of the defence of such a kind that the contested decision must be annulled. As the hearing took place after the applicant had replied to the statement of objections, it has had the opportunity to comment in writing on the objections upheld in the contested decision.

64 Second, the inconsistency alleged by the applicant does not exist.

65 Contrary to the applicant's contentions, neither the statement of objections nor the contested decision requires that the same fees be charged for self-handling and for handling for third parties.

66 Thus, the statement of objections states that 'ADP's fees and remuneration in respect of the control and organisation of handling or self-handling services must be shared in an equitable and non-discriminatory manner between the undertakings concerned' (point 75), that 'an unjustified difference between the percentages of commercial fees has a significant effect on competition between those supplying services to third parties' (point 76), that '[t]he absence of distortion between suppliers or users therefore means that a system of non-discriminatory commercial fees must be applied in the same way to all undertakings licensed to provide the same type of handling service at the same airport, including self-handling services' (point 80), that '[i]n the present case, ADP does not apply any system of commercial fees fixing in a predefined manner the rates of commercial fees on turnover', that '[d]epending on the suppliers of services or users concerned, those rates of fee thus vary... and ADP has put forward no objective reason to justify those differences in treatment' (point 82) and, last, that '[i]n the light of the foregoing considerations, the commercial fees applied by ADP for the abovementioned handling services appear to be discriminatory' (point 83). It is clear from those extracts that in the statement of objections the Commission does not require that the fees be the same, but only that they be non-discriminatory fees, since any differences in the conditions

granted to suppliers of services must be justified by objective and non-discriminatory reasons. The Commission thus leaves open the possibility of different fees, but observes that in the present case ADP has put forward no objective reason to justify the differences found.

67 Likewise, in Article 2 of the operative part of the contested decision, the Commission requires that ADP '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'. Clearly, therefore, the Commission requires in the contested decision not that the fees be the same but only that they be non-discriminatory.

68 The unequivocal nature of the operative part is not in any way affected by recitals 117 and 122 to the contested decision. First, neither in those recitals, on which the applicant relies, nor in any other provision of the contested decision did the Commission state that the fees must be 'the same'. Second, recitals 117 and 122 impose no obligation on ADP, but merely refer to the findings in relation to the low fees applied to self-handling activities and to the advantage which such low fees confer on those supplying such services. Third, in recital 120 to the contested decision the Commission observes, on the contrary, that limiting a handling licence to self-handling might entail financial disadvantages (difficulties in obtaining a return on investments) of such a kind as to justify, on the basis of objective and non-discriminatory considerations, a possible difference in the terms accorded. The Commission therefore considers that it is possible to charge different fees for self-handling and handling for third parties. Similarly, recital 121 to the contested decision states that, in the case of self-handling, the fee might be calculated on a basis other than turnover (number of passengers served or number of aircraft cleaned). Last, under the heading 'Conclusion concerning the commercial fees', recital 124 states that '[i]t is therefore necessary, in order to prevent distortion between suppliers and users, to introduce a system of non-discriminatory commercial fees for all undertakings licensed in an airport to supply a form of groundhandling service, including self-handling'.

69 The Commission thus accepts, both in the statement of objections and in the recitals to and the operative part of the contested decision, that the fees might be different, provided that that difference is justified by objective and non-discriminatory considerations.

70 The explanations which the Commission provided at the hearing on 16 April 1997 were therefore entirely consistent with the content of the statement of objections and also with the contested decision.

71 It follows that the plea must be rejected.

3. *Third plea, alleging breach of the obligation to state reasons*

Arguments of the parties

72 The applicant maintains that the contested decision does not satisfy the requirements as regards the statement of reasons, in so far as there is some doubt as to the nature and scope of the infringements, since the contested decision does not disclose whether or not the Commission requires that the fees for self-handling and handling for third parties be the same. Article 2 of the operative part of the contested decision, which orders that ADP apply a 'non-discriminatory' scheme of fees, assumes at least that the Commission has precisely defined the prohibited conduct. Although the Commission attempts to explain what, in the contested decision, the applicant must not do, at no point does it clearly and precisely state what it specifically requires.

73 The applicant also claims that the statement of reasons for the contested decision contains a number of other defects.

74 Thus, although the contested decision appears to concern all suppliers or users of handling or self-handling services, the Commission states in recital 5: 'The contractual relationships between ADP and other suppliers of groundhandling services, including some airlines providing their own handling services (self handling), were examined by the Commission in connection with the present case. The firms concerned are not involved in these proceedings, although they will be referred to below.' ADP contends that it is inconsistent to state that those undertakings are not concerned in the procedure when the finding of the infringement and the order to put an end to it concern them.

75 Similarly, according to the applicant, the Commission states first of all that it is not required to decide on the level of State fee and then contradicts itself by stating in recital 127 to the contested decision that it 'is not opposed... to the incorporation of a State component in the overall fee imposed [...]'.

76 Last, by referring to the suppliers of handing services in Orly and Roissy-CDG airports and ordering ADP to apply a scheme of fees, the Commission allows some uncertainty to remain as to whether the fees must be the same within each airport or indeed in all Paris airports.

77 The Commission contends that the contested decision contains an adequate statement of reasons.

Findings of the Court

78 The applicant puts forward five complaints in support of the plea alleging breach of the obligation to state reasons.

79 First, the applicant maintains that the contested decision allows some doubt to remain as to whether the fees were to be the same for self-handling and handling services supplied to third parties.

80 As is clear from an examination of the second plea, the contested decision contains a sufficient and proper statement of reasons as regards the requirement that the fees imposed by ADP on suppliers of handling services must be non-discriminatory. There is no doubt as to the scope of the direction addressed to ADP. No provision of the contested decision requires that ADP apply identical fees. All that is required is that they be non-discriminatory, because, the airport management services provided by ADP being the same for all the undertakings supplying services, any difference in treatment between the latter must be justified by objective and non-discriminatory considerations.

81 Second, the applicant contends that the contested decision does not indicate what it is specifically required to do or what it should avoid doing in future.

82 It should be remembered, in that regard, that it is settled case-law that the Commission's power to issue directions 'is to be applied according to the nature of the infringement found and may include an order to do certain acts or things which, unlawfully, have not been done as well as an order to bring an end to certain acts, practices or situations which are contrary to the Treaty' (Joined

Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45), and in exercising that power the Commission must observe the principle of freedom of contract (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 51).

83 In the present case, the Commission found in Article 1 of the contested decision that ADP infringed Article 86 of the Treaty by using its dominant position to impose discriminatory commercial fees in the Paris airports of Orly and Roissy-CDG on suppliers of certain types of groundhandling services and, in Article 2, it ordered ADP to put an end to that infringement by applying to the suppliers concerned a non-discriminatory scheme of commercial fees within two months of the date of notification of the decision. Those articles clearly reveal an obligation to achieve a result which, in the light of all the reasons on which the contested decision is based, requires that ADP put an end to the discriminatory fees demanded of suppliers of groundhandling services in the airports concerned. The contested decision therefore imposed a clear obligation, as to the scope of which ADP cannot be mistaken either in law or in fact, while recognising the parties' freedom of contract. The Commission was therefore not required to stipulate for ADP the means whereby a non-discriminatory scheme of commercial fees was to be put in place.

84 Third, the applicant, relying on recital 5 to the contested decision, contends that the reasoning therein is inconsistent, since the Commission examined the applicant's contractual relationships with other suppliers of groundhandling services yet stated that those suppliers, who are mentioned by name, were not concerned by the contested decision.

85 That argument cannot be upheld. In order to provide a well-founded factual and legal analysis aimed at the application of Article 86 of the Treaty to ADP, the contractual relationships between ADP and its contractual partners supplying groundhandling services in Orly and Roissy-CDG airports had necessarily to be taken into account. Furthermore, because it has effects on the prices of

groundhandling services supplied in the Paris airports, the contested decision concerns all suppliers or users engaged in such services. However, ADP is the only undertaking capable of being sanctioned under Article 86 of the Treaty. The Commission was therefore correct to take the view that the suppliers of services are concerned by the contested decision but that it is not directed at them, that is to say, they are not 'undertakings... concerned' within the meaning of Article 19(1) of Regulation No 17. The fact that the Commission took into account and examined the commercial relationships between ADP and the suppliers of groundhandling services but did not refer to the latter in the operative part of the decision therefore does not constitute an infringement of the obligation to state the reasons on which the contested decision was based.

86 Fourth, the applicant refers to an alleged inconsistency in the contested decision between recital 98, which states that the Commission 'is not required... to decide on the levels of [State] fees charged to the service suppliers in question', and recital 127, which states:

'With regard to AFS in particular, the Commission is not opposed, however, to the incorporation of a State component in the overall fee imposed. The State component does not, however, justify the differences in the commercial fees identified in the case in question (see [recital] 112 [to the contested decision]).'

87 In that regard, it should be pointed out that in recital 127 to the contested decision the Commission made no assessment of the level of a State fee, but only assessed the effect which the absence of such a fee had on the amount of the overall fee paid to ADP by AFS. Recital 127 to the contested decision refers expressly to recital 112, in which the Commission finds that, under the commercial agreement with ADP, AFS has a zero annual State fee and that 'the difference in the commercial fees paid [...] respectively is thus appreciably greater

than would be warranted by incorporating a State element in the commercial fee paid annually by AFS'. Recital 112 to the contested decision therefore does not contain an assessment of the State fees. It follows that there is no inconsistency between recitals 127 and 98 to the contested decision.

88 Fifth, the applicant contends that the contested decision does not state whether the fees must be the same within each airport or throughout the Paris airports.

89 It should first of all be observed, as stated above, that the contested decision is perfectly clear in that it does not require that ADP propose the same fees but requires that it put an end to a discriminatory scheme of fees.

90 Next, it follows from the contested decision, and in particular from recitals 1, 63 and 71, regarding the relevant market, that that non-discriminatory scheme of commercial fees must be applied in all the international Paris airports for which ADP is responsible, namely Orly and Roissy-CDG.

91 Consequently, the fifth complaint put forward by the applicant in support of the third plea in law must also be rejected.

92 It follows from the foregoing that the plea alleging breach of the obligation to state reasons is unfounded.

4. *Fourth plea, alleging infringement of Article 86 of the Treaty*

93 This plea consists of five limbs.

First limb of the plea, alleging that in exercising the activity in question ADP is not operating as an undertaking for the purposes of Article 86 of the Treaty

Arguments of the parties

94 The applicant contends that the Commission has seriously misrepresented the activity in question in the present case. The activities of ADP to which the Commission refers, namely the services which it provides as manager of the Paris airports, do not constitute consideration for the fee in issue. That fee, as regards both the fixed portion and the variable portion, is payable by virtue of the private occupation of publicly-owned property and not as consideration for the approval of service-providers and the supervision of movements of vehicles and persons within the airport zone, which form part of a supervisory activity in respect of which no fee is payable. The organisation of the activities taking place in the airport installations is a public service task which does not involve the levying of a fee.

95 In that regard, the applicant claims that HRS, a supplier of groundhandling services in the Paris airports, provides airline catering services for AOM from outside the airport perimeter and that it does not pay any fee to ADP.

96 Next, the applicant contends that it is not an undertaking for the purposes of Article 86 of the Treaty. Bodies pursuing activities which are not economic in

nature, such as the activities of public bodies which depend on the exercise of their official powers, are not undertakings (Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* v *AGF and Cancava* [1993] ECR I-637; Opinion of Advocate General Tesauro in Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43, at I-45, point 9).

97 The administration of publicly-owned property cannot therefore constitute an economic activity for the purposes of Article 85 of the EC Treaty (now Article 81 EC) and Article 86 of the Treaty.

98 On the one hand, that activity is exercised according to the rules applicable to State ownership, which are quite distinct from the rules of private law. The fact that public assets must be used in the public interest explains the mandatory nature of the fee levied where publicly-owned property is occupied. On the other hand, the administration of publicly-owned property has neither the same object nor the same nature as an industrial or commercial activity. The applicant observes that, according to the Opinion of Advocate General Mischo in Case 118/85 *Commission* v *Italy* [1987] ECR 2599, at 2609, it is necessary to take into account the exercise of powers conferred by public law and the protection of the general interests of the State or other public bodies in order to distinguish 'public authorities' and 'public undertaking', and states that the administration of public property involves, precisely, the exercise of powers conferred by public law. The Cour d'Appel (Court of Appeal) de Paris has recently confirmed (judgment No 97/08842 of 20 January 1998 *Chambre Syndicale Nationale de Vente et Services Automatiques*) that the requirement that an agreement be concluded and a fee paid for the occupation of publicly-owned property does not fall within the scope of activities associated with production, distribution or services within the meaning of French competition law but within that of measures relating to the management of publicly-owned property and the exercise of powers conferred by public law.

99 In the alternative, the applicant contends that the licensing of suppliers, the monitoring of vehicle movements and the organisation of airport activities does not confer on it the capacity of undertaking, but are the expression of its status as a public authority.

100 ADP contends that the judgments which the Commission cites in its defence as authority for treating ADP as an undertaking are irrelevant. In Case 41/83 *Italy* v *Commission* [1985] ECR 873 it was never contended that the activity of British Telecommunications (BT) presumed the exercise of sovereign powers and, moreover, that case concerned the provision of telecommunications, an activity which is unrelated to the administration of publicly-owned property. In Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, the actual question of the nature of the activities in issue was not raised. Furthermore, that judgment did not deal with questions relating to the occupation of publicly-owned property, but with services involving the provision of locomotives and railway services. Last, Case C-18/93 *Corsica Ferries* [1994] ECR I-1783 concerned pilotage activities and not the occupation of publicly-owned property.

101 The Commission, it alleges, is wrong to seek to rely on French law to justify describing ADP as an undertaking. The applicant claims, in that regard, that Decision 98-D-34 of 2 June 1998 of the French Competition Council, to which the Commission refers, was the subject of an appeal before the Cour d'Appel de Paris. At the hearing, the applicant stated that the judgment of the Cour d'Appel de Paris of 23 February 1999 upholding that decision was set aside by the Tribunal des Conflits in its judgment of 18 October 1999. The Tribunal des Conflits expressly held in that judgment that the management of publicly-owned property constitutes the exercise of powers conferred by public law and is not an economic activity for the purposes of French competition law.

102 The applicant also claims that the judgment of the Cour d'Appel de Paris of 20 January 1998, cited above, expressly held that a decision concerning the occupation of publicly-owned property and the associated procedures, in particular payment of a fee, is not a service activity that is subject to French competition law. The distinction, drawn by the Commission in its defence, between the 'administration' and 'management' of publicly-owned property is therefore unfounded.

103 The applicant further states that in its judgment of 13 December 1976 *Époux Zaoui* v *Aéroport de Paris* the Tribunal des Conflits held that '[ADP] is responsible for a public service task and manages installations which are in the nature of a public work ... those installations ... are not services of an industrial or commercial nature'.

104 The applicant concludes that it cannot be disputed that the present case is exclusively concerned with its administration and management of publicly-owned property, that that activity involves the exercise of powers conferred by public law and entails the protection of the interests of the community, and that its installations are not services of an industrial or commercial nature.

105 The defendant and the intervener maintain that the activities in question must be regarded as activities of an undertaking for the purposes of Article 86 of the Treaty.

Findings of the Court

106 The applicant maintains that it is not an undertaking for the purposes of Article 86 of the Treaty. It claims, in substance, that the Commission has misrepresented the activity in question in that the fees in issue are payable by way of consideration for the private occupation of publicly-owned property, not for the airport management services which the applicant provides. The applicant alleges that the administration of publicly-owned property cannot constitute an economic activity. In the alternative, the applicant maintains that airport management services, which the Commission has identified as constituting the relevant activity, do not confer the status of undertaking on the applicant.

107 It must first be noted that, under Community 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, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; *Poucet and Pistre*, cited above, paragraph 17; and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36) and that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v *Italy*, cited above, paragraph 7).

108 Furthermore, the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority (see, in that regard, Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraphs 14 and 15).

109 It follows that the fact that ADP is a public corporation placed under the authority of the Minister responsible for civil aviation and that it manages facilities in public ownership does not in itself mean that it cannot be regarded in the present case as an undertaking for the purposes of Article 86 of the Treaty.

110 It is therefore necessary first to determine what the relevant activities are and then to consider whether or not they constitute economic activities.

111 ADP is a public corporation enjoying financial autonomy, registered in the Paris register of companies; it is engaged in the planning, operation and development of all civil air transport installations in the Paris region that are designed to facilitate the arrival and departure of aircraft, and it supervises air-traffic control, and the embarkation, disembarkation and moving on land of passengers, cargo and air mail (recital 51 to the contested decision).

112 A distinction must be drawn 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.

113 In the contested decision, the Commission called in question only the commercial fees, and defined the market as the market in airport management services, the commercial fees constituting the consideration for those services. Thus, in recitals 105 and 106 to the contested decision, the Commission states:

'The Commission therefore considers that the variable commercial fee constitutes an access charge paid in exchange for a licence to operate within the airport. The fee, based on the supplier's turnover, remunerates services provided by the airport manager which bear no relation to the allocation of business premises; the services provided by the airport manager include the supervision and organisation of groundhandling activities and the making available of facilities shared by users and suppliers operating at the airport. The management of shared infrastructures makes it necessary to organise and coordinate all the activities that take place there, efficiently and safely.'

114 The applicant states that there are not two fees, one a fixed State fee and the other a variable commercial fee, but one overall fee, which may however consist of a fixed component and a variable component.

115 In that regard, it should be pointed out, first, that, at least from the standpoint of competition law, that distinction is of no relevance and therefore purely semantic.

116 Next, under the agreements between ADP and AFS and between ADP and OAT, a clear distinction is drawn, as regards the financial consideration payable by the groundhandlers, between the part payable for the provision of premises and the part corresponding to the licence to operate, which is calculated as a proportion of turnover. Thus, Article 23 of the agreement between ADP and AFS refers to a licence to occupy and to operate and then provides that no State fee is to be levied and that the commercial fee is to be calculated as a proportion of turnover. Similarly, Article 14 of the agreement between ADP and OAT states that OAT is to pay ADP a fee consisting of a fixed part, by way of remuneration for the occupation of all or part of the premises necessary for the licensed activity, and a variable part proportional to the activity carried out.

117 The Commission was therefore correct to draw a distinction in the contested decision between the occupation of the land, buildings and facilities within the airport perimeter, in return 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. The fact that the turnover corresponding to the supply by aircraft caterers of catering services to customers outside the airport is not taken into account in the calculation of the commercial fee also confirms that that fee constitutes consideration not for the private occupation of publicly-owned property but rather, contrary to what the applicant maintains, for the licence to operate within the airport and for the airport infrastructure management services which the applicant provides.

118 The Commission was therefore correct to take the view in the contested decision that the commercial fees in issue constitute consideration for the management services provided by ADP and for the provision of premises jointly used by the users and suppliers of groundhandling services operating within the airport.

119 It is now necessary to consider whether those services constitute a business activity for the purposes of Article 86 of the Treaty.

120 Through its activity as manager of the airport infrastructures, ADP determines the procedures and conditions on which suppliers of groundhandling services carry out their activities and in return levies the fee at issue. Such an activity on the part of ADP cannot be classified as a supervisory activity. The existence under domestic law of a system of special supervision of publicly-owned property is not in any way incompatible with the exercise in public places or on public land of activities of an economic nature. Thus, the provision of airport facilities by ADP contributes to the performance, on publicly-owned property, of a range of services of an economic nature and so forms part of its economic activity. Accordingly, the fact that the agreements between ADP and the groundhandlers were concluded under French law applicable to agreements for the occupation of publicly-owned property, even if that were proved to be the case, is not capable of calling in question the reasoning on which the contested decision is based.

121 The provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP, must be regarded as an economic activity.

122 Similarly, the facilities within the Paris airports are essential, since their use is indispensable to the provision of various services, in particular groundhandling. The management and provision of those facilities for the supply of such services constitute an economic activity.

123 The case-law confirms that analysis. Thus in *Italy* v *Commission*, cited above (paragraphs 18 to 20), the Court of Justice held that the activity whereby BT managed public telecommunications equipment and placed such equipment at the disposal of users on payment of a fee did amount to a business activity subject to the obligations imposed by Article 86 of the Treaty and that the schemes adopted by BT in the exercise of its statutory power to introduce schemes formed an integral part of its business activity, since the United Kingdom legislature in no

way predetermined the content of the schemes. Similarly, it follows from *Deutsche Bahn* v *Commission*, cited above, that the provision of locomotives, traction and access to the railway infrastructure is to be regarded as an economic activity.

124 Last, 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 (see, in that regard, *Höfner and Elser*, cited above, paragraph 22). In Commission Decision 98/190/EC of 14 January 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/34.801 FAG — Flughafen Frankfurt/Main AG) (OJ 1998 L 72, p. 30), the Commission found that the undertaking which owns and operates Frankfurt airport (Flughafen Frankfurt/Main AG) is a private undertaking approved in accordance with German law.

125 It follows from that analysis 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.

126 That finding is not affected by ADP's argument that one groundhandler, HRS, operates from outside the airport perimeter without paying ADP a fee. Although HRS is based outside the airport perimeter, the fact none the less remains that, in order to provide its groundhandling services to airlines, it must use the airport facilities, since by definition groundhandling services are provided within the airport. Its activity should therefore also be subject to a commercial fee and the fact that it does not pay such a fee is merely a further instance of discrimination which, although not expressly raised in the contested decision, cannot alter the nature of the commercial fee at issue or the services for which it constitutes remuneration.

127 For the sake of completeness, it should be pointed out that it is clear from the written answers to the questions put by the Court that under the new arrangements for access to the airport facilities introduced with effect from 1 March 1999, ADP has abolished the old commercial fee and now imposes a fee on all suppliers with access to the airport facilities, even where they are not entitled to occupy publicly-owned property in a private capacity.

128 As regards ADP's argument based on the classification of its activities adopted by the Tribunal des Conflits in its decision of 13 December 1976, cited above, not only is it irrelevant, since in that case Mr and Mrs Zaoui were the victims of an accident on airport premises which was not attributable to the undertakings providing commercial services under a contract with ADP, but domestic classifications are in any event irrelevant to the assessment of an activity from the viewpoint of Community law, in particular competition law.

129 For the sake of completeness, it should be pointed out, in that regard, that according to the French Competition Council, ADP may be regarded as an undertaking subject to the competition rules laid down in French law and the provision of airport premises constitutes an economic activity (decision 98-D-34 of 2 June 1998, cited above). Moreover, it is clear from the judgment of the Tribunal des Conflits of 18 October 1999, cited above, that the decision of the Competition Council of 2 June 1998 was only partially annulled. The Tribunal des Conflits held that 'the decisions to locate the activities of the Air France group at Orly-Ouest air terminal and to refuse to allow TAT European Airlines to open new routes from that air terminal, which relate to the management of publicly-owned property, constitute the use of powers conferred by public law'. By contrast, the Tribunal des Conflits confirmed that 'the practices on the part of ADP which may constitute abuse of a dominant position by requiring TAT European Airlines to use [ADP's] groundhandling services instead of its staff, can be severed from the assessment of the lawfulness of an administrative measure'.

130 It follows from the foregoing that the Commission, far from having misrepresented the scope and the content of the agreements concluded between ADP and the various groundhandlers, correctly considered in the contested decision that the fixing by ADP of the commercial fees and the conditions of the activities of those groundhandlers constitutes a business activity for the purposes of Article 86 of the Treaty.

Second limb of the plea, alleging that the definition of the relevant product market and geographical market is manifestly inaccurate

Arguments of the parties

131 The applicant disputes the Commission's definition of the market, namely that '[t]his case concerns the management and operation of the Paris airports' and that '[t]he airport management services provided by ADP... include the approval of authorised suppliers, supervision and organisation of activities in airport installations in common use and control of the quality of groundhandling services supplied'. The applicant observes that it only levies a fee in the event of private occupation of public property and not as consideration for airport management services. A supplier is not required to enter into an agreement to occupy publicly-owned property in order to provide groundhandling services, as may be seen from the fact that HRS does not pay a fee. By taking into account activities not forming part of the relevant activity, the Commission made a manifest error of assessment in defining the very nature of the market.

132 The Commission's definition of the market is also inaccurate in terms of its geographical size. The fact that certain groundhandling services may to a large extent be provided outside the airport perimeter is sufficient to show that the geographical market cannot be limited solely to the airport precincts, in other

words the public property managed by ADP, but must also include all the land and buildings available in the Paris area.

133 The applicant contends that the Commission changed its position since, in recital 61 to the contested decision, it rules out any possibility of substitutability, although it acknowledges its existence in its defence. There is a manifest substitutability between the large continental airports, especially in the case of freight. As regards aircraft catering services, the airlines are not required to obtain supplies in Paris and actually choose the airport where they find the most advantageous conditions for their supplies of food and beverages.

134 The applicant maintains that the contested decision contains inconsistencies in so far as it states that the groundhandlers have no choice other than to use the Paris airports, but that certain groundhandling services may to a large extent be provided outside the airport precincts.

135 In the alternative, the applicant claims that the Commission's view that the Paris airports are not interchangeable with other Community airports are equally unconvincing. Thus, the large continental airports are very broadly substitutable for freight. As regards aircraft catering services, an airline is not in any event obliged to obtain supplies in Paris, even if it operates daily flights from the Paris airports.

136 The defendant maintains that the definition of the market in the contested decision is correct.

Findings of the Court

137 The first part of the applicant's argument, concerning the definition of the product market, is indissociable from the question of the nature of the activities in return for which the commercial fees in issue are paid. As stated in connection with the examination of the previous limb of the plea, the Commission was correct to take the view that the commercial fees in issue constituted consideration for the airport infrastructure management services. The market to be taken into consideration is therefore the market in management services in the Paris airports. As manager of those airports, ADP is the supplier on the relevant market, while the groundhandlers, who need the licence issued by ADP and the airport facilities in order to carry out their activities, constitute the demand side of that market.

138 As the Commission correctly observes, the situation in the present case may be compared with that in Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraph 5, concerning British Leyland's monopoly in issuing the certificates of conformity required in order for a vehicle of that marque to be registered, where the Court held that 'the relevant market [was] not that of the sale of vehicles..., but a separate, ancillary market, namely that of services which are in practice indispensable for dealers who wish to sell the vehicles manufactured by [British Leyland]'. In the same way, in the present case, it is the market in the management of airport premises, which are indispensable to the exercise of groundhandling services and to which ADP provides access, that must be taken into consideration for the purpose of assessing ADP's dominant position and conduct from the aspect of Article 86 of the Treaty.

139 As stated above, the applicant's argument concerning HRS cannot alter that analysis, since, although it is certainly conceivable that a groundhandler does not

need premises within the airport perimeter, groundhandling services must by definition be provided while the aircraft are on the ground and therefore in the airport. 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.

140 As regards the geographical market, it can be defined as the territory in which all traders operate in similar conditions of competition with regard specifically to the relevant products (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 91).

141 In the light of the definition of the relevant product market in the present case, the applicant's argument that all the land and buildings available in the Paris region must be taken into consideration is wholly unfounded. What is at issue is 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. 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.

142 Last, as regards the alternative argument that the other large continental airports must be taken into consideration, it should be pointed out, first, that it is correctly stated in the contested decision (recitals 59 to 63) that, for most passengers leaving or arriving in the Paris region or other French regions, the air transport services using Orly and Roissy-CDG are not interchangeable with the services offered in other airports and that competition between airports is important only in so far as an airport forms a transit point for other destinations. In that regard, it is clear from the statistics provided by the defendant and not disputed by the applicant that the proportion of traffic from Paris airports for which those airports are used as a transit point is less than [...]% at Orly airport and [...]% at

Roissy-CDG. In those circumstances, the substitutability of the other airports is quite insufficient to support the contention that the geographical market in the present case extends to airports other than Orly and Roissy-CDG.

143 As regards the applicant's argument that the air carriers providing services from or to the Paris region are not required to use the groundhandling services offered at Orly and Roissy-CDG airports, it should be pointed out that, as the defendant correctly observes, the possibility of obtaining supplies of meals in another airport is limited by the requirements of freshness and quality of the food, the storage capacity of the equipment and the fact that such choices are available only in the case of short-haul flights. Last, as regards freight services, since the applicant has not disputed the claim that a large proportion of freight is carried in the same aircraft as passengers, the choice of airport therefore depends mainly on passenger traffic, for which the other airports are not substitutable.

144 It follows that the argument alleging an inaccurate definition of the market is unfounded.

Third limb of the plea, alleging that ADP does not occupy a dominant position

Arguments of the parties

145 The applicant maintains that it does not occupy a dominant position. It has the same rights as those of any proprietor over a building belonging to him. Its

capacity as administrator of publicly-owned property does not in itself place it in a dominant position. Even supposing that the relevant market is the market in the premises from which groundhandling services can be provided in Orly and Roissy-CDG airports, the Commission should have taken into account all the land and buildings in the Paris region capable of accommodating activities of that type. Since any supplier of services can establish itself outside the airport zone, ADP is competing fully with all owners of land and buildings, both public and private.

146 The defendant maintains that ADP occupies a dominant position on the relevant market.

Findings of the Court

147 It is settled case-law that the dominant position referred to in Article 86 of the Treaty relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (see, in particular, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 65 and 66, and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 90).

148 It also follows from the case-law that the application of Article 86 is not precluded by the fact that the absence or restriction of competition is facilitated

by laws and regulations (Case 311/84 *CBEM* [1985] ECR 3261, paragraph 16, and Case 30/87 *Bodson* [1988] ECR 2479, paragraph 26).

149 Since the relevant market in the present case is the market in management services for the Paris airports, ADP indisputably enjoys a dominant position, and even a legal monopoly. Under Article L. 251-2 of the Civil Aviation Code, ADP has a legal monopoly to manage the airports concerned and is alone able to confer authorisation to carry out groundhandling activities there and to determine the terms on which those activities are carried out.

150 ADP therefore 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 (see, in that regard, Case 26/75 *General Motors Continental* v *Commission* [1975] ECR 1367, paragraph 9, and *British Leyland* v *Commission*, cited above).

151 As stated above, the argument alleging failure to take into account all the land and buildings in the Paris region cannot be upheld, since the management of airport services, which is the relevant market in the present case, concerns only the airport precincts, the supply of services by ADP, and only ADP, being a necessary condition of the provision of groundhandling services.

152 Last, it must be held that Orly and Roissy-CDG airports constitute a substantial part of the common market, regard being had to the volume of traffic and their importance within the network of European airports (see, in that regard, Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 15).

153 It follows that the third limb of the plea alleging infringement of Article 86 of the Treaty must be rejected.

Fourth limb of the plea, alleging that ADP's conduct does not satisfy the conditions laid down in Article 86 of the Treaty

Arguments of the parties

154 The applicant maintains that its conduct does not satisfy the conditions laid down in Article 86 of the Treaty.

155 First, the applicant contends that Article 86 of the Treaty cannot be applied to it, since recital 134 to the contested decision finds that the fees in issue affect competition on markets, namely the market in airlines and the market in suppliers of groundhandling services, on which it is not present (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91). The present case bears no resemblance to the situations described in *Commercial Solvents* v *Commission*, cited above, or *CBEM*, cited above.

156 Since the Commission has sought to analyse the anticompetitive effects of the abuse of a dominant position on a market other than the market on which that position was held, it cannot rely on *Corsica Ferries*, cited above (paragraph 43), because the situation in that case was quite different. On the other hand, it follows from Case C-333/94 P *Tetra Pak* v *Commission*[1996] ECR I-5951 that even where the undertaking is present on the market which it does not dominate, which ADP is not, practices which produce effects only on that market do not in

principle fall within the scope of Article 86 of the Treaty, except in special circumstances, which have not been shown to exist in the present case.

157 Second, the applicant claims that the Commission was incorrect to take the view that it had used its dominant position in order to impose discriminatory fees. It did not impose anything on AFS: it was AFS who freely made a proposal, and all that ADP did was to accept that proposal.

158 The applicant further observes, in that regard, that it never promised AFS that it would remain the sole provider of aircraft catering services at Orly airport, since the agreement provided that should the quality of the services deteriorate, one or more other concessionaires would be quickly installed. AFS was thus kept fully informed from the outset of all the conditions to which it would be subject in order to occupy publicly-owned property. The defendant's assertion that, for AFS, the initial situation was in no way comparable to the situation existing at the time when the contested decision was adopted is therefore incomprehensible.

159 Third, the applicant claims that it endeavoured to maintain the structure of competition by continuing to perform the agreement concluded with AFS in spite of serious and manifest breaches of that agreement (repeated shortcomings in the provision of services, non-disclosure of turnover by AFS) which would have provided ample grounds for terminating the agreement. The applicant further states that in December 1992 it granted AFS a very significant reduction in the rate of the fee, at the latter's suggestion, in order to take account of OAT's arrival on the market. The applicant therefore contends that it did nothing to hinder free competition.

160 Fourth, the applicant states that it had no interest in distorting competition on the markets in groundhandling services and transport services, on which it is not

present. On the other hand, having regard to the liberalisation of the airline sector in the European Union, it is in its interest that the airlines using Orly and Roissy-CDG airports are able to find a varied range of high-quality, competitive groundhandling services.

161 The defendant contends that the conduct of ADP which is found to be an infringement in the contested decision falls within the scope of Article 86 of the Treaty.

Findings of the Court

162 The applicant relies essentially on four arguments in support of its complaint that its conduct does not fall within the scope of Article 86 of the Treaty.

163 First, it contends that Article 86 cannot be applied to it because it is not present on the markets in respect of which the Commission found, in recital 134 to the contested decision, that competition was affected. It is said to follow from the judgment of the Court of Justice in *Tetra Pak* v *Commission* that Article 86 of the Treaty cannot be applied in such circumstances.

164 That argument is entirely unfounded in law. The Court of Justice quite clearly stated in Case C-333/94 P *Tetra Pak* v *Commission*, cited above (paragraph 25),

that *Commercial Solvents* v *Commission*, cited above, and *CBEM* v *CLT and IPB*, cited above, provide examples of abuses having effects on markets other than the dominated markets. There is no doubt, therefore, that an abuse of a dominant position on one market may be censured because of effects which it produces on another market. It is only in the different situation where the abuse is found on a market other than the dominated market that Article 86 of the Treaty is inapplicable except in special circumstances (Case C-333/94 P *Tetra Pak* v *Commission*, cited above, paragraph 27).

165 In the present case, although the conduct of ADP to which the contested decision objects, namely the application of discriminatory fees, has effects on the market in groundhandling services and, indirectly, on the market in air transport, the fact remains that it takes place on the market in the management of airports, where ADP occupies a dominant position. Furthermore, where the undertaking in receipt of the service is on a separate market from that on which the person supplying the service is present, the conditions for the applicability of Article 86 are satisfied provided that, owing to the dominant position occupied by the supplier, the recipient is in a situation of economic dependence *vis-à-vis* the supplier, without their necessarily having to be present on the same market. It is sufficient if the service offered by the supplier is necessary to the exercise by the recipient of its own activity.

166 As the Commission correctly states, the situation in the present case can be compared to that in *Corsica Ferries*, cited above, in which the complaint was that the corporation of pilots of the Port of Genoa, on which the Italian public authorities had conferred the exclusive right to provide the compulsory pilotage services in that port, had abused its dominant position on that market in services by imposing discriminatory tariffs on the shipping companies engaged in transport between Member States, although the corporation was not present on the shipping market.

167 Second, the applicant contends that it did not commit an abuse, on the ground that it merely accepted the offer made by AFS and therefore did not impose anything.

168 In that regard, it should be pointed out, first, that the lawfulness of the contested decision must be assessed in relation to the situation existing at the time of its adoption and not at the time when AFS proposed the fee. When the contested decision was adopted, the situation was substantially different from the situation existing when AFS made its offer, owing to the arrival of competitors on the market in groundhandling services.

169 Furthermore, the abuse consisting in the application of discriminatory fees could by definition come into existence only when a competitor of AFS, in fact OAT, arrived on the market. The fact that the rate of the fee payable by AFS was the result of a proposal made by AFS, in the context of a response to a call for tenders, cannot suffice to allow such a fee to escape sanction under Article 86 of the Treaty, particularly when the point in issue here is not the level of fees as such but their discriminatory nature. Moreover, when AFS considered that it was the victim of discrimination it requested ADP to put an end to that discrimination.

170 It should be observed, next, that '[t]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market' (*Hoffmann-La Roche*, cited above, paragraph 91) and that, for an undertaking in a dominant position on a market, the fact of binding — even at their request — purchasers by an obligation or promise to obtain all or a considerable proportion of their needs exclusively from that undertaking constitutes an abuse. Similarly, in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraphs 27 and 29, the Court of Justice held that 'the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty, regardless of the means and procedure by which it is achieved', and even 'irrespective of any fault'.

171 It follows that the argument based on the fact that the rate of the fee was proposed by AFS must be rejected.

172 Third and fourth, the applicant claims (i) that it endeavoured to maintain competition in that it continued to perform the agreement concluded with AFS despite breach by the latter of its contractual commitments and even granted it a reduction in the rate of the fee and (ii) that it has no interest in distorting competition on the markets in groundhandling and transport, on which it is not present.

173 In that regard, it should be recalled that the concept of abuse is an objective concept and implies no intention to cause harm. Accordingly, the fact that ADP has no interest in distorting competition on a market on which it is not present, and indeed that it endeavoured to maintain competition, even if proved, is in any event irrelevant. It is not the arrival on the market in groundhandling services of another supplier that is in issue, but the fact that at the time of the adoption of the contested decision, the conditions applicable to the various suppliers of those services were considered by the Commission to be objectively discriminatory. The reduction in the rate of the fee granted to AFS was also taken into consideration, since the Commission took the view that there was discrimination on the basis of the new, reduced rate.

174 Nor can the applicant rely on any failures by AFS to meet its contractual obligations to justify its own breach of a provision that is in the public economic interest, such as Article 86 of the Treaty. On the contrary, ADP, in full knowledge of the facts, granted the new groundhandlers fees which ultimately subjected AFS to different tariff conditions.

175 It follows that the fourth limb of the plea alleging infringement of Article 86 of the Treaty must be rejected.

Fifth limb of the plea, alleging that there was no discrimination by ADP for the purposes of Article 86 of the Treaty

Arguments of the parties

176 The applicant maintains that there was no discrimination by it for the purposes of Article 86 of the Treaty. In support of that argument, it puts forward, in substance, three objections.

177 First, ADP observes that it is for the Commission to adduce evidence of the existence of discrimination (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79). However, the Commission has reversed the burden of proof by merely pointing out the difference between certain variable elements of the fees in question, when it should have shown the equivalence of the situations of the persons occupying publicly-owned property so that it could then conclude that the difference in rates is objectively unjustified. The Commission merely states that the concessionaires are in an equivalent situation because they receive the same 'services' from ADP, whereas those services are not the consideration for the fee in issue. The Commission has created an irrebuttable presumption of abuse requiring ADP to show that the fees for occupation of public property are justified in each individual case.

178 Second, ADP maintains that the Commission has misrepresented the scope and content of the relevant agreements. The Commission makes a grave error in considering that the fixed and variable components of the fee are the remuneration for the supply of land and airport management services respectively. Those two components in fact form part of the same overall fee and correspond exclusively to the occupation and private use of publicly-owned property. The applicant observes that none of the agreements states that the variable component of the fee is consideration for the 'services' it provides, relating to 'the control and organisation of groundhandling services'. The

Commission should have examined those contracts under the law applicable to property owned by the State.

179 The applicant observes that any use of public property is subject to payment of a fee, which is a single and overall fee, although it may be divided into two parts. The determination of the components of the remuneration depends in each particular case on the rental value of the site and the advantages granted to the concessionaire. The overall fee is the consideration payable to ADP for the private use of publicly-owned property. According to the applicant, the French Directorate-General of Taxation, in its basic documentation, Series 9 D, property division B, immovable property, Titles 1 and 2, paragraphs 30 to 36, has stated: 'Equally, Article R. 56 [of the French Code of State Property] does not preclude a fee from being divided into two parts, one fixed and the other variable... Although the fixed element constitutes consideration for the right to occupy on a private basis the site made available, irrespective of any actual taking of possession, the second element of the fee — or the second component of the overall fee — corresponds to the actual use of the asset in so far as that use gives rise to profits or advantages quantifiable in monetary terms, so that the overall fee represents the proper price for the service provided.' Those principles were observed in full when ADP granted OAT the use of a part of the publicly-owned property in return for payment of an overall fee determined on the basis of a variable component and a fixed component, classified respectively as 'State fee' and 'commercial fee'.

180 It is quite possible, moreover, for the administration to receive a fee consisting solely of the variable element, which is determined on the basis of the advantages of any type accruing to the concessionaire and takes account, in particular, of the level of the fixed component of the fee. The basic documentation referred to above states: 'An individual allowed to occupy publicly-owned property derives a private advantage from that property... The fee represents the price of that exceptional enjoyment and constitutes consideration for the individual and special advantages conferred on the licensee to the detriment of the communal enjoyment, advantages which are often based on the exceptional position of the property made available and of the fact that it is particularly appropriate for the activities authorised by the State.' The variable component is therefore in no case a levy designed to remunerate the 'management services' provided by ADP, but

constitutes the remuneration payable to the latter for the enjoyment and use of property, the public's property, like the remuneration payable to any owner.

181 Contrary to what is stated in recital 101 to the contested decision, moreover, the fees demanded by ADP correspond to the framework fixed by French law. Thus the basic documentation referred to above states that it is the advantages derived from the use of publicly-owned property that determine the variable component of the fee. That use depends on the activity of the service-provider occupying publicly-owned property. It is clear that, in view of the exceptional situation of publicly-owned assets, the more use the service-provider makes of them, the clearer the exceptional advantage which it derives from them will be. The variable component therefore depends on the turnover of the service-provider, an element of assessment adopted in the basic documentation referred to above.

182 ADP observes that the fixed and variable components of the fee are the two components of one and the same reality. They correspond to a single fee levied for the occupation and use of public property which has its direct counterpart in the service consisting of making the property available and is not intended to cover the charges of the 'airport management services'.

183 The fact that the Commission concentrates its analysis on the variable component of the fee and thus ignores the fixed component prevents it from analysing the entire situation of those occupying publicly-owned property. The Commission cannot therefore claim to find any discrimination, since in order to do so it would have to take into account the overall situations to be compared.

184 Third, ADP contends that in any event the fees are not discriminatory and take account of the characteristics of each licence to occupy public property.

(a) Self-handling

185 ADP observes that there are undeniable factual and legal differences between self-handling and handling for third parties, which may therefore be subject to different treatment without there being any discrimination.

186 As regards the factual differences, a carrier who engages in self-handling is required to incur permanent financial outlay in order to maintain the range of groundhandling services it needs and thus to bear costs and risks which a carrier using the services of a supplier is not required to assume.

187 As regards the legal differences, the applicant emphasises first of all that Article 7 of Directive 96/67 lays down special provisions for self-handling distinct from those applicable to groundhandling for third parties. Next, it observes that Community law affords different treatment to internal relations within a group of companies, such as relations between a carrier and a subsidiary which provides services. Self-handling is therefore a service which is objectively different from handling for third parties.

188 The fact that the occupation of public property confers fewer advantages on a person who engages in self-handling, owing to the higher costs inherent in that activity, constitutes an objective and relevant difference in situation which justifies different treatment.

189 Since self-handling and handling for third parties constitute two distinct activities, the rate of the fee payable in respect of self-handling can have no

influence on competition between suppliers on the market in groundhandling for third parties. Nor has AFS ever questioned the rate of the fee payable by OAT in respect of self-handling, but only the rate applied in respect of groundhandling for third parties. Case 155/73 *Sacchi* [1974] ECR 409, *British Leyland* and *Corsica Ferries* are of no relevance, since they concern the different treatment of the same activities.

190 Last, there is no restriction on self-handling in the Paris airports, since all air carriers wishing to provide their own groundhandling services are placed in a strictly equal situation. Moreover, the many companies which provide their own groundhandling services are placed in precisely the same situation [...] as Air France. Therefore there is no discrimination on the market in air transport either.

(b) Groundhandling for third parties

191 Nor is there any discrimination as regards groundhandling for third parties.

192 As regards the alleged discrimination between OAT and AFS, ADP observes first of all that AFS itself fixed its fee following a call for tenders, that ADP did not take action in respect of the serious and manifest breaches of contract by AFS and that it agreed to reduce the rate of the fee to [...]%. The applicant then states that the fees paid by AFS and OAT are the same in practice if the turnover on the

services provided to third parties ('external turnover') and the fixed element of OAT's fee are taken into account, as the following table shows:

	AFS	OAT
Total turnover	[...]	[...]
External turnover	[...]	[...]
Fee on external turnover	[...]	[...]
Fixed element	[...]	[...]
Total external fees	[...]	[...]
% of external turnover	[...]	[...]

193 ADP states that in reality the Commission underestimates the variable element of OAT's fee when, in recital 111 to the contested decision, it indicates a total of external fees of FRF [...] when it should be FRF [...] and that, in addition, it compares factors that should not be compared since it incorrectly includes OAT's turnover for self-handling. Furthermore, where it makes a comparison which claims to take account of the fixed components, the Commission errs in taking into account the absolute value of the fees without relating them to relevant turnover and in wrongly referring to the sum of FRF [...] initially paid by AFS to purchase CIWL's premises.

194 As regards the alleged discrimination on freight services, ADP maintains that the rate actually charged is [...]% irrespective of the service provider, whereas the rate given is [...].

195 As regards catering services at Roissy-CDG airport and cleaning services at both Paris airports, ADP emphasises that there is no discrimination, since the fees are the same.

196 The applicant states that, with the exception of AFS, the various suppliers of groundhandling services have not lodged any complaint.

197 ADP claims that the numerous tables produced by the Commission in its defence are inaccurate. Those tables incorrectly include the turnover in respect of self-handling, which cannot be taken into account for the purpose of comparing the fees paid by AFS and OAT in respect of their groundhandling activities for third parties. Since AFS does not engage in self-handling, it is pointless to take account of OAT's turnover in respect of that activity. Furthermore, AFS has never disputed the rate of the fee payable by OAT in respect of self-handling, which does not in any event concern the activities of groundhandling for third parties for which the two companies are in competition.

198 The applicant observes that the evidence adduced by the Commission in its defence in order to demonstrate the existence of a system favouring the Air France group does not appear in either the statement of objections or the contested decision.

199 The Commission and the intervener maintain that ADP committed abuses in the form of discrimination for the purposes of Article 86 of the Treaty.

Findings of the Court

200 In substance, the applicant raises three objections in support of this limb of the plea. It contends that the Commission has reversed the burden of proof, that it

has completely misrepresented the scope and content of the agreements for the occupation of publicly-owned property and that it has made an error of assessment in wrongly categorising the fees as discriminatory.

201 As regards, first, the objection that the Commission has reversed the burden of proof, it should be pointed out that the Commission was correct to decide that the commercial fees in question constituted consideration for the airport management services and the licence to carry out groundhandling services. Therefore, as stated in recital 120 to the contested decision, ADP provides all groundhandlers with the same services and those groundhandlers are therefore, as regards the subject matter of the contested decision, in the same situation *vis-à-vis* ADP. In those circumstances, the Commission was justified in inferring from the difference in the rates of the fees demanded from the groundhandlers by ADP that ADP was imposing discriminatory fees, unless it justified that difference in treatment by objective reasons.

202 Furthermore, even accepting the applicant's argument that the fee does not constitute consideration for the airport management services and for authorisation to provide groundhandling services, but the consideration payable to ADP for the private use of publicly-owned property, that fee must still not be arbitrary. It must, in principle, be determined according to objective criteria, so that, in the event of disparity, it is for ADP to justify the reasons for and correctness of the differences in the rates of fee applied to different groundhandlers operating at Orly and Roissy-CDG airports. Furthermore, according to the provisions referred to by the applicant, the variable part of the overall fee corresponds to the actual use of the asset, in so far as that use gives rise to profits. Although the concessionaire's turnover is an appropriate criterion by which to determine the variable part of the overall fee, that criterion must be applied by ADP in a non-discriminatory manner to all groundhandlers. If ADP imposes different rates of fee on those service providers, it must therefore establish the existence of objectively different situations or circumstances capable of justifying that disparity in treatment.

203 It follows that the objection that the burden of proof was reversed is unfounded.

204 As regards, second, the objection that the scope and content of the agreements concluded between ADP and the various groundhandlers in the Paris airports were misrepresented, it has already been rejected when the first limb of the fourth plea was being examined (see paragraph 130 above).

205 As regards, third, the objection that the fees were not discriminatory, the applicant maintains, in substance, (a) that certain factual and legal differences objectively justify a different treatment in terms of fees between those providing groundhandling services for third parties and those providing such services for themselves and (b) that there is no discrimination in relation to groundhandling services provided for third parties.

(a) Self-handling

206 It should first of all be pointed out that, as the Commission maintains, in so far as the present dispute concerns the conduct of ADP, it is the situation of the service-providers *vis-à-vis* ADP that is relevant, not their situation on the market in groundhandling services. Both categories of service-providers receive the same management services from ADP.

207 Next, while it is true that an air carrier which decides to provide its own groundhandling services must bear significant costs, those costs are borne in the same way by a person who provides such services for third parties, and will be included in the price of his services which he invoices to the air carrier.

208 The alleged factual differences are therefore irrelevant.

209 As regards the alleged legal differences, the argument that Community law does not apply to relations between parent companies and their subsidiaries is irrelevant. It is not the agreements between air carriers and the subsidiaries through which they provide their own groundhandling services that are in issue, but an abuse of a dominant position by ADP *vis-à-vis* the various groundhandlers with which it has concluded agreements.

210 It follows that the arguments relating to the correctness of the different treatment, in terms of fees charged, of those providing groundhandling services for third parties and those providing their own groundhandling services must be rejected.

(b) Groundhandling services for third parties

— AFS and OAT

211 First of all, the arguments that ADP merely accepted the offer made by AFS, that it endeavoured to continue to perform the agreement concluded between them and that it agreed to reduce the rate of AFS's fee to [...]% following the arrival of OAT on the market in 1992 have already been rejected when the fourth limb of the plea was being examined.

212 Next, the evidence in the table submitted by the applicant in order to demonstrate the absence of discrimination cannot be accepted.

213 First, the fixed component of the fee cannot be taken into account, since its purpose is to pay for the occupation of publicly-owned property, which is not in issue here. For the sake of completeness, it should be pointed out that the amounts charged in respect of that component cannot in any event be compared in the abstract, but must be related to the surface area, quality and position of the premises made available to the various service-providers. Nor does the applicant mention the sum of FRF [...] which AFS initially paid to purchase CIWL's premises.

214 Second, contrary to what the applicant maintains, it is necessary to take account of the turnover in respect of self-handling, since, as stated above, OAT receives the same management services provided by ADP for its self-handling services and for the handling services provided for third parties.

215 Third, it cannot be accepted that the rate of the fee applied in the case of self-handling can have no impact on competition between those involved in the market in groundhandling services for third parties because self-handling is a separate activity from groundhandling for third parties. First of all, those providing the two categories of groundhandling services receive the same services from ADP. Next, the fact that self-handling is subject to a rate of fee of [...] means that those authorised to provide both categories of services are able to write off their investments and are thus able to offer better terms for services provided for third parties. Last, this rate of fee of [...] may encourage certain airlines to take up self-handling rather then employ the services of a third party.

216 It follows that both types of groundhandling services must be taken into account for the purpose of ascertaining whether the fees are discriminatory.

217 In any event, the discrimination is quite clear from the table in recital 19 to the contested decision, the accuracy of which is not disputed by the applicant and the information in which, moreover, comes from the applicant's own replies to the Commission's requests for information. It is apparent from that table that the rate of OAT's fee is [...]% for self-handling and [...]% for services provided for third parties, whereas the rate of AFS's fee is [...]%.

218 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.

— Freight services

219 The applicant maintains that there is no discrimination, since ADP in practice applies a fee of [...]% irrespective of the service-provider. It states, however, that while [...] pay a fee, it is because, unlike the other service-providers who provide services for all the companies which request them to do so, from their own premises, they work exclusively as subcontractors for [...] respectively, in those airlines' own premises.

220 First, it should again be pointed out that since ADP provides the same services to groundhandlers, the different rate of fee imposed on [...] is not justified. Second,

according to the table in recital 19 to the contested decision, which was drawn up on the basis of the figures provided by the applicant in reply to the Commission's request for information, Air France is charged a rate of [...]% both for self-handling and for handling for third parties. Third, the explanation that the fact that a handler acts solely as a sub-contractor of an airline justifies a higher rate contradicts ADP's allegation that the rate of [...]% applied to HRS for its aircraft catering activities was justified on the ground that it acted solely as a sub-contractor of AOM. Fourth, the fact that [...] carry out their activities as sub-contractors in the premises of [...] does not mean that they are in a different situation from that of other groundhandlers with their own premises, since neither company occupies buildings in respect of which a State fee is payable. Fifth, the explanation that the other groundhandlers provide services to all the companies which request them to do so is contradicted by the abovementioned table, which shows that they only provide self-handling services.

221 It follows that the arguments put forward in support of the fifth limb of the fourth plea must also be rejected and that, accordingly, that limb is unfounded.

5. Fifth plea, alleging infringement of Article 90(2) of the Treaty

Arguments of the parties

222 In the alternative, the applicant contends that, in accordance with Article 90(2) of the Treaty, the rules on competition cannot be applied to it, so that it can perform the task entrusted to it in the general interest (Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 49).

223 The applicant claims that, pursuant to Article L. 251-2 of the Civil Aviation Code, it 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'. That task has been classified both by the Tribunal des Conflits in its judgment of 13 December 1976, cited above, and by the French Cour de Cassation (Court of Cassation) in its judgment of 13 January 1982, *SA Alta e.a./Aéroports de Paris*, as a public service activity and it constitutes a 'service of general economic interest' within the meaning of Article 90(2) of the Treaty.

224 The Commission's view that the variable part of the fee corresponds only to payment for some services would significantly reduce the value of the publicly-owned property managed by ADP and, consequently, of its resources, so that it would no longer be able to meet the high charges which it must assume. Remuneration for the management services alone, which, moreover, are rather vaguely defined, does not bear comparison with consideration for the occupation of publicly-owned property.

225 ADP contends that the Commission's analysis, which does not accept the nature of the fee payable for the occupation of publicly-owned property, constitutes a real expropriation which prevents it from carrying out its tasks.

226 The defendant maintains that the activities in question do not necessarily assume the character of services in the general economic interest and that the applicant has not shown that the practices objected to are necessary to the performance of its task.

Findings of the Court

227 The derogation set out in Article 90(2) of the Treaty is to be given a strict interpretation and can apply only on the double condition, first, that the undertaking has been entrusted by the public authorities with the operation of a service of general economic interest and, second, that the application of the rules of the Treaty obstructs the performance of the particular task assigned to that undertaking and that the interests of the Community are not affected (*Merci Convenzionali Porto di Genova*, cited above, paragraph 26).

228 Without its being necessary to adjudicate on the question whether the activities in issue constitute a service in the general economic interest within the meaning of Article 90(2) of the Treaty, it is sufficient to observe that the applicant has not in any event established in what way the contested decision would make it impossible for it to perform its public interest task or that the application of the rules on competition would be likely to obstruct the performance of that task.

229 In the contested decision, the Commission does not prohibit ADP from levying fees in return for the services provided or even decide on the level of those fees; it merely requires that ADP put an end to the infringement consisting in imposing discriminatory commercial fees. ADP can therefore continue to levy fees in order to perform what may possibly be a task of operating a service in the general economic interest. In that regard, although, in order properly to perform its task as manager, ADP levies fees intended to offset the expenditure associated with its investments, that task does not in any way require the imposition of discriminatory fees; and ADP has adduced no evidence to the contrary.

230 It follows that the fifth plea, alleging infringement of Article 90(2) of the Treaty, must be rejected.

6. Sixth plea, alleging infringement of Article 222 of the Treaty

Arguments of the parties

231 The applicant contends that, by reducing the fee in issue to a mere compensation for the 'services' provided by the administrator of public property, the Commission, in the contested decision, reduces the value of that property.

232 The applicant further maintains that the contested decision has a particularly serious effect on the contracts which it has concluded. It claims, in that regard, that the position adopted by the Commission obliges it to bring the fee paid by AFS, which was freely proposed by AFS at a specific time, into line with that of a new concessionaire which proposed a fee at a different time in a completely different economic context. Competition law does not in any event require, by virtue of the principle of non-discrimination, such an alignment in a situation involving private parties who have entered into contracts on dates a considerable distance apart. The Commission thus discriminates between private property and public property.

233 The defendant contends that it did not misapply the provisions of Article 222 of the Treaty.

Findings of the Court

234 Article 222 of the EC Treaty provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership'.

235 According to the applicant, the Commission has affected the value of property owned by the French State and thus infringed that article.

236 Without its being necessary to consider whether affecting the value of publicly-owned property prejudices the rules governing the system of property ownership, it is sufficient to state that in any event the Commission, in the contested decision, does not in any way affect that property.

237 In that regard, in recital 98 to the contested decision, the Commission expressly states 'that it is not required... to decide on the levels of fees charged to the service suppliers in question'.

238 Likewise, in the operative part of the contested decision, it merely orders ADP to put an end to the levying of discriminatory commercial fees, but does not prohibit the levying of fees or even fix a maximum fee.

239 Accordingly, in the contested decision the Commission did not place a value on publicly-owned property, but merely required ADP to observe the mandatory provisions of Article 86 of the Treaty, with which the bodies responsible for the management of publicly-owned property, like private owners, are required to comply.

240 It follows that the plea alleging infringement of Article 222 of the Treaty is unfounded.

241 That finding is not affected by the argument that the contested decision adversely affects the contracts concluded by ADP. The public policy nature of competition law is specifically designed to render its provisions mandatory and to prohibit traders from circumventing them in their agreements.

7. *Seventh plea, alleging misuse of powers*

Arguments of the parties

242 The applicant contends that the Commission misapplied Article 86 of the Treaty, since in reality the contested decision seeks to harmonise the remuneration payable for occupying publicly-owned property in the context of groundhandling activities.

243 In that regard, the applicant claims that the Commission, while considering that the fixed part of the fee is not a matter for its discretion, none the less states in recital 127 to the contested decision that '[w]ith regard to AFS in particular, [it] is not opposed... to the incorporation of a State component in the overall fee imposed'. The applicant likewise states that the Commission refers expressly, in point 18 of the statement of objections, to the fact that 'ADP's practices in relation to commercial fees do not correspond to the practices normally found in other Community airports such as London Heathrow, London Gatwick, Amsterdam-Schiphol and Frankfurt'.

244 Nor did the Commission attempt to ascertain the service suppliers' views on the fees at issue. That shows that the Commission was not applying the

rules on competition to a specific situation but pursuing legislative objectives.

245 Since groundhandling at airports is directly connected to the common transport policy, it is not for the Commission to use the complaint lodged by AFS in order to attempt to impose an amendment of domestic law relating to remuneration for the occupation of publicly-owned property.

246 The defendant contends that it has not misused its powers.

Findings of the Court

247 It is settled case-law that a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at least the main purpose, of achieving an end other than that stated (Case T-72/97 *Proderec* v *Commission* [1998] ECR II-2847, paragraph 118).

248 It is quite clear from a reading of both the operative part and the grounds of the contested decision, which, moreover, concerns only the Paris airports, that the Commission is not in any way attempting to harmonise the conditions for determining the fees for occupying publicly-owned property, but is aiming solely to bring to an end an abuse of a dominant position by prohibiting ADP from imposing discriminatory fees on the various groundhandlers. In recital 98 to the

contested decision, moreover, the Commission states that 'it is not required, in this case, to decide on the levels of fees charged to the service suppliers in question'. The contested decision cannot therefore constitute an abusive measure used by the Commission in an attempt to harmonise remuneration for the occupation of publicly-owned property.

249 As regards the objection that the Commission did not question other service suppliers about the fees in issue, it should be recalled that Article 19(2) of Regulation No 17 provides that the Commission may hear third parties, but it is under no obligation to do so. Since the applicant did not request that any other undertaking be heard, it cannot criticise the Commission for not conducting further hearings. In any event, the complaint is of no relevance for the purpose of establishing the alleged misuse of powers.

250 The plea is manifestly unfounded.

251 It follows from all the foregoing that the application must be dismissed as unfounded.

Costs

252 Under Article 87(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 applicant has been unsuccessful, it must, having regard to the forms of order sought by the Commission and the intervener, be ordered to pay the costs incurred by those parties.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the Commission and by the intervener, Alfa Flight Services.**

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 12 December 2000.

H. Jung
Registrar

J. Azizi
President