# OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 16 December 2010 [1]

1. Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges [2] ('the Directive'), includes within its scope two categories of airport, first, airports 'whose annual traffic is over five million passenger movements' and, secondly, airports 'with the highest passenger movement in each Member State'.

2. By this action the Grand Duchy of Luxembourg requests the Court to annul the provision which refers to the second category of airports and, in the alternative, should the Court regard it as impossible to annul the Directive partially, Luxembourg requests the annulment of the Directive in its entirety.

1 — Original language: Italian.
2 — OJ 2009 L 70, p. 11.

## I — Legal context

### A — *Directive 2009/12/EC*

3. The directive in issue was adopted on the basis of Article 80(2) EC. Its purpose is to establish 'common principles for the levying of airport charges at Community airports' (Article 1(1)).

4. Recitals 2, 3 and 4 of the preamble to the Directive are worded as follows:

'(2) It is necessary to establish a common framework regulating the essential features of airport charges and the way they are set, as in the absence of such a

framework, basic requirements in the relationship between airport managing bodies and airport users may not be met....

(3) This Directive should apply to airports located in the Community that are above a minimum size as the management and the funding of small airports do not call for the application of a Community framework.

(4) In addition, in a Member State where no airport reaches the minimum size for the application of this Directive, the airport with the highest passenger movements enjoys such a privileged position as a point of entry to that Member State that it is necessary to apply this Directive to that airport in order to guarantee respect for certain basic principles in the relationship between the airport managing body and the airport users, in particular with regard to transparency of charges and non-discrimination among airport users.'

5. According to recital 19, the objective of the Directive 'cannot be sufficiently achieved by the Member States as systems of airport charges cannot be put in place at national level in a uniform way throughout the Community and can therefore, by reason of its scale and effects, be better achieved at Community level.'

6. In accordance with Article 1(2), the Directive applies 'to any airport located in a territory subject to the Treaty and open to commercial traffic whose annual traffic is over five million passenger movements and to the airport with the highest passenger movement in each Member State.'

7. Essentially, the Directive requires Member States to establish a procedure for regular consultation, at least once a year, between the airport managing body and airport users, on the operation of the system of charges for the use of infrastructure and services provided by the former to the latter (Article 6(1)). In that context, both parties are placed under a mutual duty to provide the information needed in order to set airport charges (Article 7).

8. Every Member State must establish an independent supervisory authority to ensure that the obligations laid down in the Directive are fulfilled (Article 11), whose intervention the parties may seek in the event of a disagreement over a decision on airport charges (Article 6(3)).

9. The Commission is to draw up, by 15 March 2013, a report assessing the application of the Directive, progress made in attaining its objectives, and the need for appropriate amendments (Article 12).

10. The deadline for transposition of the Directive into national law was set at 15 March 2011 (Article 13).

**II — Procedure before the Court and forms of order sought**

11. Luxembourg brought the present action by document lodged at the Registry of the Court on 18 May 2009.

12. The European Commission intervened in support of the position expressed by the Parliament and the Council. The Slovak Republic intervened in support of Luxembourg.

13. The parties presented oral argument at the hearing on 21 October 2010.

14. Luxembourg claims that the Court should:

— annul Article 1(2) of the Directive in so far as it refers to airports 'with the highest passenger movement in each Member State';

— in the alternative, annul the Directive in its entirety;

— in any event, order the defendant institutions to pay the costs.

15. The Parliament and the Council claim that the Court should:

— dismiss the action;

— order Luxembourg to pay the costs;

— in the alternative, in the event of its annulment, preserve the effects of the Directive until a new act can be adopted.

**III — Arguments of the parties**

A — *Breach of the principle of non-discrimination*

16. Luxembourg argues breach of the principle of non-discrimination inasmuch as the

Directive engenders both different treatment of similar situations and similar treatment of different situations.

17. As far as concerns the first aspect of this discrimination, Luxembourg complains that the inclusion within the Directive's scope of airports such as that at Luxembourg-Findel ('Findel Airport') entails administrative burdens and costs for such airports that other airports in a comparable situation, that is to say, large regional airports with fewer than 5 million passenger movements a year, escape, without that difference in treatment being objectively justified.

18. Particular reference is made to the airports of Charleroi, in Belgium, and Hahn, in Germany, which, located within the same catchment area as Findel, are in direct competition with it. Findel Airport (which saw 1 642 848 passenger movements in 2007) falls within the Directive's scope of application for the reason that it is Luxembourg's main airport. By contrast, the two airports just mentioned, whilst serving more passengers (in 2008 they recorded 2.9 million and 4 million passenger movements respectively) do not fall within the scope of the Directive because they do not serve more than 5 million passengers a year and are not the main airports of their respective Member States.

19. As far as concerns the second aspect of this discrimination, however, Luxembourg complains that it is being treated in similar fashion to other Member States, such as Belgium and Germany, which nevertheless have airports that serve considerably more than 5 million passengers a year. The situation in which the main airports of those Member States find themselves is different and they should not, therefore, be subject to the same burdens.

20. It is Luxembourg's opinion that the 'privileged position' enjoyed by the main airports does not confer on airports that have relatively few passengers, such as Findel Airport, an advantage of the same type as that gained by having a high passenger throughput. What is more, even from an economic point of view, Findel Airport is hardly comparable with the large international airports.

21. Luxembourg takes issue with the statement contained in recital 4 of the preamble to the Directive and disputes that the main airport of each Member State enjoys a privileged position as a 'point of entry' into that Member State. By inserting this fourth recital, the Council sought to provide an *ex post facto* justification for the inclusion within the Directive's scope of at least one airport per Member State.

22. According to Luxembourg, the risk of a dominant position's being taken is much greater in the case of regional airports that are significantly larger than Findel Airport and, whilst being located close to large urban

centres, are not the main airports of their respective Member States and are thus excluded from the scope of the Directive. Findel is being discriminated against by comparison with such airports because of a difference in treatment based on the mere difference in the nationality of the airport.

23. Lastly, Luxembourg finds no justification for the legislature having imposed burdens on Findel Airport that, in its view, are discriminatory. Any complex assessments that had to be carried out during the drafting of the Directive could not, in its opinion, have related to such an obviously simple situation as that of Findel Airport.

24. Slovakia joins Luxembourg in the objections which it puts forward in connection with costs and administrative burdens, adding, in particular, that the administrative and supervisory procedures laid down by the Directive (such as the right of airport users to have recourse to an independent authority in the event of a dispute over a decision taken by the airport managing body) might impede the decision-making process and thus make airports less competitive.

25. For its part, the Council submits that, in creating a context of transparency for airport charges for the benefit of the aviation sector, the legislature could not ignore the privileged position of the main airports of the various Member States, whose position makes them comparable to airports registering more than 5 million passenger movements a year. In this connection, the Council denies that extending the scope of the Directive to airports serving the greatest number of passengers in each Member State was an *ex post facto* addition. In any event, even if the scope of the Directive as originally proposed (which covered airports serving more than a million passengers a year or handling more than 25 000 tonnes of cargo a year) had not been altered, Findel Airport, which in 2008 recorded annual cargo of over 700 000 tonnes, would still have been subject to the provisions of the Directive.

26. The Council also submits that Luxembourg has failed to prove the difference in treatment of which it complains. There is no evidence to prove as a fact that the airports of Charleroi and Hahn enjoy a privileged position similar to that enjoyed by the main airports of the Member States, nor to prove as a fact that the airlines normally active at Findel Airport would be induced to abandon it and move to Charleroi or Hahn.

27. According to the Parliament, only by making the Directive applicable to all Member States was it possible to improve transparency and reduce discrimination in the fixing of airport charges by the managing bodies. Moreover, in this way, the airlines were left

with a choice, in every Member State, of at least one airport that is subject to the Community rules on airport charges.

28. Secondly, the Parliament maintains that the obligations arising under the Directive do not entail such costs as would put Findel Airport at a disadvantage by comparison with airports not subject to its rules.

29. The Parliament further insists, with the Council in agreement, on the necessity of the Directive's being applied in every Member State. Seen from that perspective, the provision with which Luxembourg takes issue is an essential element of the general structure of the Directive, since it ensures that, in every Member State, there is at least one airport that is required to comply with the rules of transparency in the field of airport charges.

30. The Commission, for its part, supports the interpretation which the Parliament and the Council give to the Directive. In particular, in connection with the justification contained in recital 4, it states that only two categories of airport might find themselves in a position of strength vis-à-vis the airlines: the main airports of each Member State, since they are the principal 'point of entry' into that country, and airports exceeding the threshold of 5 million passenger movements a year.

31. As far as the Commission is concerned, the criterion of 'main' airport in each Member State is, in light of the Directive's purpose, the mainstay of the system of rules governing airport charges. The criterion of more than 5 million passenger movements a year, on the other hand, serves merely to complement the first criterion.

B — *Breach of the principles of proportionality and subsidiarity*

32. In so far as concerns the principle of proportionality, *Luxembourg* submits that the procedures and administrative burdens flowing from the Directive are excessive and out of proportion with the reality of Findel Airport's situation.

33. As regards the principle of subsidiarity, the plaintiff Member State argues that it is unnecessary, in the management and financing of airports serving fewer than 5 million passengers a year, to apply a Community framework. Proof of that assertion lies in the fact that many airports larger than Findel Airport are exempt from the obligations arising under the Directive.

34. The *Council* disputes that argument, on the presumption that the regulation of airport charges calls for complex assessments which leave the legislature with a broad discretion that will be open to criticism only in the event of obvious error. In accordance with that presumption, it submits that the action should be dismissed since it has not been demonstrated that the measure in question is manifestly inappropriate to the objectives pursued by the Community legislature.

35. The Council also submits that the fundamental principles underlying the Directive, that is to say, transparency, non-discrimination and consultation, make it easier not only for airlines but also for airports to conduct their business. In its opinion, given that the definition of such common principles may be better carried out by the European Union, Luxembourg has failed to demonstrate in what way the principle of subsidiarity has been breached.

36. The *Parliament* adopts largely the same position as the Council, adding that the proportional nature of the Directive is self-evident given the very low level of obligations laid down in it.

37. The *Commission*, for its part, points out that the principles of compulsory consultation and non-discrimination have already been adopted in the majority of the Member States, a situation which, in terms of administrative burdens, attenuates the effect of the Directive on the airport systems in those Member States.

## IV — Assessment

38. Luxembourg raises two pleas in support of the form of order which it seeks. The first relates to breach of the principle of non-discrimination and the second to breach of the principles of proportionality and subsidiarity.

39. In my examination of this dispute I shall consider, first of all, the limits on the Court's jurisdiction to review the legality of the choice made by the legislature in so far as concerns the ambit of the Directive. Within those limits, I shall then analyse the comparability of the situations, with reference both to the principle of non-discrimination and to the proportionality of the Directive. Lastly, I shall focus on the alleged breach of the principle of subsidiarity.

40. However, it seems necessary to me to clarify at the outset the objective of the Directive in order to determine whether, in light of that objective, it is possible to annul the act in part.

A — *Preliminary observations*

1. The objective of the Directive

41. It is clear from the observations made by the parties that they are not in agreement as to the definition of the Directive's objective. According to the Parliament, Council and Commission, the Directive is mainly intended to protect airlines from potentially abusive conduct on the part of airports that enjoy a position of strength. Even Luxembourg, at least in its written observations in response to the Commission's intervention, has aligned itself with that thinking. However, Slovakia, for its part, appears to maintain that the object pursued by the legislature is to promote the fair play of competition between airports by preventing the abuse of dominant positions.

42. An examination of the Directive and of the preparatory work for it clearly reveals that the first view is the correct view and that the Directive seeks to prevent airports from exploiting, to the detriment of airlines, the particular advantages they may enjoy thanks to their geographical situation and their size.

43. I would observe in this connection that recital 2 of the preamble to the Directive expressly mentions the 'relationship between airport managing bodies and airport users'.

44. The alternative interpretation, on the other hand, is not borne out by the text of the Directive and seems to be based solely on some vague suggestion in the preparatory work. Nevertheless, leaving aside the fact that, as is well-known, preparatory work cannot be regarded as conclusive if it is not reflected in the legislative text, [3] even analysis of the preparatory work confirms that the objective pursued by the legislature was to regulate the relationship between airport managing bodies and airline companies.

45. So much was already clear from the Opinion of the European Economic and Social Committee, [4] and the Commission itself, as author of the proposal for the Directive, has expressly confirmed, both in its Communication of 8 July 2008 [5] and in its Opinion of 18 February 2009, [6] that 'the objective of the proposal adopted by the Commission

3 — Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 26; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 40; Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 27.

4 — CESE 1244/2007, 26 September 2007, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on airport charges, paragraph 2.2.

5 — COM(2008) 455 final, Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and the Council on airport charges, paragraph 2.

6 — COM(2009) 86 final, Opinion of the Commission pursuant to Article 251(2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council on airport charges amending the proposal of the Commission pursuant to Article 250(2) of the EC Treaty, paragraph 3.

on 24 January 2007 is to facilitate the discussions on airport charges between airports and airlines'.

46. Consequently, both the tenor of the Directive and an analysis of the preparatory work leading to its adoption clearly indicate that the objective that the legislature meant to pursue, and that must be borne in mind when assessing the lawfulness of the Directive, is to prevent abusive conduct on the part of airport managing bodies with regard to airline companies.

2. Annulment in part of the Directive

47. As mentioned, Luxembourg asks the Court to rule the Directive unlawful in so far as its scope extends to the airports 'with the highest passenger movement in each Member State'. In its opinion, removing that part would not upset the general structure of the Directive.

48. I cannot share that view.

49. The problem of which Luxembourg complains concerns the ambit of the contested directive and in particular the extension of the control procedures laid down therein to at least one airport per Member State.

50. According to the settled case-law of the Court, annulment in part of an act is possible only when it relates to 'severable' parts of the act and then only provided that annulment in part would not alter the substance of the act [7]. In the present case, the scope of the Directive is, in my opinion, one of its essential elements.

51. It is clear from the preparatory work that the discussions between the institutions concerning the defin.ition of the scope of the Directive were central throughout the legislative process. [8] The decision to use two criteria, namely a numeric threshold (5 million

7 — See, for example, Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraphs 12 and 13, and Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraphs 105 and 106.

8 — Whilst the original threshold contemplated by the proposal for the Directive (COM(2006) 820 final, 24 January 2007, Article 1(2)) was annual traffic of over a million passenger movements or 25 000 tonnes of cargo, the Parliament's Transport and Tourism Committee proposed, on 6 July 2007, to replace that with a threshold of 5 million passenger movements a year and to remove the reference to cargo (PE 392.008, Draft report on the proposal for a directive of the European Parliament and of the Council on airport charges, amendment 1). On the other hand, on 26 September of the same year the European Economic and Social Committee suggested applying the Directive to airports above the size of one million passengers per year (Opinion cited in footnote 4, paragraph 2.3). Taking a different view, the Committee of the Regions suggested, in its Opinion of 10 October 2007, that the Directive should apply to airports that have over 1 % of the total EU-wide air passenger market (Opinion of the Committee of the Regions on the future of European airports, OJ 2007 C 305, p. 11, second paragraph). The amendments made by Parliament on 21 November 2007 upheld the threshold of annual traffic of over 5 million passenger movements and inserted another threshold of more than 15 % of the passenger movements in the Member State (C6-0056/2007). The common position adopted by the Council on 23 June 2008 made a further amendment corresponding to the actual text of the Directive (8332/2/08 REV 2, Article 1(2)).

passengers a year) and the 'privileged' status of an airport (with the inclusion of the main airport in each Member State), was the result of a laborious compromise that made it possible to avoid the stalemate that, a few years earlier, had led the Commission to withdraw its proposal. [9]

52. For those reasons I consider that the inclusion within the Directive's scope of the main airport in each Member State is indissolubly linked with the inclusion of airports with passenger traffic of over 5 million per annum.

53. It is, therefore, evident that, were it to be held that the reference to the main airport in each Member State must be removed, thus dismantling the dual criteria contemplated by the legislature, the remaining threshold of 5 million passengers a year would in the end be insufficient to achieve the Directive's objectives. It would at very least profoundly alter the logic pursued by the legislature.

54. Consequently, should Luxembourg's arguments be upheld, the Court's decision could only, in my view, be the total annulment of the contested directive.

9 — I refer here to the Commission's 1997 proposal COM(1997) 154 final, which was withdrawn in 2001 (COM(2001) 763 final/2).

B — *The limits of the review of the validity of the Directive*

55. The directive in issue in the present action was adopted on the basis of Article 80(2) EC. It is settled case-law that, in the transport sector, as in all sectors in which assessments of a political, economic and social nature must be made, the legislature enjoys a broad margin of discretion. [10] In such situations the Court speaks of 'complex assessments'. [11] Complex, that is, because of the difficulties which arise on attempting to reconcile divergent interests or because of the political responsibilities involved in economic and social regulation. When reviewing the lawfulness of legislative acts relating to such sectors, the Court is not asked to give its opinion on the appropriateness of the choices made by the legislature, but to penalise legislative

10 — In so far as concerns the transport sector, see, for example, Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 23, Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 63, and Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council* [2004] ECR I-7789, paragraph 56. The case-law is particularly copious on the point in connection with agricultural policy. See, for example, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 80 and the case-law cited therein, and Case C-34/08 *Azienda Agricola Disarò Antonio and Others* [1999] ECR I-4023, paragraphs 44 and 76 and the case-law cited therein. For similar considerations in the environmental sector, see Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 61.

11 — See, for example, most recently, Case C-379/08 *ERG and Others* [2010] ECR I-2007, paragraph 60 and the case-law cited therein, and Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 46. In the air transport sector in particular, see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 80.

choices that are vitiated by a manifest error of assessment. [12]

56. Furthermore, the discretion allowed by the Community legislature includes the possibility of establishing, in overall terms, which facts it must take into account when making its choices. Indeed, as the Court has already had occasion to clarify, when the implementation of a common policy, such as that for transport, requires the assessment of a complex situation, the institutions' discretion is exercisable not only in relation to the nature and scope of the provisions to be adopted but also, to a certain extent, to checking the essential facts, which it may do on the basis of findings of a general nature. [13]

*C — Breach of the principle of non-discrimination*

57. According to settled case-law, the principle of non-discrimination requires similar situations not to be treated differently and different situations not to be treated in the same way, unless that is objectively justified. [14]

58. I shall now deal separately with the distinct aspects of the discrimination of which Luxembourg complains in order to determine, first and foremost, whether the situations which that Member State uses in its comparison are indeed similar to its own and, if they are, whether the treatment of which it complains is actually discriminatory.

59. In the light of the considerations just mentioned in connection with the legislature's discretion, the question that must be asked, for the purposes of the comparison, is whether the decision to treat the 'main' airports of each Member State in the same way as airports with more than 5 million passenger movements, and differently from 'secondary' airports that have a similar volume of passenger traffic to 'main' airports, amounts to a difference in treatment arising from a manifest error of assessment. That point must be assessed in the light of the object pursued by the legislature, which, as we have seen, is to prevent abusive conduct on the part of airport managing bodies with regard to airlines.

12 — The case-law is consistent on the point. See, for example, Case C-491/10 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 123, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 52, and *Afton Chemical*, cited in footnote 11, paragraphs 28 and 42.

13 — See *SAM Schiffahrt and Stapf*, cited in footnote 10, paragraph 25 and the case-law cited therein, and *Omega Air and Others*, cited in footnote 10, paragraph 65.

14 — See, for example, Case 13/63 *Italy* v *Commission* [1963] ECR 165, in particular p. 178; Case 106/83 *Sermide* ECR 1984, p. 4209, paragraph 28, and Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 80.

1. Different treatment of similar situations

60. In so far as concerns different treatment of similar situations, Luxembourg complains of two types of discrimination that put an airport such as Findel Airport at a disadvantage in relation to 'secondary' airports which do not fall within the Directive's scope. The first type relates to airports which Luxembourg regards as being in direct competition with Findel Airport and which register similar numbers of passenger movements, namely the airports of Hahn and Charleroi. The second type of discrimination, however, relates to airports that are similar to Findel Airport not only in terms of size, but in terms of strategic importance, by reason of their being located near to large urban centres.

61. A breach of the principle of equal treatment as a result of different treatment of similar situations presupposes that the situations concerned are comparable, having regard to all the elements which characterise them and to the subject-matter and purpose of the Community act that makes the distinction in question. [15] From that perspective, therefore, in order to compare the situations here in issue, consideration should be given not only to factors such as passenger movements or the degree of competition between airports, [16] but also to all the circumstances which, from the point of view of the airlines, which the Directive seeks to protect, might make an airport similar to or different from another.

Comparison with secondary airports having similar passenger movements and located within the same catchment area as Findel Airport

62. I shall therefore begin by analysing the situation in which Findel Airport finds itself by comparison with a secondary airport having a similar number of passenger movements and located within the same catchment area, such as Hahn airport. My observations hold, more generally, for all airports having similar passenger movements to Findel Airport but not located near to an urban centre.

63. In this connection, I find sympathy for the Commission's observation that the main airports of each Member State all share certain common characteristics which are absent in other airports.

15 — See Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 74, and *Arcelor Atlantique et Lorraine and Others*, cited in footnote 10, paragraphs 25 and 26).

16 — For similar reasoning in relation to the comparability of different sectors, see *Arcelor Atlantique et Lorraine and Others*, cited in footnote 10, paragraph 36.

64. One of those characteristics, for example, is their location in the immediate vicinity of a city, usually the capital city, a factor which makes them particularly attractive, at least to a certain category of passenger, namely, business travellers. In relation to that segment of the market, therefore, it is more advantageous for airlines to offer flights to a main airport such as Findel Airport than to a secondary airport such as Hahn. A secondary airport, on the other hand, given its more remote location, is more attractive to low cost airlines, which satisfy a demand with different requirements from those of the business traveller, a demand where there is greater sensitivity to the cost of flights and where there is greater willingness to travel further between the city and the airport.

65. In addition, it is clear that a main airport is likely, if for no other reason than its reputation, to attract both business customers and tourists, whereas a secondary airport is, for the reasons stated, usually of interest only to the second type of customer. In other words, whilst main airports will most likely deal with both national flag carriers and low cost airlines, it is easier for secondary airports to deal only with the latter. Given the different categories of airline that use the two types of airport and the resulting differences in their respective marketing strategies, one might very much doubt, as indeed does the Commission, whether there is indeed any direct competition between main airports and secondary airports.

66. On the basis of such considerations, I take the view that a main airport and a secondary airport, whilst recording similar passenger movements, are not perfectly interchangeable from the point of view of the airlines.

67. In order to test that assertion, one might ask whether application of the Directive is sufficient to make airlines switch from a main airport to a secondary airport with a similar passenger throughput. As a matter of fact, the documents produced in no way suggest that airlines would, as a result of the costs and administrative burdens which application of the Directive would entail, be persuaded to abandon Findel Airport in favour of airports such as Hahn. Moreover, Luxembourg's analysis of the financial impact of the Directive reveals only a very small increase in costs.

68. It must be observed in this connection that it is not clear who, in Luxembourg's case, will in the ultimate analysis, be required to bear the costs connected with implementation of the Directive. Indeed, the act itself calls for no particular choice to be made in this regard. Luxembourg seems to rule out

the possibility of the State's continuing to shoulder the costs, should the Directive be transposed into its national law. In its written observations, that Member State took it for granted that the costs incurred by the airport managing body would be passed on to the airlines, and from them on to the end user, that is to say, passengers. At the hearing, however, it was not ruled out that the airport managing body might decide not to pass those costs on to the airlines.

69. Whatever the situation might be, it must be observed that, whilst Luxembourg took the view in its pleadings that the increased cost would in the end have to be borne by passengers alone (thus discounting the possibility of sharing the burden with airlines carrying cargo, [17] or of the costs continuing to be borne by the state or by the airport managing body), that Member State itself could conceive of a possible increase in airport charges of at most an estimated 16 %, being the equivalent of 50 euro cents per passenger. Such an increase, even were it to be proved, does not seem to me to be sufficient to suggest that Findel Airport would lose customers, especially since any increase passed on by carriers to passengers would, as has been mentioned, be passed on to people who, unlike those who normally use secondary airports, are generally not over-sensitive to changes in ticket prices.

70. For those reasons, the position in which Findel Airport finds itself is not, for the purposes of the present dispute, comparable to that of airports such as Hahn and Charleroi, which, whilst being of similar size, are not the main airport of any Member State. I therefore see no discrimination in the fact that only the first category of airport is included within the Directive's scope.

Comparison with secondary airports having similar passenger movements and located close to urban centres

71. Of slightly different tenor is the discussion of the different treatment which Luxembourg alleges between Findel Airport and other airports that record fewer than 5 million passenger movements a year but which, although situated close to a large urban centre, are not the main airport of the Member State to which they belong. As examples of this category of airport, Luxembourg mentioned at

17 — It is worth pointing out that, even though cargo throughput is not taken into consideration in determining the scope of the Directive's application, in those airports where it does apply, the rules on transparency concern all airlines, *including those carrying cargo*.

the hearing the airports of Turin, in Italy, and Bordeaux, in France.

72. On the basis of the considerations developed thus far, I would say that the fact of recording a similar number of passenger movements cannot be decisive for the purposes of the comparison, since, as I have shown, [18] passenger movements alone cannot explain the preference which airlines can have for one airport over another. I shall therefore focus on the aspect of location close to a large urban centre. From that perspective, the question which must in my view be asked is whether a secondary airport situated close to an urban centre is of the same strategic interest to an airline as a main airport.

73. The strategic interest determining inclusion within the Directive's ambit is defined by the legislature in recital 4 of the preamble, which explains the notion of 'privileged position' as meaning that such airports are, for the airlines, a 'point of entry to that Member State'.

74. It is thus clear that, from the legislature's perspective, 'point of entry' is to be interpreted with reference only to airlines, not passengers. In that connection, the main airport may be the only point of entry for an airline into a given Member State, as it is in the case of Findel Airport, amongst others. Alternatively, the airline itself might be interested in serving only one landing stage in a given Member State and, in such case, it would appear to be reasonable for it to have a preference for the airport serving the largest number of passengers.

75. It therefore seems to me to be consistent with the Directive's objective to take the view that the position of strength which a main airport enjoys in relation to airline companies could be greater than that enjoyed by an airport in proximity to any given urban centre.

76. I would also observe that the fact that users of airports of this second type cannot benefit from the procedures laid down in the Directive, since it does not apply to them, might possibly amount to discrimination between users, that is to say, between airlines, but certainly not discrimination between airports, such as Luxembourg complains of. Paradoxically, however, that situation might, rather than penalising airports such as Findel, actually put them at an advantage, since they would be rendered more attractive to airlines precisely because of their obligation to put

18 — See paragraphs 61 and 63 to 65 above.

into practice a policy of transparency as regards airport charges.

77. Luxembourg has failed, in my view, to prove that no risk of abuse of a dominant position can arise from the privileged position enjoyed by Findel Airport. I therefore take the view that the legislature did not make a manifest error of assessment by treating the two categories of airport under consideration in different fashion, on the basis of their differing strategic importance to the airline companies. Since this is therefore a case of different treatment of different situations, I can see no arbitrary discrimination in the fact that main airports are included within the Directive's scope while secondary airports located in the proximity of an urban centre are excluded from it.

78. In conclusion, since the two categories of airport do not enjoy the same position of strength with regard to the airlines, I do not consider that there has been any breach of the principle of equal treatment.

2. Similar treatment of different situations

79. The second type of possible discrimination that must be assessed is similar treatment of different situations. In particular, Luxembourg maintains that the Community legislature unjustifiably equated the main airport of each Member State with airports whose annual traffic exceeded the threshold of 5 million passenger movements.

80. In this case also, the question must be resolved from the point of view of the airlines, and in particular by posing the question whether the main airport of a Member State is, in so far as they are concerned, in the same position of strength as airports serving large numbers of passengers.

81. I would observe in this connection that, proceeding from a legitimate overall analysis of the airport sector,[19] the Community legislature took into consideration two types of characteristic that might, in the context of the setting of airport charges, place an airport in a position of particular strength: its strategic location and its size. The Directive's scope was defined on the basis of these two criteria, by which it was possible to identify objectively two types of body: main airports and airports having more than 5 million passenger movements a year.

19 — See the considerations set out above, in particular in paragraph 56.

82. Luxembourg has failed to prove that the reasoning underlying the legislature's inclusion of the main airports in each Member State is unconnected with the objective of the Directive. I would point out, in fact, first, that treating main airports and airports having more than 5 million passenger movements in the same way is responsive to the need to take account not only of advantages relating to size, but also of the strategic advantages generally enjoyed by certain categories of airport. Secondly, both the criteria are designed to prevent airport managing bodies from using an unfettered discretion in the setting of charges for the use of airport infrastructure. The fact that the position of an airport such as Findel Airport is not *identical* to that of an airport having more than 5 million passenger movements a year does not mean that it was improper to make both subject to the duty of price transparency laid down in the Directive. The factor that the two airports have in common, namely the fact that they enjoy a position of strength on the market, albeit for different reasons, is what justifies their both being bound to comply with the Directive.

83. Consequently, given that, *in light of the Directive's objective*, main airports and airports having more than 5 million passenger movements find themselves in a similar position, I conclude that there has been no arbitrary discrimination to the detriment of the former.

84. A word in conclusion on the further argument put forward by the defendant institutions on the comparability of Findel Airport and the larger airports of the Union, to the effect that Luxembourg Airport has an extremely high volume of cargo traffic. That circumstance, whilst certainly significant and confirmatory, to a degree, of the fact that the legislature made the right decisions, has no direct bearing on the facts in issue, since the legislature decided not to take account of cargo traffic when deciding which airports should come under the Directive. Moreover, as I have just shown, the absence of any discrimination can be demonstrated without referring to cargo traffic.

3. The need to apply the Directive in every Member State

85. One specific point that must now be addressed, and on which the parties were in particular disagreement at the hearing, is *the need to apply the Directive in every Member State*. According to Luxembourg, the need to have at least one airport in every Member State subject to the Directive is illogical and introduced a nationalistic element into a set of rules that ought, by contrast, to have a Community and cross-border tenor.

86. I cannot share that view of Luxembourg's for three reasons.

87. First of all, it is an unavoidable fact that the Directive must, in order to achieve the objectives which it sets itself, be applied in every Member State, including Luxembourg. There are of course factors capable of influencing the level of charges and the way in which they are set that are necessarily typical of each Member State. Suffice it to point, by way of example, to salary levels or, more generally, the national legal background.

88. Secondly, I must sympathise with the arguments put forward at the hearing, in particular by the Council, which emphasised the usefulness to airport users, even users of airports not subject to the Directive, as a point of reference, of indications as to how the charges *of at least one airport in every Member State* are set. That could constitute an element of transparency capable of influencing, to a certain degree, the pricing policy even of airports which currently fall outside the scope of the Directive.

89. Thirdly, in line with my observations in the two preceding paragraphs, the Directive is clearly informed by the need to set a Community standard that can work in all Member States, regardless of whether or not they currently have more than one airport.

90. In light of all the foregoing, it cannot be held that the legislature exceeded the bounds which must be placed on its margin of discretion.

4. Potentially discriminatory treatment

91. In the alternative, should the Court nevertheless find that there has been different treatment of similar situations, or similar treatment of different situations, it must be borne in mind that, discrimination must, if it is in fact to be discrimination, result in certain parties' being disadvantaged by comparison with others. [20]

92. In the present case it is therefore necessary to determine whether including the main airport of every Member State within the Directive's scope implies significant disadvantages for that category of airport by comparison with airports not subject to the same obligations.

20 — See Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch* v *High Authority* [1962] ECR 325, in particular p. 345; Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8, Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 115, and *Arcelor Atlantique et Lorraine and Others*, cited in footnote 10, paragraph 39.

93. In this connection, the Court has confirmed that, in order for it to be established that there is a disadvantage, the mere imposition of a legal obligation might suffice. [21] In the present case, however, the disadvantage of which Luxembourg complains by comparison with airports not subject to the Directive is of an essentially economic nature. It does not take issue with the obligations imposed by the Directive in and of themselves. It even says that it agrees with the principles underlying those obligations. It does, however, take issue with the adverse economic implications for main airports having fewer than 5 million passenger movements. Consequently, the question whether Findel Airport is at a disadvantage can only, in my opinion, be assessed from an economic viewpoint.

94. The burdens of which Luxembourg complains relate to the consultation procedure, which is compulsory for Findel Airport. Under the Directive, the discussions between airports and airlines need take place no more than once a year (Article 6(1) of the Directive) and entail, in substance, for both parties, a duty of reciprocal communication of the confidential and economically sensitive information referred to in Article 7 of the Directive. In my view, those obligations are not likely, even in the abstract, to generate economic repercussions for airport managing bodies that might put them at a competitive disadvantage, both because the burden imposed on them is very slight and because the discussions in issue are for their own benefit. First, in the immediate future, airport managing bodies will have access to information that airlines might not as a rule provide but which the Directive requires them to communicate. [22] Secondly, it is not to be ruled out that, in the longer term, the guarantee that airport charges will be set in transparent fashion might attract an ever increasing number of airlines to those airports which offer it. The introduction of transparent mechanisms for setting rates might also lead to a reduction in airport charges, which in turn could make airports more attractive to users.

95. Next, I find no basis for Slovakia's criticisms regarding potential economic losses arising from possible hindrance of the decision-making process for the setting of airport charges. First of all, the fact that airport managing bodies must take part in a periodic consultation process with airport users does not prevent them from taking reasoned decisions with which airport users do not agree (Article 6(2)). Furthermore, in that the effects of any decision challenged will be suspended for

21 — *Arcelor Atlantique et Lorraine and Others*, cited in footnote 10, paragraph 44.

22 — See recital 13 of the preamble to the Directive, which states that such information enables airport managing bodies 'to properly assess the requirements with regard to future investments'.

the duration of any appeal, the ruling of the independent authority must be given, at least on an interim basis, within four weeks of the referral of the matter (Article 6(4)).

96. I therefore take the view that, even if the Court were to hold that main airports suffer potentially discriminatory treatment by comparison with other airports, the difference in treatment is not such as to put the former at a real disadvantage to the latter.

D — *Breach of the principle of proportionality*

97. An assessment of proportionality is logically connected with an assessment relating to non-discrimination. [23] It is clear from the considerations developed above in relation to the principle of non-discrimination that the dual criteria chosen by the legislature in order to establish the scope of Directive may be explained by reference to the objective of ensuring that airports do not abuse their dominant position to the detriment of the airlines. I shall now proceed to assess this connection between the provision in issue and the objective pursued from the point of view of proportionality.

98. According to settled case-law, the principle of proportionality requires the choices made by the legislature to be suited to achieving the desired objective and must not go beyond what is necessary to achieve it. [24] Given the discretion allowed the Community legislature in regulating airport charges, it is not a question of establishing whether the measure adopted by the legislature was the only one or the best one possible, [25] but of ensuring that the choice made by the legislature was not manifestly unnecessary or inappropriate having regard to the objective pursued by the Directive. [26]

99. In the present case, main airports were included within the scope of the Directive on the assumption that there was a risk of abusive conduct because of the strategic advantages which that category of airport generally enjoys. The applicant has failed to prove that

23 — On the connection between the principle of non-discrimination and the principle of proportionality, see Case C-535/03 *Unitymark and North Sea Fishermen's Organisation* [2006] ECR I-2689, paragraph 53, and *Arcelor Atlantique et Lorraine and Others*, cited in footnote 10, paragraph 47. For a comparison between the type of assessment required to determine whether there has been discrimination and the type of assessment required to verify proportionality, see the Conclusions of Advocate-General Capotorti in Case 114/76, *Bela-Mühle Bergmann* [1977] ECR 1211, paragraph 6.

24 — See case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 54, and *IATA and ELFAA*, cited in footnote 11, paragraph 79.

25 — See *Jippes and Others*, cited in footnote 10, paragraph 83.

26 — *Afton Chemical*, cited in footnote 11, paragraph 46.

that assumption was manifestly incorrect. [27] Against that background, and on the basis of an overall assessment of the state of the airport sector, the legislature thus decided that it was necessary to establish a supervisory authority in every Member State, in order to promote more transparent regulation of airport charges, with reference to the situation of the air transport sector in the Union. It does not seem to me that, in and of itself, making provision for such a body may be considered arbitrary or manifestly unnecessary, especially if account is taken of possible changes in the regulation of airport charges arising from the results obtained. [28]

100. More particularly, as regards, the specific impact of the obligations imposed by the Directive on the actual situation obtaining within airports, it is necessary to establish whether, by the introduction of the 'main airport' criterion, the legislature did not impose on that category of airport greater burdens than were necessary in order to counter the risk of abusive conduct.

101. Luxembourg and Slovakia complain that applying the Directive to their own main airports would entail burdens which, proportionally speaking, would have a greater adverse effect on them than on airports recording more than 5 million passenger movements a year.

102. However, it must be noted that, in assessing whether or not the measure is manifestly inappropriate, the simple fact that the solution adopted by the legislature puts one group at a greater disadvantage than another is irrelevant. [29] The importance of the objectives pursued might even justify substantial negative economic consequences for certain operators, [30] and the Court may intervene only when such legislative choices appear to be manifestly incorrect or when the resultant disadvantages for certain economic operators are wholly disproportionate to the advantages otherwise offered. [31] To be more specific then, fault could be found with the 'main airport' criterion only if it were proved that the administrative burdens generally imposed on airports recording fewer than 5 million passenger movements outweighed the benefits flowing from application of the Directive and increased their operating costs to the

27 — See paragraphs 77 and 82 above.

28 — See Article 12 of the Directive.

29 — See Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 34, and *Unitymark and North Sea Fishermen's Organisation*, cited in footnote 23, paragraph 63.

30 — *Atlantique e Lorraine and Others*, cited in footnote 10, paragraph 59.

31 — *Germany* v *Parliament and Council*, cited in footnote 24, paragraph 56.

point of permanently compromising their competitiveness. [32]

103. I do not think that Luxembourg has furnished such proof. As I observed earlier, [33] the costs which, according to Luxembourg, would ensue from the establishment of the supervisory body would not result in any increase in airport charges such as to cause airlines to decide to abandon it in favour of other competing airports. Moreover, I do not believe that the minimum level of harmonisation required by the Directive can have any significant effect on the situation of airports which, in many cases, have already begun to align themselves with the guarantees of transparency and non-discrimination suggested in the past by the Council of the International Civil Aviation Organization. [34] It does not, therefore, seem to me that the theoretical costs put forward by Luxembourg are disproportionate to the interest in implementing the Directive in all the Member States.

104. I therefore take the view that including the main airport of each Member State within the scope of the Directive does not go beyond what was necessary to counter the risk of abusive conduct on the part of airport managing bodies to the detriment of airlines. In conclusion, I do not consider that the Community legislature can be charged with any breach of the principle of proportionality.

E — *Breach of the principle of subsidiarity*

105. The principle of subsidiarity, as is well-known, requires that, in areas which do not fall within its exclusive competence, the Union is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Union level. [35]

106. In so far as concerns the directive in issue in the present case, I have already pointed out [36] that, on the basis of Article 80(2) EC, it establishes common principles for the

32 — *Germany* v *Parliament and Council*, cited in footnote 24, paragraph 56. A similar burden of proof was regarded as necessary by the Court in, for example, *SAM Schiffahrt and Stapf*, cited in footnote 10, paragraph 36.

33 — See paragraphs 67 to 69 above.

34 — The Directive takes up and gives regulatory force to the policies on airport charges defined by the 2004 Council of the International Civil Aviation Organization (the ICAO Council): see recitals 9 and 10 of the preamble to the Directive.

35 — *British American Tobacco (Investments) and Imperial Tobacco*, cited in footnote 12, paragraph 177, and *Alliance for Natural Health and Others*, cited in footnote 12, paragraph 101.

36 — See paragraph 46.

levying of airport charges in the airports of the Community in order to prevent abusive conduct on the part of airport managing bodies with regard to airline companies. According to the Community legislature, that objective 'cannot be sufficiently achieved by the Member States as systems of airport charges cannot be put in place at national level in a uniform way throughout the Community and can therefore, by reason of its scale and effects, be better achieved at Community level.' [37]

107. Luxembourg disputes that a Community framework is necessary for airports having fewer than 5 million passenger movements, relying on the fact that the Directive excludes from its own scope many airports of that size.

108. Given the considerations I have expressed in relation to the dual criteria selected by the legislature in the exercise of the discretion allowed it in the sector, I find Luxembourg's observation lacking in pertinence. Indeed, airports having fewer than 5 million passenger movements which do fall within the scope of the Directive, such as Findel Airport, are included because they are main airports, irrespective of the number of their passenger movements.

109. To leave it up to Member States to regulate airport charges in their own main airports having fewer passenger movements than the 5 million a year threshold would give rise to the divergent development of national rules. Such divergence could, in the long term, lead to inefficiency, and in the immediate present also make it easier for airports to adopt abusive conduct to the detriment of the airlines. Lastly, the fact should not be forgotten that air traffic is, by its very nature, a largely international matter and is therefore generally ill suited to being regulated at the level of the individual Member States.

110. It follows that the Directive's objective could not be achieved sufficiently well by means of action taken at national level.

111. In conclusion, by defining the scope of the Directive by reference to the dual criteria set out in Article 1(2), the Community legislature did not, in my opinion, breach the principle of subsidiarity.

37 — Recital 19 of the preamble to the Directive.

## V — Conclusion

112. On the basis of the observations set out above, I suggest that the Court should:

— dismiss the application;

— order the Grand-Duchy of Luxembourg to pay the costs;

— order the Commission and the Slovak Republic to bear their own costs.