JUDGMENT OF THE COURT (Second Chamber)
4 July 2001 *

In Case C-447/99,

Commission of the European Communities, represented by F. Benyon and S. Dragone, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by U. Leanza, acting as Agent, and I.M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by maintaining in force Article 3 of the Decreto Ministeriale (Ministerial Decree) of 13 August 1998, which brings into

* Language of the case: Italian.

force Law No 537 of 24 December 1993, as amended by Law No 662 of 23 December 1996, and which provides for different departure taxes according to whether the flight in question is domestic or intra-Community, the Italian Republic has failed to fulfil its obligations under the combined provisions of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8),

THE COURT (Second Chamber),

composed of: V. Skouris (Rapporteur), President of the Chamber, R. Schintgen and N. Colneric, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 November 1999, the Commission of the European Communities brought an application under Article 226 EC for a declaration that, by maintaining in force Article 3 of the Decreto Ministeriale (Ministerial Decree) of 13 August 1998 (*Gazzetta Ufficiale della Repubblica Italiana* No 251 of 27 October 1998), which brings into force Law No 537 of 24 December 1993, as amended by Law No 662 of 23 December 1996, and which provides for different departure taxes according to whether the flight in question is domestic or intra-Community, the Italian Republic has failed to fulfil its obligations under the combined provisions of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8).

Relevant legislation

The Community legislation

2 It is apparent from the first and second recitals in the preamble to Regulation No 2408/92 that its purpose is to lay down, in accordance with Article 8a of the

EC Treaty (now, after amendment, Article 18 EC), an air transport policy with a view to the progressive establishment of the internal market, which comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

3 Article 3(1) of Regulation No 2408/92 provides that:

'subject to [the] regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.'

The national legislation

4 Article 5 of the Italian Law No 324 of 5 May 1976 (GURI No 142 of 31 May 1976) provides that, on departure, passengers travelling by air are charged a 'diritto per l'imbarco passeggeri' or departure tax, the amount of which varies according to whether the flight in question is international or domestic. That Law was subsequently amended by Law No 316 of 2 October 1991 (GURI No 237 of 9 October 1991), Law No 537 of 24 December 1993 (GURI, Ordinary

Supplement No 121 of 28 December 1993) and Law No 662 of 23 December 1996 (GURI, Ordinary Supplement No 233 of 28 December 1996), all of which retained the system of different departure taxes for the two categories of passengers.

5 Article 3 of the Decreto Ministeriale of 13 August 1998 altered the amount of the departure tax in the following manner:

'The departure tax for passengers on international flights, provided for by Article 5 of Law No 324 of 5 May 1976, as amended, is hereby increased from ITL 15 154 to ITL 15 500.

The departure tax for passengers on domestic flights, provided for by Article 2 of Law No 316 of 2 October 1991, is hereby increased from ITL 5 919 to ITL 7 000.'

The precontentious procedure

6 By letter of formal notice of 23 December 1996, the Commission informed the Italian Republic that the distinction made by Article 5 of Law No 324 of 5 May 1976, as amended, between the departure tax for passengers travelling between

Italy and other Member States and that for passengers on domestic Italian flights was incompatible with the principle of the freedom to provide services enshrined in Articles 59 and 62 of the EC Treaty (the latter article was repealed by the Treaty of Amsterdam), with Regulation No 2408/92 and with the freedom granted by Article 8a of the Treaty to every citizen of the Union to move within the territory of the Member States.

7 On 14 December 1998, following an exchange of correspondence with the Italian Republic, the Commission issued a reasoned opinion in which it called upon Italy to take the measures necessary to comply with the opinion within two months of its notification. The Italian Republic failed to respond to that opinion, whereupon the Commission brought the present action.

Arguments of the parties

8 The Commission submits that the Italian legislation establishing the departure taxes infringes Article 3(1) of Regulation No 2408/92, which must be interpreted in accordance with the general principle of freedom to provide services laid down in Article 59 of the Treaty.

9 In this connection, the Commission observes that the freedom to provide air transport services within the Community was created when the Council adopted, on 23 July 1992, the third parcel of liberalisation measures, which came into

effect on 1 January 1993. Regulation No 2408/92 is a fundamental part of that parcel of measures, governing all matters relating to access to the air transport market and thus putting into effect the principles laid down in Article 59 of the Treaty.

10 The Italian Government does not dispute the Commission's complaint, but states that new national provisions are being prepared and that they will remove the distinction between intra-Community and domestic flights in so far as concerns departure tax, thus removing the grounds for complaint.

Findings of the Court

11 It must observed at the outset that, as the Court held at paragraph 32 of its judgment in Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, the purpose of Regulation No 2408/92 is, amongst other things, to define the conditions for applying in the air transport sector the principle of the freedom to provide services which is enshrined, in particular, in Articles 59 and 61 (now Article 51 EC) of the EC Treaty, so that all matters of market access are dealt with in the same regulation.

12 Next, it must be borne in mind that the freedom enshrined in Article 59 precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17).

13 Lastly, it must be remembered that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, in particular, Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26).

14 In the present case, it is common ground that the Italian Republic has not adopted the measures needed in order to comply with the reasoned opinion within the period allowed for the purpose.

15 In view of all the foregoing, the Court finds that, by maintaining in force Article 3 of the Decreto Ministeriale of 13 August 1998, which provides for different departure taxes according to whether the flight in question is domestic or intra-Community, the Italian Republic has failed to fulfil its obligations under the combined provisions of Article 59 of the Treaty and Article 3(1) of Regulation No 2408/92.

Costs

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

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Declares that, by maintaining in force Article 3 of the Decreto Ministeriale of 13 August 1998, which brings into force Law No 537 of 24 December 1993, as amended by Law No 662 of 23 December 1996, and which provides for different departure taxes according to whether the flight in question is domestic or intra-Community, the Italian Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes;

2. Orders the Italian Republic to pay the costs.

Skouris Schintgen Colneric

Delivered in open court in Luxembourg on 4 July 2001.

R. Grass V. Skouris

Registrar President of the Second Chamber