Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

2 June 2016*

(Failure of a Member State to fulfil obligations — Air transport — Regulation (EEC) No 95/93 — Allocation of slots at European Union airports — Article 4(2) — Independence of the coordinator — Concept of 'interested party' — Airport managing body — Functional separation — System of financing)

In Case C-205/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 24 April 2014,

European Commission, represented by P. Guerra e Andrade and F. Wilman, acting as Agents,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes and V. Moura Ramos, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby (Rapporteur), A. Rosas, E. Juhász and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 June 2015,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2015,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by not ensuring that the coordinator for the allocation of slots is functionally and financially independent, the Portuguese Republic has failed to fulfil its obligations under Article 4(2) of Council Regulation (EEC) No 95/93 of

* Language of the case: Portuguese.

18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), as amended by Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 167, p. 24) ('Regulation No 95/93').

Legal context

EU law

2 The second, fifth, sixth, eighth and tenth recitals of Regulation No 95/93 are worded as follows:

'... the allocation of slots at congested airports should be based on neutral, transparent and non-discriminatory rules;

...

... the Member State responsible for the coordinated airport should ensure the appointment of a coordinator whose neutrality should be unquestioned;

... transparency of information is an essential element for ensuring an objective procedure for slot allocation;

...

... it is Community policy to facilitate competition and to encourage entrance into the market, ... these objectives require strong support for carriers who intend to start operations on intra-Community routes;

...

... there should also be provisions to allow new entrants into the Community market.'

3 Article 2 of that regulation sets out, inter alia, the following definitions:

'For the purpose of this Regulation:

(a) "slot" shall mean the permission given by a coordinator in accordance with this Regulation to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off as allocated by a coordinator in accordance with this Regulation;

...

(g) "coordinated airport" shall mean any airport where, in order to land or take off, it is necessary for an air carrier or any other aircraft operator to have been allocated a slot by a coordinator, with the exception of State flights, emergency landings and humanitarian flights;

...

(j) "managing body of an airport" shall mean the body which, in conjunction with other activities or otherwise, has the task under national laws or regulations of administering and managing the airport facilities and coordinating and controlling the activities of the various operators present at the airport or within the airport system concerned;

...'

4 Article 4 of that regulation, entitled 'The schedules facilitator and the coordinator', is worded as follows:

'1. The Member State responsible for a ... coordinated airport shall ensure the appointment of a qualified natural or legal person as ... airport coordinator ... after having consulted the air carriers using the airport regularly, their representative organisations and the managing body of the airport and the coordination committee, where such a committee exists. The same ... coordinator may be appointed for more than one airport.

2. The Member State responsible for a ... coordinated airport shall ensure:

...

(b) the independence of the coordinator at a coordinated airport by separating the coordinator functionally from any single interested party. The system of financing the coordinators' activities shall be such as to guarantee the coordinator's independent status;

(c) that the coordinator acts according to this Regulation in a neutral, non-discriminatory and transparent way.

...

5. The coordinator shall be the sole person responsible for the allocation of slots. He shall allocate the slots in accordance with the provisions of this Regulation and shall make provision so that, in an emergency, slots can also be allocated outside office hours.

6. ... The coordinator shall monitor the conformity of air carriers' operations with the slots allocated to them. These conformity checks shall be carried out in cooperation with the managing body of the airport and with the air traffic control authorities and shall take into account the time and other relevant parameters relating to the airport concerned. ...

...

8. The coordinator shall on request and within a reasonable time make available free of charge for review to interested parties, in particular to members or observers of the coordination committee, either in written form or in any other easily accessible form, the following information:

(a) historical slots by airline, chronologically, for all air carriers at the airport,

(b) requested slots (initial submissions), by air carriers and chronologically, for all air carriers,

(c) all allocated slots, and outstanding slot requests, listed individually in chronological order, by air carriers, for all air carriers,

(d) remaining available slots,

(e) full details on the criteria being used in the allocation.'

5 Article 5(1) of Regulation No 95/93 provides:

‘At a coordinated airport, the Member State responsible shall ensure that a coordination committee is set up. The same coordination committee may be designated for more than one airport. Membership of this committee shall be open at least to the air carriers using the airport(s) in question regularly and their representative organisations, the managing body of the airport concerned, the relevant air traffic control authorities and the representatives of general aviation using the airport regularly.

...’

Portuguese law

6 Article 1(1) of Decreto-Lei No 109/2008 (Decree-law No 109/2008) of 26 June 2008 (*Diário da República*, Series 1, No 122 of 26 June 2008, p. 3965) designates the coordinated airports, in accordance with the provisions of Regulation No 95/93.

7 Article 1(2) and (4) of that decree-law appoints Aeroportos de Portugal SA (‘ANA’) as the national coordinator for the allocation of slots at coordinated airports. ANA, a commercial company governed by private law, is also the managing body of the Portuguese airports.

8 Article 5 of that decree-law, entitled ‘Independence’, provides:

‘1. In carrying out its functions as national ... coordinator in respect of the allocation of slots, ANA ... shall ensure that this activity is independent of its activity as an airport manager by means of appropriate separation.

2. For the purposes of the preceding paragraph, ANA ... shall guarantee that independence, at least at a functional level, and shall keep specific accounts relating to slot coordination activities, which shall be strictly separate from the accounts relating to other activities.’

9 Article 8 of Decree-law No 109/2008, entitled ‘Supervision and monitoring’, is worded as follows:

‘1. The Instituto Nacional de Aviação Civil IP [National Institute for Civil Aviation, Portugal] shall be responsible for supervising and monitoring the allocation of slots and monitoring their use by air carriers.

...

4. Furthermore, it shall be the task of the National Institute for Civil Aviation to ensure compliance with the conditions and requirements in respect of independence laid down in Article 5; to that end, it may instruct an independent auditor to establish that there are no financial flows between the provision of slot coordination services and the other activities.’

10 Article 9 of that decree-law, entitled ‘Infringements’, provides:

‘1. For the purposes of the application of the scheme relating to civil aviation infringements, approved by Decree-law No 10/2004 of 9 January 2004, the following shall constitute very serious infringements:

(a) the absence of functional separation, on the part of ANA ..., between the activity of airport manager … and the activity of national coordinator in respect of the allocation of slots;

(b) the absence of separate accounts, on the part of ANA ..., in respect of the activities connected with slot coordination and the other activities;

…’

11 Article 10 of Decree-law No 109/2008, relating to how infringements are dealt with, provides:

‘1. It shall be the task of the National Institute for Civil Aviation to initiate and conduct infringement proceedings relating to the infringements covered by this decree-law and to apply the corresponding fines and ancillary penalties.

…’

12 Article 11 of that decree-law, entitled ‘Charges’, reads as follows:

‘1. The supply of the services of coordination and allocation of slots shall be subject, in consideration for the use of those services, to a slot-allocation charge, which shall be levied at the same time as the landing and take-off charges, per movement, and be fixed by order of the minister responsible for civil aviation.

…

3. The charge referred to in paragraph 1 constitutes revenue of ANA …’

13 As regards ANA, pursuant to Resolução do Conselho de Ministros No 111-F/2012 (Resolution of the Council of Ministers) (*Diário da República*, Series 1, No 251 of 28 December 2012), the Portuguese Republic decided to transfer 100% of the share capital of ANA, of which it was the owner, to VINCI-Concessions SAS. On the basis of that decision, ANA was privatised on 21 February 2013.

The pre-litigation procedure

14 On the basis of information relating to the allocation of slots in the airports located in Portugal, the Commission sent a letter of formal notice to the Portuguese Republic on 30 April 2012 in which it claimed that a department that had been created within the structure of ANA to carry out the tasks which are part of the function of the coordinator for the allocation of slots (‘the DCNS’) did not satisfy the requirements of independence laid down in Article 4(2) of Regulation No 95/93.

15 The Commission stated, inter alia, that, since the DCNS was a division of ANA, there was no functional separation within the meaning of Article 4(2)(b) of that regulation. Furthermore, it maintained that the financing of the DCNS was not such as to guarantee its independent status. It stated that such independence could be ensured only by means of accounts and a budget which are specific to the DCNS. According to the Commission, the DCNS was financed entirely by ANA and the slot-allocation charge provided for in Article 11 of Decree-law No 109/2008 had never been introduced.

16 The Portuguese Republic responded by letter of 19 July 2012. In that letter it referred to Article 5 of Decree-law No 109/2008, according to which ANA is to ensure that its activity as an airport manager is independent of its functions as coordinator for the allocation of slots.

17 According to the Portuguese Republic, the DCNS, although it is an integral part of ANA, carries out the activity of coordinator in an independent manner since it has its own human resources and keeps accounts that are separate from those of ANA. It maintains that the coordinator’s independent status is therefore guaranteed at both the functional and financial level.

18 As it took the view that that response was not satisfactory, the Commission sent the Portuguese Republic a reasoned opinion on 25 January 2013, in which it reiterated the complaint it had already made and requested that Member State to submit its observations within two months of receipt of that opinion.

19 The Portuguese Republic responded to that reasoned opinion on 27 March 2013, reaffirming its original point of view. However, acknowledging the necessity, after the privatisation of ANA, of setting up a new body to be responsible for the coordination of slots, it stated that it was going to ensure that that new body was created. At a later stage it provided a summary note concerning the creation of that body.

20 As it took the view that the responses to the reasoned opinion were not satisfactory, the Commission brought the present action.

The action

21 The Commission submits that the Portuguese Republic does not ensure that the coordinator for the allocation of slots is functionally and financially independent, contrary to what is laid down by Article 4(2) of Regulation No 95/93.

The first complaint, concerning the functional separation of the coordinator from any single interested party

Arguments of the parties

22 In the context of its first complaint, the Commission complains that the Portuguese Republic has not ensured that the coordinator is independent by separating it functionally from any single interested party in accordance with Article 4(2) of Regulation No 95/93.

23 It submits that, having regard to the purpose of that regulation, that provision must be interpreted broadly. It maintains that, in that context, the independence of the coordinator is designed to ensure that discrimination is prevented as well as that the coordinator is impartial, that information is transparent, that the benefits of liberalisation are not unevenly spread, that there is no distortion of competition, that the management of slots is efficient and that new operators have access to the European Union market.

24 According to the Commission, the term ‘independence’ means that the coordinator must have a status which enables it to carry out its activities with complete freedom and autonomy, without having to take any instructions or being put under any pressure. It maintains that it is apparent from the coordinator’s central role in the allocation of slots that the mere risk of not being able to act with complete freedom is enough to hinder the independent performance of the coordinator’s activities.

25 The Commission states that, as regards the requirement of functional separation, the expression ‘any single interested party’, within the meaning of Article 4(2)(b) of Regulation No 95/93, which must be interpreted broadly, refers not only to air carriers, which are directly affected by the coordinator’s decisions, but also to any person who may have an interest in the way in which the coordinator allocates slots in a coordinated airport. It points out, in that regard, that the managing body of the airport concerned, which may have such an interest, based, for example, on the benefit derived from slot-coordination activities, in the form of airport charges, must, as such, be regarded as an interested party, without it being necessary to prove that such an interest exists. The Commission maintains that it is therefore essential for the coordinator to be independent of that managing body.

26 The Commission submits that, in the present case, Decree-law No 109/2008 lays down only a general rule designed to ensure the independence of the coordinator. According to the Commission, pursuant to that decree-law, since ANA itself is the coordinator, it must also be the guarantor of the independence between the activities of the coordinator and those of the managing body. In that regard, the Commission claims that the Portuguese Republic was not able to state, first, in which way ANA had ensured that the activities of the DCNS, which is an integral part of ANA and shares its personnel and premises, was independent of ANA itself and, secondly, which guarantees existed in that regard.

27 Moreover, the Commission states that the Código português das sociedades comerciais (the Portuguese Code on commercial companies) provides that the board of directors of a public limited company, such as ANA, manages its activities, which means that the report and annual accounts of a department of that public limited company, such as the DCNS, are examined by that board of directors, with the result that the DCNS cannot carry out its activities independently of and separately from that company.

28 The Portuguese Republic maintains that the DCNS satisfies the requirements of Article 4(2) of Regulation No 95/93. It submits that ANA, as a managing body, cannot be regarded as an interested party from which the DCNS should be separate and, since Regulation No 95/93 does not define who is to be classified as an interested party, it is necessary to carry out an assessment on a case by case basis, which the Commission did not envisage.

29 It takes the view that, in the present case, the classification of ANA as an interested party requires that its interest, direct or indirect, in the slot-allocation process must be determined and specifically assessed. However, it maintains that ANA, the airport managing body, benefits only indirectly from the activity of coordinating slots and solely as regards the collection of airport charges, which depend on the number of users. It submits that, as a result, it is unlikely that ANA individually favours any of the airport's users when it does not derive any benefit from this. It states that it would be different if ANA held shares in the capital of an air carrier, which is not the case.

30 It maintains that even if ANA could be regarded as an interested party, the Portuguese Republic guarantees the independence of the coordinator, provided for in Article 4(2)(b) of Regulation No 95/93. According to that Member State, that provision does not require the coordinator to be a separate legal entity from the managing body of the airport, but simply requires functional separation. It takes the view that there is indeed functional separation between ANA and the DCNS since the DCNS has genuine technical, functional, organisational and managerial autonomy as regards the activities connected with the allocation of slots and that its decisions are therefore in no way subject to any assessment or approval by ANA.

Findings of the Court

31 Under the first sentence of Article 4(2)(b) of Regulation No 95/93, the Member State concerned must ensure 'the independence of the coordinator ... by separating the coordinator functionally from any single interested party'.

32 Accordingly, it is necessary to ascertain, in the context of the first complaint, whether ANA, as the airport managing body, must be regarded as an 'interested party' within the meaning of that provision and, if so, whether the Portuguese Republic has provided the guarantees necessary to ensure that the coordinator is functionally separate from that interested party.

33 It must be pointed out at the outset that Regulation No 95/93 does not contain any definition of the concept of the 'functional separation' of the coordinator or of that of the 'interested party' from which the coordinator must be separate. In order to ascertain the scope of those concepts, it is therefore

important to take into account not only the wording of the first sentence of Article 4(2)(b) of Regulation No 95/93 and the objective of the independence of the coordinator in relation to any single interested party within the meaning of that provision, but also the requirements laid down in Article 4(2)(c) of that regulation. That provision states that it is necessary that 'the coordinator acts according to this Regulation in a neutral, non-discriminatory and transparent way' and those three factors thus form an integral part of the independent nature of the function of the coordinator.

34 As regards, in the first place, the neutrality of the coordinator, it is apparent from the fifth recital of Regulation No 95/93 that that neutrality must be 'unquestioned'. It is established that such a requirement must be guaranteed in relation to any single interested party.

35 In the second place, it must be pointed out that, in accordance with the sixth recital of Regulation No 95/93, transparency of information 'is an essential element for ensuring an objective procedure for slot allocation'.

36 In the third place, in order to enable the coordinator to pursue effectively the objectives of Regulation No 95/93, the objectivity of the procedure for slot allocation requires the tasks which that regulation confers upon the coordinator to be carried out without the coordinator being subject to any pressure.

37 The functional approach of the independence of the coordinator is therefore characterised, inter alia, by the obligation to allocate slots objectively and transparently to each person who requests the allocation of such slots.

38 As regards the concept of 'interested party', the Commission maintains that that concept has to be given a wide meaning in such a way that it covers an extensive circle of persons, including an airport managing body.

39 By contrast, the Portuguese Republic submits that whether a party may be classified as an interested party must be assessed on a case-by-case basis, on the basis of a specific inspection, with the result that it is for the Commission to show that, in the present case, the managing body has an interest in the allocation of slots.

40 That latter argument must be rejected at the outset. In view of the purpose of the first sentence of Article 4(2)(b) of Regulation No 95/93 of ensuring the unquestioned neutrality of the coordinator, it must be held that that provision seeks to preclude any risk of the coordinator not carrying out its tasks in an independent manner.

41 In those circumstances, it must be held that 'interested party' must be understood as meaning any entity the interests of which might be affected by the allocation of slots. As the Commission submits, that is the case with regard to the managing bodies of airports.

42 First, it is apparent from Article 4(1) of Regulation No 95/93 and also from Article 4(8) of that regulation, read in conjunction with Article 5(1) thereof, that the managing bodies of airports are, like all air carriers, included in the circle of entities which have the right to be consulted before the coordinator is appointed and to be informed of, inter alia, the requested, allocated and remaining available slots. That fact confirms that Regulation No 95/93 is based on the premiss that the interests of the managing body of an airport may be affected by the slot allocation for which the coordinator is responsible.

43 Secondly, as the Commission submits, the managing body of an airport may have an interest in the slots being allocated to a certain air carrier, even if it has no direct or indirect shareholding in the capital of that air carrier, and such an interest may arise, for example, out of contracts for the lease of space in the airport concluded between a certain air carrier and the managing body or out of the latter's wish for the airport in question to become a hub for a certain air carrier.

44 Consequently, it must be held that ANA, as the airport managing body in Portugal, must be regarded as an 'interested party' within the meaning of Article 4(2)(b) of Regulation No 95/93.

45 In the light of that finding, it is necessary to examine whether Decree-law No 109/2008 established to the required legal standard guarantees capable of ensuring the functional separation of the coordinator, for the purposes of that provision.

46 It must be pointed out that, according to Decree-law No 109/2008, it is ANA, which is responsible for carrying out both the functions of coordinator and those of airport managing body, that, under Article 5(1) and (2) of that decree-law, ensures that the activity of coordinator is independent of its activity as an airport manager by means of appropriate separation and that it is also ANA which guarantees that independence, at least at a functional level. Furthermore, that decree-law establishes, in Article 8 thereof, the body responsible for supervising and monitoring the allocation of slots and defines, in Articles 9 and 10 thereof, serious infringements and the way in which that body must deal with those infringements.

47 It must be held that the guarantees provided for by the Portuguese legislation at issue are not, on account of its vague nature, sufficient to actually ensure the functional separation required by the first sentence of Article 4(2)(b) of Regulation No 95/93. That legislation relies, in essence, solely on the self-limitation of ANA, without, in that regard, imposing on it an appropriate and specific framework.

48 Even if it were true that, as the Portuguese Republic submits, ANA has never brought any pressure to bear in practice and that the National Institute for Civil Aviation, as the regulatory body for the civil aviation sector in Portugal, has never received the slightest complaint relating to the actions of the coordinator, such factual claims are ineffective as regards whether the Portuguese Republic has laid down the rules of law necessary to ensure that the coordinator is independent of any single interested party.

49 Consequently, since Decree-law No 109/2008 has not laid down sufficiently specific rules of law to ensure 'the independence of the coordinator ... by separating the coordinator functionally from any single interested party', within the meaning of the first sentence of Article 4(2)(b) of Regulation No 95/93, the Commission's first complaint must be held to be well founded.

The second complaint, concerning the system of financing the coordinator

Arguments of the parties

50 Article 4(2)(b) of Regulation 95/93 requires the system of financing the coordinator's activities to be such as to guarantee the coordinator's independent status. That means, according to the Commission, that the coordinator should keep separate accounts, manage separate budgets and, in particular, that the financing of its activities should not be contingent on interested parties or solely on one interested party, in the present case the managing body of the airport. The Commission submits that, in the present case, the financing of the coordinator is exclusively contingent on that body and its budget is approved by that body. Furthermore, the Commission maintains that, even though the coordinator constitutes a specific cost centre, all of its expenses are borne by the managing body, which does not make it possible to conclude that the system of financing the coordinator is independent of that body.

51 According to the Portuguese Republic, a system of financing such as to guarantee the coordinator's independent status, as required by Article 4(2)(b) of Regulation No 95/93, is merely an indicator which makes it possible to measure the degree of the coordinator's independence and not a fundamental legal requirement. It maintains that the fact that the slot-allocation charge has not been introduced does not therefore make it possible to conclude that the DCNS lacks independence.

52 The Portuguese Republic claims that, in the present case, the accounts in respect of the activities of the DCNS are strictly separate from those relating to the activities of ANA, with the result that the DCNS constitutes a specific cost centre.

Findings of the Court

53 The second sentence of Article 4(2)(b) of Regulation No 95/93 provides that 'the system of financing the coordinators' activities shall be such as to guarantee the coordinator's independent status'.

54 In the present case, ANA is an interested party, as is apparent from paragraph 44 of this judgment. It is therefore necessary for the DCNS to have its own accounts, budget and financial resources in order to ensure that it carries out its functions as coordinator in accordance with Regulation No 95/93, without any influence from ANA.

55 However, there is, in particular, no mechanism for financing by means of own resources in the present case. It is common ground that the Portuguese legislation does not provide for such a mechanism and that the resources of the DCNS come exclusively from ANA.

56 Furthermore, the Portuguese Republic does not dispute that the adoption of the coordinator's operational budget and annual accounts falls within the exclusive competence of ANA's board of directors.

57 As regards the Portuguese Republic's argument that the DCNS constitutes a specific cost centre, that fact alone is not capable of affecting the conclusion that the coordinator is entirely financed by an interested party, in the present case by ANA. Consequently, the system of financing the coordinator's activities is not such as to guarantee the coordinator's independent status as required by the second sentence of Article 4(2)(b) of Regulation No 95/93.

58 In those circumstances, it must be held that the Commission's second complaint is well founded.

The ancillary claims of the Portuguese Republic

59 Accessorily, the Portuguese Republic asks the Court to declare, first, that 'in Portugal, the current coordinator ensures that the requirements relating to functional independence laid down in Article 4(2)(b) of Regulation No 95/93 are complied with' and, secondly, that 'the Portuguese Republic has fulfilled its obligations under Regulation No 95/93'.

60 As regards those claims, it must be held that, in the context of an action for failure to fulfil obligations, the Court does not have jurisdiction to deal with an application other than that submitted by the Commission. Those claims must therefore be rejected as inadmissible.

61 In the light of all of the foregoing, it must be held that, by failing to ensure that the coordinator for the allocation of slots is independent by separating the coordinator functionally from any single interested party and by failing to ensure that the system of financing the coordinator's activities is such as to guarantee the coordinator's independent status, the Portuguese Republic has failed to fulfil its obligations under Article 4(2) of Regulation No 95/93.

Costs

62 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic's failure to fulfil its obligations has been established, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Declares that, by failing to ensure that the coordinator for the allocation of slots is independent by separating the coordinator functionally from any single interested party and by failing to ensure that the system of financing the coordinator's activities is such as to guarantee the coordinator's independent status, the Portuguese Republic has failed to fulfil its obligations under Article 4(2) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, as amended by Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009;**

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

[Signatures]