JUDGMENT OF THE COURT,

19 January 1994 *

In Case C-364/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Belgian Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

SAT Fluggesellschaft mbH

and

European Organization for the Safety of Air Navigation (Eurocontrol),

on the interpretation of Articles 86 and 90 of the EEC Treaty,

* Language of the case: French.

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida and M. Díez de Velasco (Presidents of Chambers), C.N. Kakouris, R. Joliet, F.A. Schockweiler, F. Grévisse (Rapporteur), M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— SAT, by Henriette Tielemans of the Brussels Bar,

— Eurocontrol, by Jacques Putzeys of the Brussels Bar,

— the German Government, by Ernst Röder, Ministerialrat, and Claus-Dieter Quassowski, Regierungsdirektor, in the Federal Ministry of the Economy, acting as Agents,

— the United Kingdom, by S. Lucinda Hudson of the Treasury Solicitor's Department, acting as Agent,

— the French Government, by Edwige Belliard, Assistant Director of the Legal Affairs Department in the Ministry of Foreign Affairs, and Catherine de Salins, Adviser on Foreign Affairs, acting as Agents,

— the Greek Government, by Nikolaos Mavrikas, Assistant Legal Adviser, and Maria Basdeki, authorized State representative, in the State Legal Service, acting as Agents,

— the Commission of the European Communities, by Bernd Langeheine, a member of its Legal Service, assisted by Géraud de Bergues, a national expert on secondment to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff in the main proceedings, the defendant in the main proceedings, the Greek Government, the French Government and the Commission, at the hearing on 28 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 10 November 1993,

gives the following

Judgment

1 By order of 10 September 1992, which was received at the Court on 18 September 1992, the Belgian Cour de Cassation referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 86 and 90 of the Treaty.

2 That question was raised in the course of proceedings between SAT Fluggesellschaft mbH (hereinafter referred to as 'SAT'), an airline company governed by German law, and the European Organization for the Safety of Air Navigation (hereinafter referred to as 'Eurocontrol').

3 Eurocontrol is an international organization, whose seat is in Brussels, which was established by the Convention of 13 December 1960. A Protocol of 12 February 1981, which came into force on 1 January 1986, substantially amended the original

Convention (hereinafter referred to as 'the amended Convention'). The Contracting States are the Kingdom of Belgium, the French Republic, the Federal Republic of Germany, the Greek Republic, Ireland, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland, and the Cypriot Republic, the Hungarian Republic, the Maltese Republic, the Swiss Confederation and the Turkish Republic.

4 In accordance with Article 2(1)(l) of the amended Convention, Eurocontrol's function is in particular to establish and collect the charges levied on users of air navigation services in accordance with the Multilateral Agreement relating to the Collection of Route Charges, signed on 12 February 1981, on behalf of the abovementioned Contracting States and the non-member States parties to that Agreement. Those non-member States are Austria and Spain.

5 The dispute which Eurocontrol has brought before the Belgian courts concerns the recovery of route charges amounting to USD 3 175 953, payable by SAT for flights made during the period from September 1981 to December 1985.

6 In order to justify its refusal to pay the charges, SAT pleads that Eurocontrol has infringed Articles 86 and 90 of the Treaty. It claims that the procedures followed by Eurocontrol, in fixing charges at different rates for equivalent services, of an amount varying in particular from State to State and from year to year, constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty.

7 Those are the circumstances in which the Belgian Cour de Cassation, hearing the action, has referred to the Court for a preliminary ruling the following question:

'Does the European Organization for the Safety of Air Navigation established by the Convention signed at Brussels on 13 December 1960, as amended by the Protocol made at Brussels on 12 February 1981, constitute an undertaking within the meaning of Articles 86 and 90 of the Treaty of Rome of 25 March 1957 establishing the European Economic Community?'

The jurisdiction of the Court

8 Eurocontrol claims that, as an international organization, whose relations with the Community are governed by the rules of public international law, it is outside the jurisdiction of the Court. The Court therefore has no jurisdiction to rule on the question submitted.

9 The objection that the Court lacks jurisdiction must be rejected. The Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty provisions pursuant to Article 177 of the Treaty which establishes direct cooperation between the Court and the courts and tribunals of the Member States by way of a non-contentious procedure excluding any initiative of the parties who are merely invited to be heard in the course of that procedure (see, in particular, the judgment in Case 44/65 *Hessische Knappschaft* v *Maison Singer et Fils* [1965] ECR 965).

10 The national court has referred to the Court a question concerning not the interpretation of the Convention establishing Eurocontrol or the Multilateral Agreement relating to the Collection of Route Charges but the interpretation of Articles 86 and 90 of the Treaty.

11 The question whether the rules of Community law may be relied upon as against Eurocontrol is connected with the substance of the case and has no bearing on the jurisdiction of the Court.

Admissibility

12 Eurocontrol also maintains that the question submitted is inadmissible, in that the grounds of the order for reference are vitiated by a material error, since they are based on the erroneous assumption that the organization possesses a monopoly on air navigation control and the collection of route charges. Moreover, any judgment subjecting Eurocontrol to the rules of competition laid down by the Treaty could not be enforced, since the States which have acceded to the Convention but which are not Members of the Community would not be legally bound by that judgment.

13 The first observation challenging the relevance of the question submitted by the national court must be rejected. Whilst it is important to define the precise extent of the powers of an organization such as Eurocontrol in order to answer, on the merits, the question submitted, any allegedly incorrect findings made by the national court as to those powers have no bearing on the admissibility of the reference for a ruling.

14 The second observation must be rejected on the same grounds as those which led to the rejection of the objection that the Court lacks jurisdiction. The observation is connected with the substance of the case in that it presupposes that the question whether Eurocontrol constitutes an undertaking subject to the rules of competition has been resolved.

Substance

15 SAT claims that Eurocontrol is an undertaking within the meaning of Articles 86 and 90 of the Treaty. The research and coordination activities carried on by that organization and the collection of route charges do not fall within the *'jus imperii'*, but constitute economic activities that could be carried on by bodies governed by private law. Even air navigation control is an economic activity, as shown by the fact that in some Member States it is private undertakings that exercise such control. SAT claims, in the alternative, that at least the collection of charges, which gave rise to the dispute in the main proceedings, is a commercial activity as is demonstrated in particular by the fact that Eurocontrol has brought actions for recovery before the Brussels Commercial Court.

16 The French, German and Greek Governments, and the United Kingdom, on the other hand, base their reasoning on the public character of Eurocontrol's activities, in denying that the latter is an undertaking within the meaning of the Treaty rules of competition. They are supported, in particular, by the judgments of the Court on the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, from which it is apparent that Eurocontrol must be regarded as a public authority acting in the exercise of its powers (judgments in Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, and in Joined Cases 9/77 and 10/77 *Bavaria Fluggesellschaft and Germanair* v *Eurocontrol* [1977] ECR 1517). More particularly, they argue that air navigation

control is a supervisory activity intended to ensure public safety. The collection of route charges, for its part, is an activity carried on on behalf of the Contracting States, the charges merely constituting the consideration for the air navigation services provided by those States.

17 The Commission also maintains that Eurocontrol does not constitute an undertaking, within the meaning of the relevant Treaty provisions, and in that connection puts forward the same arguments as those developed by the Member States so far as the collection of route charges is concerned. Furthermore, it considers that air navigation control, which is not directly at issue in the main proceedings, is a task involving the exercise of public authority and is not of an economic nature, since that activity constitutes a service in the public interest which is intended to protect both the users of air transport and the populations affected by aircraft flying over them.

18 It follows from the case-law of the Court (see especially the judgments in Case C41/90 *Höfner and Elser* v *Macrotron GmbH* [1991] ECR I-1979, at paragraph 21, and in Joined Cases C-159/91 and C-160/91 *Poucet et Pistre* [1993] ECR I-637, at paragraph 17) that, in Community competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.

19 In order to determine whether Eurocontrol's activities are those of an undertaking within the meaning of Articles 86 and 90 of the Treaty, it is necessary to establish the nature of those activities.

20 Under Article 1 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (United Nations Treaty Series, Vol. 15, No 105): 'The Contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory'. It is in the exercise of that sovereignty that the States ensure, subject to compliance with the provisions of the applicable international conventions, the supervision of their air space and the provision of air navigation control services.

21 According to the Convention establishing it, Eurocontrol is a regionally-oriented international organization, whose aim is to strengthen cooperation between the Contracting States in the field of air navigation and develop joint activities in this field, making due allowance for defence needs and providing maximum freedom for all air space users consistent with the required level of safety. The organization is to act in cooperation with the civil and military authorities of the Contracting States (Article 1 of the amended Convention).

22 Eurocontrol's tasks, as defined in Article 2 of the amended Convention, are concerned in the first place with research, planning, coordination of national policies and staff training.

23 Secondly, Eurocontrol is competent to establish and collect the route charges levied on users of air space. Eurocontrol settles, in accordance with the guidelines laid down by the International Civil Aviation Organization, the common formula on the basis of which the route charges are calculated. That formula takes into account the weight of the aircraft and the distance travelled, to which a 'rate per unit' is applied. That rate is not fixed by Eurocontrol, but by each of the Contracting States for the use of its air space. A single charge, making up the sum of the charges payable, is calculated and collected by Eurocontrol for each flight. The charges are collected on behalf of the Contracting States to which they are paid over, after deduction of a proportion of the revenue corresponding to an 'administrative rate' intended to cover collection costs.

24 Finally, as the Protocol of 12 February 1981 expressly provides, the operational exercise of air navigation control is limited since Eurocontrol can only carry on that activity at the request of the Contracting States. In that connection, it is common ground that Eurocontrol confines itself to providing air space control for the Benelux countries and the northern part of the Federal Republic of Germany from its Maastricht centre. For the purposes of such control, Eurocontrol is vested with rights and powers of coercion which derogate from ordinary law and which affect users of air space. In exercising those particular powers, it must ensure compliance with international agreements and national rules concerning access, overflying and the territorial security of the Contracting States concerned.

25 So far as the last-mentioned activity is concerned, it may be noted that it has not been disputed that Eurocontrol is required to provide navigation control in that air space for the benefit of any aircraft travelling through it, even where the owner of the aircraft has not paid the route charges owed to Eurocontrol.

26 Finally, Eurocontrol's activities are financed by the contributions of the Contracting States.

27 Eurocontrol thus carries out, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety.

28 Contrary to SAT's contention, Eurocontrol's collection of route charges, which gave rise to the dispute in the main proceedings, cannot be separated from the organization's other activities. Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services. As the Court has already held, specifically in connection with the interpretation of the abovementioned Convention of 27 September 1968, Eurocontrol must, in collecting the charges, be regarded as a public authority acting in the exercise of its powers (the *LTU* judgment, cited above, at paragraphs 4 and 5).

29 Eurocontrol acts in that capacity on behalf of the Contracting States without really having any influence over the amount of the route charges. Responsibility for the fact, relied upon by SAT before the national court, that the amounts of the charges vary in time or with respect to the areas overflown, cannot be attributed to Eurocontrol, which merely establishes and applies a common formula in the circumstances set out above, but to the Contracting States which set the amount of the rates per unit.

30 Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the

control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.

31 Accordingly, an international organization such as Eurocontrol does not constitute an undertaking subject to the provisions of Articles 86 and 90 of the Treaty.

32 On those grounds, the answer to the question submitted must be that Articles 86 and 90 of the Treaty are to be interpreted as meaning that an international organization such as Eurocontrol does not constitute an undertaking within the meaning of those articles.

Costs

33 The costs incurred by the French, German and Greek Governments, the United Kingdom, and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Belgian Cour de Cassation by order of 10 September 1992, hereby rules:

Articles 86 and 90 of the EEC Treaty are to be interpreted as meaning that an international organization such as Eurocontrol does not constitute an undertaking within the meaning of those articles.

Due Mancini Moitinho de Almeida

Díez de Velasco Kakouris Joliet

Schockweiler Grévisse Zuleeg

Kapteyn Murray

Delivered in open court in Luxembourg on 19 January 1994.

J.-G. Giraud
Registrar

O. Due
President