JUDGMENT OF THE COURT (Sixth Chamber)

16 October 2003 *

In Case C-363/01,

REFERENCE to the Court under Article 234 EC by the Oberlandesgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court between

Flughafen Hannover-Langenhagen GmbH

and

Deutsche Lufthansa AG,

on the interpretation of Article 16(3) of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, V. Skouris, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Flughafen Hannover-Langenhagen GmbH, by G. Schohe, Rechtsanwalt,

— Deutsche Lufthansa AG, by B. Haager and H. Neumann, Rechtsanwälte,

— the Greek Government, by M. Apessos, I. Bakopoulos and S. Chala, acting as Agents,

— the Commission of the European Communities, by M. Huttunen and M. Niejahr, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Flughafen Hannover-Langenhagen GmbH, represented by G. Schohe; of Deutsche Lufthansa AG, represented by B. Haager, H. Neumann and M. Kleuk, Abteilungsleiter, and of the Commission, represented by M. Huttunen and M. Niejahr, at the hearing on 5 December 2002,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2003,

gives the following

Judgment

1 By order of 31 July 2001, received at the Court on 24 September 2001, the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 16(3) of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36; 'the Directive').

2 Those questions were raised in the course of proceedings between Flughafen Hannover-Langenhagen GmbH ('the Flughafen'), which operates the Hannover-Langenhagen airport (Germany), and the airline Deutsche Lufthansa AG

('Lufthansa'), concerning Lufthansa's refusal to pay the Flughafen a separate fee from 1 January 1998 onwards for access to the groundhandling market ('the access fee').

Legal background

Community legislation

3 Recital 5 in the preamble to the Directive states that 'the opening-up of access to the groundhandling market should help reduce the operating costs of airline companies and improve the quality of service provided to airport users'.

4 According to Recital 9 of the Directive, 'free access to the groundhandling market is consistent with the efficient operation of Community airports'.

5 Recital 25 of the Directive states:

'Whereas access to airport installations must be guaranteed to suppliers authorised to provide groundhandling services and to airport users authorised to self-handle, to the extent necessary for them to exercise their rights and to permit fair and genuine competition; whereas it must be possible however, for such access to give rise to the collection of a fee'.

6 Pursuant to Article 2 of the Directive:

'For the purposes of this Directive:

(a) "airport" means any area of land especially adapted for the landing, taking-off and manœuvres of aircraft, including the ancillary installations which these operations may involve for the requirements of aircraft traffic and services including the installations needed to assist commercial air services;

...

(c) "managing body of the airport" means a body which, in conjunction with other activities or not as the case may be, has as its objective under national law or regulation the administration and management of the airport infrastructures, and the coordination and control of the activities of the different operators present in the airport or airport system concerned;

(d) "airport user" means any natural or legal person responsible for the carriage of passengers, mail and/or freight by air from, or to the airport in question;

(e) "groundhandling" means the services provided to airport users at airports as described in the Annex;

(f) "self-handling" means a situation in which an airport user directly provides for himself one or more categories of groundhandling services and concludes no contract of any description with a third party for the provision of such services; for the purposes of this definition, among themselves airport users shall not be deemed to be third parties where:

— one holds a majority holding in the other;

or

— a single body has a majority holding in each;

(g) "supplier of groundhandling services" means any natural or legal person supplying third parties with one or more categories of groundhandling services.'

7 Article 6 of the Directive, entitled 'Groundhandling for third parties', provides:

'1. Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling services to third parties.

Member States shall have the right to require that suppliers of groundhandling services be established within the Community.

2. Member States may limit the number of suppliers authorised to provide the following categories of groundhandling services:

— baggage handling,

— ramp handling,

— fuel and oil handling,

— freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.

They may not, however, limit this number to fewer than two for each category of groundhandling service.

3. Moreover, as from 1 January 2001 at least one of the authorised suppliers may not be directly or indirectly controlled by:

— the managing body of the airport,

— any airport user who has carried more than 25% of the passengers or freight recorded at the airport during the year preceding that in which those suppliers were selected,

— a body controlling or controlled directly or indirectly by that managing body or any such user.

However at 1 July 2000, a Member State may request that the obligation in this paragraph be deferred until 31 December 2002.

The Commission, assisted by the Committee referred to in Article 10, shall examine such request and may, having regard to the evolution of the sector and, in particular, the situation at airports comparable in terms of traffic volume and pattern, decide to grant the said request.

4. Where pursuant to paragraph 2 they restrict the number of authorised suppliers, Member States may not prevent an airport user, whatever part of the airport is allocated to him, from having, in respect of each category of groundhandling service subject to restriction, an effective choice between at least two suppliers of groundhandling services, under the conditions laid down in paragraphs 2 and 3.'

8 Article 7 of the Directive, entitled 'Self-handling', is worded as follows:

'1. Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure the freedom to self-handle.

2. However, for the following categories of groundhandling services:

— baggage handling,

— ramp handling,

— fuel and oil handling,

— freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft,

Member States may reserve the right to self-handle to no fewer than two airport users, provided they are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria.'

9 Paragraph 1 of Article 9 of the Directive, entitled 'Exemptions', provides:

'Where at an airport, specific constraints of available space or capacity, arising in particular from congestion and area utilisation rate, make it impossible to open up the market and/or implement self-handling to the degree provided for in this Directive, the Member State in question may decide:

(a) to limit the number of suppliers for one or more categories of groundhandling services other than those referred to in Article 6(2) in all or part of the airport; in this case the provisions of Article 6(2) and (3) shall apply;

(b) to reserve to a single supplier one or more of the categories of groundhandling services referred to in Article 6(2);

(c) to reserve self-handling to a limited number of airport users for categories of groundhandling services other than those referred to in Article 7(2), provided that those users are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria;

(d) to ban self-handling or to restrict it to a single airport user for the categories of groundhandling services referred to in Article 7(2).'

10 Article 16 of the Directive, entitled 'Access to installations', states:

'1. Member States shall take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle have access to airport installations to the extent necessary for them to carry out their activities. If the managing body of the airport or, where appropriate, the public authority or any other body which controls it places conditions upon such access, those conditions must be relevant, objective, transparent and non-discriminatory.

2. The space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria.

3. Where access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria.'

11 At the time the Directive was adopted, the Commission arranged for a statement to be entered in the minutes relating to the application of Article 16(3), worded as follows:

'The Commission states that Article 16(3) recognises an airport is right to collect a fee from suppliers of groundhandling services and self-handling users for access to its installations.

The Commission states that such a fee may be construed as a commercial charge ["Geschäftsgebühr" in the German version of the declaration] and may in particular contribute to the self-financing of the airport in so far as it is determined on the basis of relevant, objective, transparent and non-discriminatory criteria'.

National legislation

12 The Gesetz über Bodenabfertigungsdienste (Law on groundhandling services) of 11 November 1997 (BGBl. 1997 I, p. 2694) inserted into the Luftverkehrsgesetz (Law on air transport) a power under which the Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften (Regulation concerning groundhandling services at airports and amending other provisions of air transport law) of 10 December 1997 (BGBl. 1997 I, p. 2885; 'the BADV') was adopted.

13 Paragraph 9(1) and (3) of the BADV provides:

'(1) The airport operator and the supplier of groundhandling services or self-handler are required to enter into a contract concerning the use of the requisite and available part of the airport and its infrastructure as well as the fees to be paid under this regulation to the airport operator....

...

(3) The airport operator is entitled to charge suppliers of groundhandling services and self-handlers a fee for the access, availability and use of its installations. The amount of such remuneration shall be determined after a hearing of the users' committee in accordance with relevant, objective, transparent and non-discriminatory criteria and may in particular contribute, in the sense of a commercial fee, to the self-financing of the airport....'

The dispute in the main proceedings and the questions referred to the Court

14 It is clear from the order for reference that Lufthansa planes fly in and out of the Hannover-Langenhagen airport. At that airport, Lufthansa provides, inter alia, check-in services for passengers flying on its planes and for passengers transported by other airlines. In the context of those activities, the Flughafen makes check-in desks available to Lufthansa in return for a rent determined in accordance with a contract for aircraft groundhandling.

15 Until the end of 1997, the Flughafen did not require Lufthansa to pay an access fee, at least in respect of its self-handling activities. However, even at that time it did collect such a fee from suppliers of groundhandling services to third parties and from other suppliers.

16 It is common ground that the access fee constitutes remuneration for the grant of the opportunity to gain access to the groundhandling market in the airport and is not intended as payment for any actual services rendered by the Flughafen, such as the provision of separate installations or installations used in common, which are covered by a user fee paid by Lufthansa to the Flughafen.

17 On 1 January 1998, the Flughafen adopted new rules governing the use of the airport, paragraphs 2.5.1 and 2.5.2 of which provide:

'2.5.1. The airport operator shall offer groundhandling services in accordance with the list of services offered and the table of fees payable which may be applicable from time to time. Self-handlers and suppliers of groundhandling services are also entitled, to the extent permitted by the managing body of the airport, to provide such services.

2.5.2. The airport operator is entitled to charge authorised self-handlers and suppliers of groundhandling services fees for access to, availability and use of its installations. Those fees are intended to contribute, in the sense of a commercial fee, to the self-financing of the airport.'

18 On that basis the Flughafen adopted a table of fees which refers to an access fee of DEM 0.30 per passenger.

19 On 24 July 1998, the Flughafen sought payment from Lufthansa of DEM 151 890.74 in access fees for the period from 1 January 1998. Lufthansa denied the validity of that demand for payment, and, consequently, the Flughafen brought an action before the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main) seeking payment of those fees.

20 After the Landgericht dismissed that action, the Flughafen appealed to the national court which has made this reference. That court is, in particular, uncertain whether Lufthansa is obliged to enter into a contract with the Flughafen regarding the payment of access fees. The Oberlandesgericht notes that

the Flughafen could, in certain circumstances, rely on Paragraph 9(3) of the BADV, in conjunction with Article 16(3) of the Directive, as a basis for a right to conclude a licence agreement and receive payment of an access fee in addition to the fee for use of the airport installations.

21 The wording of Paragraph 9(1) and (3) of the BADV does not, of itself, establish whether there is a right to remuneration for the grant of access to the groundhandling market as distinct from the right to remuneration in respect of the availability and use of the airport installations.

22 According to the national court, it cannot be inferred from the wording, meaning or purpose of the Directive, and in particular Article 16(3) thereof read in conjunction with Recital 25, that an airport operator is entitled to require payment of an access fee in addition to a separate fee for making airport installations available.

23 It points out that Article 16(3) of the Directive refers to 'access to airport installations', which covers physical installations. It is difficult to equate access to installations to access to a specific market. That provision allows for the collection of a fee, set by way of common agreement, for the provision of physical installations, which takes account of both the airport operator's interest in achieving a profit and the need to cover its costs, on the one hand, and the objective of opening up the market on the other.

24 In the national court's view, the Directive aims to ensure the opening-up of the market and a reduction in costs. Accepting the Flughafen's view would not only result in the denial of access of a type which Lufthansa and other airlines in a comparable situation had enjoyed for decades, but also render such access more difficult because it would be associated with a significant increase in costs.

Article 16(3) of the Directive, in conjunction with Recital 25 in its preamble, merely provides that access to airport installations may be made subject to payment of a fee the amount of which is to be determined in accordance with the criteria indicated, taking into account the profit of the undertaking concerned.

25 The national court submits that the view advocated by the Flughafen appears to be supported by the wording of Paragraph 9(3) of the BADV, by Commission Decision 98/513/EC of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 — Alpha Flight Services/Aéroports de Paris) (OJ 1998 L 230, p. 10), and by Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929). In the light of those texts, Article 16(3) of the Directive and Paragraph 9 of the BADV could also be interpreted as referring to fees payable in return for the grant of a commercial opportunity rather than for making physical installations available for a specific use.

26 According to the national court, the legislative history of the Directive militates against the interpretation advocated by the Flughafen. The proposals drawn up by the European Parliament and the Committee of the Regions of the European Union, the latter of which used the term concession charge, were not taken up in the resolution on the common position of the Council or in the final text of the Directive.

27 The national court also states that some academic writers consider that the access fee differs from the fee for specific services usually provided by the airport operator and points out that Paragraph 9(3) of the BADV provides for a fee relating to three components, namely access, availability and use. Conversely, other authors take the view that no provision of the Directive provides for collection of an access fee and that collection of such a fee impedes airport operators' competitors from gaining access to the groundhandling market.

28 The national court considers that even if the Directive had to be interpreted as authorising collection of an access fee, such a fee would be permissible only in cases where the supplier of services gains access to the market without using the airport installations because, otherwise, the grant of a commercial opportunity would already be remunerated by the user fee for those installations.

29 Moreover, assuming that the Directive must be interpreted as permitting collection of an access fee, the national court raises the question whether such a fee can also be charged in areas in which the market in question has long since been opened up and where, accordingly, the Directive can no longer have any effect.

30 If that question is answered affirmatively, the Oberlandesgericht poses the further question whether that fee may then also be charged to an undertaking which had in the past been granted market access in return for a user fee alone, adjusted at regular intervals, thereby causing groundhandling costs to rise significantly, contrary to the objectives of the Directive.

31 Moreover, the national court takes the view that a difference in the treatment of existing and new operators might result in objectively unjustified unequal treatment and an infringement of the prohibition of discrimination. That court considers that its preferred interpretation does not give rise to discrimination between self-handlers and suppliers of services to third parties or between existing and new operators. The airport operator would in each case be able to charge a user fee determined in such a way as to allow it to achieve a profit while complying with the criteria laid down in Article 16(3) of the Directive.

32 If it were to follow from the interpretation given by the Court of Justice that the Flughafen is entitled to require an undertaking in Lufthansa's situation to pay an access fee, the question would arise whether fee calculation methods such as those at issue in the main proceedings meet the requirements laid down in Article 16(3) of the Directive.

33 In the light of the foregoing considerations, the Oberlandesgericht Frankfurt am Main decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Council Directive 96/67/EC of 15 October 1996, in particular Article 16(3) thereof, in conjunction with Recital 25 in the preamble thereto, to be interpreted as meaning that the managing body of an airport within the meaning of Article 3 is entitled to demand from a self-handler and/or a supplier of groundhandling services to third parties payment of a separate licence fee for the grant of "access to airport installations" in the sense of an access fee in return for the opening-up of a commercial opportunity in addition to a user fee (rental) payable by the self-handler and/or supplier to third parties of groundhandling services for the rental under contract of airport installations, in this case, passenger check-in desks; or

alternatively, does the Directive merely provide that, for the purposes of determining a user fee, account is to be taken of the criteria mentioned in Article 16(3) and regard is to be had to the interest of the managing body of the airport in achieving a profit?

(2) If the answer to Question 1 — first alternative — is affirmative, does the airport operator also have the right to claim such a fee from the self-handler and/or supplier of groundhandling services to third parties (supplier in the

situation of the defendant in the main proceedings) in sectors where free access to the groundhandling market was already guaranteed prior to the entry into force of the Directive, in particular in regard to land-side handling services?

(3) If Question 2 is answered affirmatively, is the Directive to be interpreted as entitling the managing body of an airport within the meaning of Article 3 also to demand payment of an additional licence fee as described in Question 1 for "access to airport installations" from a self-handler and/or a supplier of services in the situation of the defendant in the main proceedings who, until the entry into force of the Directive or provisions transposing it into national law, paid (only) rent for the use of the relevant airport installations?

(4) May it even be mandatory to demand (additionally) payment of a licence fee by a self-handler and/or supplier of groundhandling services who has hitherto enjoyed free access to that market, or, as the case may be, to the self-handling sector alone, without being required to pay an additional licence fee, in order to prevent unequal treatment in relation to other self-handlers and suppliers of groundhandling services

(a) who have already hitherto been requested to pay a supplementary licence fee in addition to a user fee;

(b) who are for the first time granted access to airport installations on the basis of the legal situation created by the Directive and are henceforth being requested to pay a licence fee for such access in addition to a further user fee for use of the installations?

(5) If Article 16(3) of the Directive entitles an airport's managing body to require payment of a supplementary licence fee as described above, does such a fee, which must be paid in addition to a fee for use of check-in desks, meet the requirements of Article 16(3) in regard to relevance, objectivity, transparency and non-discrimination where it is determined according to numbers of passengers (in this case DEM 0.30 per passenger checked in)?'

The first question

34 By the first part of its first question, the national court is asking essentially whether the Directive, in particular Article 16(3) thereof, authorises the managing body of an airport to make access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an acess fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations.

35 According to the Flughafen and the Greek Government, the fee for 'access to airport installations' which the managing body of an airport may, under Article 16(3) of the Directive, collect from suppliers of services and self-handlers in reality constitutes remuneration for access to the 'market' in groundhandling services or in other words for the anticipated profit that such access provides to suppliers and self-handlers. Accordingly, such a fee is payable in addition to the fee charged for the provision of the airport installations by the airport's managing body, which does not fall within the scope of the Directive.

36 That interpretation is incorrect.

37 Recital 25 of the Directive states that 'access to airport installations must be guaranteed to suppliers authorised to provide ground-handling services and to airport users authorised to self-handle' and 'it must be possible... for such access to give rise to the collection of a fee'.

38 Under Article 16(1) and (3) of the Directive, entitled 'Access to installations', 'Member States shall take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle have access to airport installations' and '[w]here access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria'.

39 It follows that the managing body of the airport is authorised to collect a fee in return for granting access to airport 'installations'.

40 The reference to installations clearly relates to the infrastructure and the equipment made available by the airport. That interpretation is consistent with Article 2(a) of the Directive, which defines an airport as any area of land especially adapted for the landing, taking-off and manœuvres of aircraft, 'including the ancillary installations' which these operations may involve for the requirements of aircraft traffic and services, and the 'installations needed to assist commercial air services'.

41 In addition, as Lufthansa correctly points out, any other interpretation of Article 16 of the Directive would render the first paragraph of that provision meaningless in so far as its aim is to ensure that suppliers and users receive access to the airport installations 'to the extent necessary for them to carry out their activities'. It is common ground that in order to carry out groundhandling activities it is in any event necessary to have access to that market. Therefore, the specification in that paragraph makes sense only if it refers to access to the airport installations themselves, the need for which varies according to the activity concerned. For some groundhandling activities, the supplier or self-handler needs to rent moveable or immoveable property belonging to the airport's managing body, while for others mere access to the installations used in common is sufficient.

42 An interpretation to the effect that the Directive does not allow for the possibility of collecting an access fee is supported by other provisions of the Directive, and in particular by Articles 6 and 7 thereof. In contrast to the provisions of Article 16(3) of the Directive relating to access to airport 'installations', those provisions, which require the Member States to take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle are granted 'free access to the market' and 'the freedom to self-handle' respectively, do not make any provision whatsoever for the collection of a fee as consideration for the exercise of those freedoms.

43 That interpretation is also correct in the light of the Directive's objective of ensuring the opening-up of the groundhandling market which, according to Recital 5 of the Directive, must help, in particular, to reduce the operating costs of airline companies.

44 Not only would the possibility for the managing body of an airport to charge an access fee in addition to the fee for use of the airport installations not facilitate access to the market concerned, it would also run directly counter to the objective of reducing the operating costs of airline companies and, in certain cases, would even lead to an increase in those costs. That would be the case if certain suppliers or self-handlers who, like Lufthansa, did not pay the access fee before the Directive was implemented, were now required, having regard to the criteria laid down in Article 16(3) of the Directive, to pay such a fee.

45 Against that background, the Court must reject the Flughafen's argument that the Directive cannot validly regulate the terms of collection of the user fee for airport 'installations' because the purpose of that Directive is, according to its very title, to ensure access to the groundhandling 'market' and not to those 'installations'.

46 As the Advocate General pointed out in points 36 and 37 of his Opinion, the fact that access to the airport installations is a necessary precondition for access to the groundhandling market explains why the Community legislature not only laid down provisions relating directly to access to that market but, in order to ensure genuine access to the market, was also entitled to specify the conditions for access to the airport installations themselves.

47 The argument put forward by the Flughafen that the Community legislature's intention was to permit the collection of an access fee as consideration for the additional costs to the managing bodies of airports of opening up the ground-handling market, in order to ensure the self-financing of those airports, is inconsistent with the broad logic of the Directive.

48 First, the Community legislature stated in Recital 9 of the Directive that free access to the market concerned was consistent with the efficient operation of Community airports, without mentioning the collection of any fee as consideration for that access. Second, none of the Directive's provisions providing for exceptions to the principle of free access, namely Articles 6, 7 and 9, permit such an exception for reasons relating to the financing requirements of airports. Moreover, airports have access to sources of financing other than those linked to groundhandling activities, such as take-off and landing fees.

49 A consideration of the legislative history of the Directive also confirms the validity of this interpretation of Article 16(3) of the Directive.

50 The final text of the Directive does not include Amendment No 29 to the Commission proposal for a Council Directive No 95/C 142/09 on access to the groundhandling market at Community airports (OJ 1995 C 142, p. 7), set out in the legislative resolution embodying the Parliament's opinion on that proposal (OJ 1995 C 323, p. 94). That amendment states that a fee 'may... be charged for access by third parties to the commercial opportunities created by the airport undertaking', in addition to the user fee which may be charged for access to airport installations and reflecting the costs that that access and the provision of the necessary infrastructure occasions for the airport. For its part, Article 16(3) of the Directive authorises the collection of a fee only for access to 'airport installations', which lends support to the argument posited by Lufthansa and the Commission that that provision does not permit the collection of a fee for market access as consideration for the commercial opportunities created by that access.

51 The statement relating to the application of Article 16(3) of the Directive, which the Commission arranged to be entered in the minutes when the Directive was adopted and on which the Flughafen relies in support of its argument, likewise does not permit the inference that the commercial fee referred to therein, which may 'contribute... to the self-financing of an airport', in fact constitutes a fee for market access. In any event, an interpretation based on such a statement cannot give rise to an interpretation different from that resulting from the actual wording of the provision concerned (se, to that effect, Case 429/85 *Commission* v *Italy* [1988] ECR 843, paragraph 9).

52 Moreover, neither Decision 98/513 nor the judgment in *Aéroports de Paris* v *Commission*, cited above, can reasonably be relied on by the Flughafen if only because the case which gave rise to that decision and later to that judgment did not concern the application of the Directive but related to the Community law applicable prior to its entry into force.

53 Nor do the fundamental principles of Community law relied on by the Flughafen, namely the principle of non-discrimination, the right to property and the freedom to carry on an economic or commercial activity militate against interpreting the Directive as prohibiting the collection of an access fee.

54 As regards the principle of non-discrimination, inasmuch as it is clear from the foregoing considerations that the collection of a fee from any suppliers or self-handlers at all in return for access to the market concerned cannot be justified on the basis of either Article 16(3) of the Directive or any other provision thereof, the Flughafen's argument alleging an infringement of that principle inasmuch as such a fee would be collected from certain operators but not from others, must be rejected because it is based on an incorrect premiss.

55 As to the right to property, the fact that the managing body of an airport is not authorised to collect an access fee does not mean, contrary to the Flughafen's assertions, that that body is deprived of the possibility of profiting from the economic services that it provides on the groundhandling market to which it must grant access.

56 Article 16(3) of the Directive requires that the fee which may be collected in return for access to airport installations must be determined according to relevant, objective, transparent and non-discriminatory criteria. Therefore, that provision does not prevent the fee from being determined in such a way that the mananging body of the airport is able not only to cover the costs associated with the provision and maintenance of airport installations, but also to make a profit.

57 That interpretation is supported by the legislative history of the Directive from which it is clear that, while the proposal for a directive referred to in paragraph 50 of this judgment stated, in the corresponding provision (see Article 14(3)), that the managing body of the airport may collect a fee only 'as a charge for the costs which this access... occasions for the airport and reflecting the level of the costs', Article 16(3) does not contain any such specification.

58 Therefore, the Flughafen's argument based on the failure to respect the right to property must be rejected inasmuch as it is based on the incorrect premiss that it would be impossible for that company to exploit its property in such a way as to make a profit.

59 At the hearing the Flughafen submitted that the prohibition on collecting an access fee constitutes arbitrary interference in its freedom to carry on an economic or commercial activity inasmuch as that prohibition is not laid down by the Directive and is thus illegal. But, as is clear from the foregoing considerations, the restriction on the freedom to set prices, which the managing body of the airport sees as the consequence of a prohibition on collecting a fee solely for access to the groundhandling market, clearly follows from the Directive and, accordingly, the Flughafen's argument in that regard is also based on an incorrect premiss and must be rejected.

60 In those circumstances, the answer to the first part of the first question must be that the Directive, in particular Article 16(3) thereof, precludes the managing body of an airport from making access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations.

61 By the second part of its first question, the national court asks whether Article 16(3) of the Directive merely provides that that body is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in that provision, which takes account of the interest of that body in making a profit.

62 As is clear from paragraphs 55 to 57 of this judgment, the answer to the second part of the first question must be that the managing body of an airport is entitled to collect a fee for the use of airport installations, of an amount, to be determined

according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

63 In the light of all the foregoing considerations, the answer to the first question must be that the Directive, in particular Article 16(3) thereof, precludes the managing body of an airport from making access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations. On the other hand, that body is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

The second to fifth questions

64 In the light of the answer to the first question there is no need to answer the second to fifth questions.

Costs

65 The costs incurred by the Greek Government and by the Commission, 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 (Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht Frankfurt am Main by order of 31 July 2001, hereby rules:

Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, in particular Article 16(3) thereof, precludes the managing body of an airport from making access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations. On the other hand, that body is entitled to collect a fee for the use of airport installations, of an amount, to be determined according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

Puissochet Gulmann Skouris

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 16 October 2003.

R. Grass V. Skouris

Registrar President