JUDGMENT OF THE COURT (Sixth Chamber)

26 June 2001 *

In Case C-70/99,

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

applicant,

v

Portuguese Republic, represented by L. Fernandes, M.L. Duarte and F. Viegas, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by maintaining in force Article 10 of Decreto Regulamentar (Regulatory Decree) No 38/91 of 29 July 1991 (*Diário da República* I, Series B, No 172 of 29 July 1991), which provides that flights from Portugal to other Member States are subject to a higher passenger service tax than

* Language of the case: Portuguese.

that applicable to domestic flights, and by maintaining in force the provisions of Decreto-Lei (Decree-Law) No 102/91 of 8 March 1991 (*Diário da República* I, Series A, No 56 of 8 March 1991), as implemented by subsequent implementing orders, under which flights from Portugal to other Member States are subject to higher security taxes than those applicable to certain domestic flights, the Portuguese 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 (Sixth Chamber),

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

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 11 January 2001,

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 26 February 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by maintaining in force Article 10 of Decreto Regulamentar (Regulatory Decree) No 38/91 of 29 July 1991 (*Diário da República* I, Series B, No 172 of 29 July 1991), which provides that flights from Portugal to other Member States are subject to a higher passenger service tax than that applicable to domestic flights, and by maintaining in force the provisions of Decreto-Lei (Decree-Law) No 102/91 of 8 March 1991 (*Diário da República* I, Series A, No 56 of 8 March 1991), as implemented by subsequent implementing orders, under which flights from Portugal to other Member States are subject to higher security taxes than those applicable to certain domestic flights (hereinafter 'the provisions at issue'), the Portuguese 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 relevant Community legislation

2 The freedom to provide services within the Member States of the Community is enshrined in the first paragraph of Article 59 of the Treaty.

3 Regulation No 2408/92, which was adopted on the basis of Article 84(2) of the EC Treaty (now, after amendment, Article 80(2) EC), is part of the third parcel of measures adopted by the Council with a view to progressively establishing an internal market for air transport over the period expiring on 31 December 1992. The regulation provides, in particular, for freedom of access for Community air carriers to intra-Community air routes.

4 Article 3(1) of that regulation provides that, '[s]ubject to this regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community'. The regulation contains derogating provisions concerning, *inter alia*, the right accorded to the Member States to impose public service obligations upon air carriers.

The relevant national legislation

5 Article 10 of Decree No 38/91 introduced a passenger service tax the rate of which varies according to whether the destination of the flight to which it applies is national or international. The amount of that airport tax is fixed by decree of the transport minister for flights departing from Lisbon, Oporto and Faro, on the one hand, and from the Azores, on the other. In both cases, different rates are fixed for national and international flights.

6 Decree-Law No 102/91 introduced a security tax chargeable on every travel document for a departure from a national airport. Initially, the rules implementing that Decree-Law fixed different tariffs depending on whether the destination of the flight was a national or an international airport. Since the adoption of

Portaria (Ministerial Decree) No 240/98 of the Minister for Transport of 16 April 1998 (*Diário da República* I, Series B, No 89 of 16 April 1998), the amount of the tax has varied according to whether the flight is regional, intra-Community or international. The list of regional flights, drawn up by ministerial decree, includes flights connecting the airports of the Azores and Madeira to other national airports.

The pre-litigation procedure

7 The Commission took the view that, because the provisions at issue imposed, on departure from a national airport, higher taxes for intra-Community flights than for national flights, (that is to say, the passenger service tax or, in the case of certain national flights classified as regional flights, the security tax), they were incompatible with the principle of freedom to provide services enshrined in Articles 59 and 62 of the EC Treaty (the latter article was repealed by the Treaty of Amsterdam) in the light of which, according to the Commission, Article 3(1) of Regulation No 2408/92 must be interpreted. Therefore, on 11 December 1996, the Commission sent the Portuguese Government a letter of formal notice calling on it to submit its observations on the matter, pursuant to Article 169 of the Treaty.

8 In its reply of 17 March 1997, in which it made no distinction between the passenger service tax and the security tax, the Portuguese Government submitted that the services required for international flights are more extensive than those provided for national flights. It also argued that the special treatment enjoyed by passengers going to and from the autonomous regions of the Azores and Madeira is justified by the public service obligation to provide flights to those regions and by reasons of social policy, because of the need for people in those regions to be able to travel within their national territory at reasonable cost.

9 By letter of 30 June 1998, the Commission sent the Portuguese Republic a reasoned opinion pursuant to Article 169 of the Treaty in which it stated that Portugal had failed to fulfil its obligations and called upon it to adopt corrective measures within two months of notification of the opinion. In that opinion, the Commission reiterated that the free access for Community air carriers to intra-Community air routes guaranteed by Regulation No 2408/92 must be interpreted in accordance with the principle of freedom to provide services enshrined in Article 59 of the Treaty.

10 The Portuguese authorities failed to respond to the reasoned opinion and to inform the Commission of the adoption of measures designed to comply with the opinion, whereupon the Commission brought the present action.

The alleged failure to fulfil obligations and the findings of the Court

11 The Commission maintains that the fact that the Portuguese Republic applies higher airport taxes to intra-Community flights than to national or regional flights is incompatible with the freedom to provide air transport services defined in Article 3(1) of Regulation No 2408/92, which provision must, according to the Commission, be interpreted in accordance with the general principles deriving from Article 59 of the Treaty. The freedom to provide air transport services within the Community was, according to the Commission, enshrined by the Council's adoption, on 23 July 1992, of the third parcel of measures designed to give effect to the principles laid down by Article 59 of the Treaty, of which Regulation No 2408/92 is a fundamental part.

12 By analogy with the case-law of the Court of Justice concerning charges for port services, and in particular Case C-18/93 *Corsica Ferries* [1994] ECR I-1783 and

Case C-381/93 *Commission* v *France* [1994] ECR I-5145, the Commission takes the view that national legislation which differentiates between domestic flights and flights to other Member States and offers a particular advantage to domestic passengers constitutes a restriction of the freedom to provide air-transport services. In *Commission* v *France*, the Court emphasised that, in the perspective of a single market and in order to permit the realisation of its objectives, the freedom to provide services 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.

13 Thus, given that they are not justified, according to the Commission, by reasons of general interest, the provisions at issue must be regarded as constituting a failure on the part of the Portuguese Republic to fulfil its obligations under Article 3(1) of Regulation No 2408/92.

The conduct of the administrative procedure

14 The Portuguese Government argues that the Commission was wrong to commence an action for failure to fulfil obligations under Article 169 of the Treaty. It submits that, because there has been no harmonisation of airport taxes within the Community, and because a distinction is made between domestic and international traffic in the national legislations of most Member States, the Commission ought to have followed the procedure provided for in Article 90 of the Treaty (now Article 86 EC) and adopted a harmonisation directive.

15 According to the Portuguese Government, the adoption of a harmonisation directive is the only necessary, appropriate and proportionate measure. Adapting the legislation of a single Member State by means of an action for failure to fulfil obligations, on the other hand, creates a risk of distorting competition between

Community air carriers. In this connection, the Portuguese Government states that the Commission has not informed it of any other actions commenced against other Member States for the same reasons.

16 Furthermore, given that the Commission has already had recourse to the procedure under Article 90 of the Treaty in a matter concerning landing charges (see Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613), it ought, in the interests of consistency in its management of litigious matters and in order to make full use of its regulatory powers, to have followed the same procedure in connection with other airport taxes.

17 In this connection, it must be borne in mind that, notwithstanding its other powers under the Treaty to ensure that Member States comply with Community law, the Commission enjoys a discretion in deciding whether or not to commence an action for failure to fulfil obligations. It is not required to justify its decision, nor will the admissibility of the action be dependent upon the circumstances dictating its choice (see to that effect, in particular, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraphs 11 and 12, and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 27). The Court of Justice need only ensure that the procedure adopted may, in principle, be employed with regard to the alleged infringement.

18 In the present case, it is common ground that the infringement of which the Portuguese Republic is allegedly guilty may, if it is proven, be regarded as a failure to fulfil obligations, and thus the present proceedings are properly brought. The Portuguese Government's argument that the Commission ought to have adopted a harmonising directive or to have brought against other Member States actions similar to the present one is clearly irrelevant.

The scope of Regulation No 2408/92

19 The Portuguese Government submits that the subject-matter of the provisions at issue does not fall within the scope of Regulation No 2408/92. It submits that, whilst that regulation prohibits the Member States from adopting rules or practices that restrict access to intra-Community air routes, it does not govern the conditions under which flights are operated, and the passenger service tax and security tax merely amount to conditions under which flights are operated.

20 That distinction is invalid. The amount of airport taxes to be paid will directly and automatically influence the price of the journey. Differences in the taxes to be paid by passengers will automatically be reflected in the transport cost, and thus, in the present instance, access to national or regional flights is favoured over access to intra-Community flights. Moreover, the Court of Justice has had occasion to rule that the application of different rates of port taxes according to whether the journey in question is domestic or intra-Community runs counter to the principle of freedom to provide services, being a restriction on access to shipping routes (see *Commission* v *France*, cited above, paragraphs 10 and 14).

21 As is clear from the first two recitals of the preamble, the very purpose of Regulation No 2408/92 is to eliminate, with regard to air travel, restrictions on the freedom to provide services within the framework of the common transport policy defined in Article 74 of the EC Treaty (now Article 70 EC) and Article 75 of the EC Treaty (now, after amendment, Article 71 EC) and in pursuance of Article 84(2) of the Treaty which confers on the Council power to lay down appropriate provisions with regard to air transport.

22 Thus, Portuguese legislation on airport taxes must comply with the provisions of Regulation No 2408/92 as interpreted in the light of the general principle of

freedom to provide services enshrined in Article 59 of the Treaty. Indeed, another purpose of that regulation is to define the conditions for applying that principle in the air transport sector, so that all matters of market access are dealt with in the same regulation (Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, paragraph 32).

Restriction of the freedom to provide services

23 Whilst the Portuguese Government denies that Regulation No 2408/92 can apply to the present case, it accepts that its national legislation must comply with the principle of freedom to provide services enshrined in Article 59 of the Treaty.

24 In this connection, the Portuguese Government maintains that the provisions at issue do comply with that principle because they do not introduce discrimination on the basis of an operator's nationality. Should the provisions at issue in fact constitute a restriction on the freedom to provide services, it argues that the measures that they enact are justified by compelling reasons of public interest that are necessary and proportionate. It emphasises that the Court of Justice accepted, in paragraph 16 of its judgment in *Commission* v *France*, cited above, that there may, in principle, be objective justification in a situation of this kind, although it did not reach a finding that there was such objective justification in the case then before it.

25 As regards the absence of discrimination on the basis of an operator's nationality, it must be observed that the Commission does not allege any such breach of the

principle of freedom to provide services and thus the Portuguese Government's point that the provisions at issue treat all air carriers established within the Community in the same way is of no consequence.

26 What the Commission actually complains of is the fact that, by means of Article 10 of Decree No 38/91 and Decree-Law No 102/91, the Portuguese Republic made the provision of air transport services between Member States more difficult than the provision of domestic air transport services within a Member State. That complaint bears no relation to discrimination on the basis of an operator's or a passenger's nationality.

27 As far as the Commission's complaint is concerned, it is common ground that, whilst applying without distinction to all air transport operators, the provisions at issue do differentiate between domestic or regional flights and flights destined for other Member States. Under those provisions intra-Community flights attract a passenger service tax three times higher than that charged for national flights and a security tax twice that payable in respect of regional flights. Article 59 of the Treaty precludes the application of any national legislation that, without objective justification, restricts the freedom of a service provider to provide services and, in the perspective of the single market, 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 (*Commission* v *France*, cited above, paragraphs 16 and 17).

28 Furthermore, the Court of Justice has had occasion to rule that a measure that makes the provision of cross-border services more onerous than that of comparable domestic services amounts to a restriction of the freedom to provide services (see Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph

38). In the present case, the provisions at issue make the provision of cross-border services — such as the flight from Lisbon to Madrid — more costly than the provision of a comparable domestic service — such as the flight from Lisbon to Oporto — and they thus constitute a breach of the principle of freedom to provide services unless they are justified by compelling reasons of public interest and the measures enacted thereby are necessary and proportional.

29 As far as concerns, firstly, the passenger service tax, the Portuguese Government justifies the different treatment of domestic and intra-Community flights by reference to the fact that additional and different services are offered to intra-Community and international passengers. It states that the case-law of the Court concerning maritime transport cannot be applied to the present case because there are constraints which are peculiar to air transport.

30 However, the Portuguese Government merely lists the services provided to passengers at airports and fails to show that they are fundamentally different from those offered in maritime ports. Nor does it demonstrate in what way the differences between the services provided to passengers on intra-Community flights and those provided to passengers travelling between two airports within Portugal constitute a compelling reason of public interest justifying a passenger service tax on intra-Community flights that is three times the amount of the same tax on domestic flights, or in what way such a difference in taxation is necessary and proportional.

31 As regards, secondly, the security tax, the fact that a reduced rate applies to regional flights is justified, according to the Portuguese Government, by the need to promote regional development and to provide special support to outlying regions for which air transport is the only solution, the reference here being essentially to the Azores and Madeira.

32 In that respect, it should be noted, first, that in accordance with Article 1(4) thereof, the autonomous region of the Azores was exempted from application of Regulation No 2408/92 up to and including 30 June 1998. It was not until it became clear that the amendments that were required to be made to the Portuguese legislation and to take effect from 1 July 1998 had not in fact been made that the Commission sent its reasoned opinion. According to the ninth recital of the preamble to Regulation No 2408/92, the exemption was justified by the inadequate state of development of the air traffic system in the Azores at the time when the regulation was adopted. Thus, the regulation made express provision for a temporary, derogating measure addressing regional development that was intended to enable progressive adaptation in regions where particular constraints forbade the sudden and immediate imposition of Community rules.

33 Next, Article 4(1) of Regulation No 2408/92 makes provision for the promotion of the development of certain regions. Under Article 4(1)(a), a Member State may 'impose a public service obligation in respect of scheduled air services to an airport serving a peripheral or development region in its territory'. Under Article 4(1)(h), such public service obligations may give rise to the payment of compensation.

34 However, whilst Regulation No 2408/92 does, in certain circumstances, permit the imposition upon air carriers of such public services obligations, which may be the subject of financial compensation, those obligations must be defined beforehand and any financial quid pro quo must be capable of being identified as specific compensation for the obligation in question.

35 Clearly, the difference in the amounts of security tax payable in respect of regional and intra-Community flights cannot be attributed to public service obligations designed to benefit autonomous regions. Whilst the Portuguese Government refers to the necessity of bringing financial and social assistance to the autonomous regions of the Azores and Madeira, it neither proves, nor even alleges, that it imposed a public service obligation of any kind upon the airlines serving those regions and — most importantly — it does not deny that the

advantage conferred is not limited to flights to autonomous regions whose situation would perhaps justify it, but benefits, or may benefit, other regional flights specified in a list drawn up by ministerial decree and subject to change depending on unspecified criteria.

36 Moreover, the arguments put forward by the Portuguese Government fail to show that there is any compelling reason of public interest that justifies the restriction of freedom to provide services created by a security tax rate that is approximately twice as high for intra-Community flights as for regional flights.

37 Finally, the point made by the Portuguese Government that applying the same rate of tax to regional flights as that applied to intra-Community flights would constitute an excessive burden on the overall price of the former has no bearing whatsoever on the merits of the present application, in particular because harmonisation of the rates of airport taxes does not necessarily imply raising the lowest rates.

38 It must therefore be held that, by introducing under Article 10 of Decree No 38/91 a higher passenger service tax for intra-Community flights than that applicable to domestic flights and by introducing under Decree-Law No 102/91 and its implementing orders a higher security tax for intra-Community flights than that applicable to certain domestic flights, the Portuguese Republic has failed to fulfil its obligations under the combined provisions of Article 59 of the Treaty and Article 3(1) of Council Regulation (EEC) No 2408/92.

Costs

39 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 Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by introducing under Article 10 of Decreto Regulamentar (Regulatory Decree) No 38/91 of 29 July 1991 a higher passenger service tax for intra-Community flights than that applicable to domestic flights and by introducing under Decreto-Lei (Decree-Law) No 102/91 of 8 March 1991 and its implementing orders a higher security tax for intra-Community flights

than that applicable to certain domestic flights, the Portuguese 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;

2. Orders the Portuguese Republic to pay the costs.

Gulmann Skouris Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 26 June 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber