OPINION OF ADVOCATE GENERAL ALBER

delivered on 8 October 2002 [1]

I — Introduction

1. The present reference for preliminary ruling concerns the imposition of differentiated airport taxes on domestic and international flights in Greece. It concerns their compatibility with Regulation (EEC) No 2408/92 [2] as well as with Articles 18 and 49 EC.

II — Legal framework

1. *Regulation No 2408/92*

2. Regulation No 2408/92, which was adopted on the basis of Article 80(2) EC, belongs to the so-called 'third package' of consolidated measures for the incremental creation of an internal market for air transport (see first recital in the preamble). In particular, it provides for free access for Community air carriers to intra-Community air routes (Article 1 refers).

3. Article 3(1) of the regulation states:

'Subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.'

2. *Greek legislation*

4. Law 2065/1992 [3] provides, in Article 40(7), a paragraph inserted by

1 — Original language: German.

2 — Council Regulation No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ 1992 L 240, p. 8.

3 — FEK (Official Gazette of the Greek Government) A' 113.

Article 27(2) of Law 2668/1998: [4]

'7. Every passenger over 12 years of age departing from a Greek airport (whether a State, municipal, community or private airport) for a domestic or international destination shall be charged an airport modernisation and development tax, as follows:

(a) for passengers whose final destination is more than 100 kilometres, but not more than 750 kilometres, from their airport of departure, a tax in drachmas of an amount equal to ECU 10;

(b) for passengers whose final destination is more than 750 kilometres from their airport of departure, a tax in drachmas of an amount equal to ECU 20.'

4 — FEK A' 282.

III — Facts

5. The claimants in the main proceedings paid an airport modernisation and development tax in the sum of GRD 6 900 (equivalent to approximately EUR 20) for a flight from Heraklion to Marseilles on 10 August 1998. He seeks a refund from the Greek State of half of this sum.

6. The national court found that passengers receive no consideration for the tax which they are charged. Rather, it is a tax which is collected by the airlines and transferred to the Bank of Greece. It is used for carrying out works and creating airport facilities, and for the modernisation thereof.

7. The national court points out that the doubled tax affects above all international flights. No domestic flight covers more than 750 kilometres, and only one international flight, namely Corfu to Rome, falls below the threshold of 750 kilometres.

8. In its order for reference, the national court also rejects the arguments put forward by the Greek Government in the

national proceedings that the tax is minimal and, furthermore, justified on the ground that the service provided for passengers on international flights is greater in duration and extent, for no specific consideration is given in return for the tax. Rather, the fiscal charge is imposed in order to pursue State objectives.

9. It also follows from the order for reference that the claimant in the main proceedings considers the Greek legislation to be in breach of Article 18 EC, according to which every citizen has the right to free movement and residence in the territory of Member States, and of Article 49 EC, which prohibits any restriction of the freedom to provide services, since that legislation gives rise to a disguised discrimination against international, and thus also intra-Community flights. Further, the claimant submits that the legislation in question infringes the provisions of Council Regulation No 2408/92, Article 3 of which forms the basis of a general freedom of access to intra-Community transport, including internal transport of a Member State, for the benefit of Community air carriers. He relies, among other, on the judgment in *Commission* v *France*.[5] Finally, he also pleads breach of the prohibition on discrimination.

5 — Case C-381/93 *Commission* v *France* [1994] ECR I-5145.

IV — Question referred for preliminary ruling

10. In that context the national court has submitted the following question:

'Are Articles 8a (after amendment, Article 18 EC) and 59 (after amendment, Article 49 EC) of the EC Treaty and Article 3(1) of Council Regulation No 2408/92 to be interpreted as prohibiting a Member State from imposing a differentiated fiscal charge on domestic and intra-Community flights with the direct result that an amount of tax is charged on intra-Community flights which is double that applicable to flights within the Member State?'

V — Observations of the parties

11. The claimant in the main proceedings lodged written observations at the Court of Justice on 5 July 2001. The time allowed for this had, however, already expired on 29 June, and the written proceedings were concluded on 3 July. The observations can no longer, therefore, be taken into account.

1. *The Greek Government*

12. The Greek Government refers first to the fact that 65% of income from such taxes is applied for the development and modernisation of the airports at which the tax is imposed. The remaining 35% is available for the Government to undertake works at any Greek airport.

13. The Greek Government does not address further the legal issues raised by the national court's order for reference. It merely states that the legislation in issue has been amended by Article 16 of Law 2892/2001, which entered into force on 1 March 2001, so that a single airport modernisation and development tax in the sum of EUR 12 is now charged on all flights.

2. *The Italian Government*

14. The Italian Government contends that the Greek legislation is compatible with Community law. It is indeed the case that international flights are subject to a tax that is double that imposed on domestic flights. But the distinction rests on the application of the neutral criterion of distance, not on the nature of the flights or the nationality of the airline or passengers.

15. The measure does not infringe Article 18 EC, as it does not restrict freedom of movement or of residence. This could perhaps be the case if the tax were prohibitively high, or discriminated against citizens of other Member States. Neither is the case.

16. Nor can any infringement of the freedom to provide services be established. The differentiated treatment is based on the application of a neutral criterion — distance — and does not constitute latent discrimination. The tax merely affects the price of flights available on international routes. This does not, however, impede free competition, or the freedom of national and international air carriers to provide services.

17. Neither is the provision incompatible with Article 3 of Regulation No 2408/92. There is no basis for suggesting that imposition of the tax is a prerequisite for obtaining authorisation to offer flights on intra-Community routes out of Greece.

3. *The Commission*

18. The Commission emphasises that Article 3(1) of Regulation No 2408/92 introduced the freedom to provide services into the air transport sector. Consequently, according to case-law, all national measures are prohibited which make the provision of inter-State transport services more onerous by comparison with domestic transport services. [6] The tax provision in issue results in international flights being subject to a tax of EUR 20, compared with a charge of only EUR 10 for domestic flights, making the provision of international services more onerous.

19. Nor does the Commission consider the restriction on freedom to provide services to be justified. The different extent of the services to be provided in respect of the various flights is mentioned only in a document of the Civil Aviation Authority (YPA). This mentions that the number of passengers clearing customs per hour is greater for domestic flights than for cross-border flights. The Commission does not, however, find this statement convincing, since, as it explains by reference to the example of Athens airport, the number of passengers clearing customs varies according to the departure terminal, not according to whether the flight is domestic or international.

6 — The Commission cited the judgment in *Commission* v *France* (cited in footnote 5).

20. Furthermore, there is no direct consideration for the tax. It is apparent from Article 14 of the Agreement on the development of Spáta airport, that the taxes are intended to help cover the costs of developing and maintenance of the airport.

21. Neither does the obligation of the Greek Government towards the company promoting Spáta airport not to change the tax regime in such a way as to restrict the resources available to the airport authority represent any justification for the differentiated taxes. Firstly, a non-discriminatory tax regime could generate the same income, and secondly, such an agreement modify the obligations which arise under Community law.

VI — Assessment

1. *Interpretation of Article 49 EC and Article 3 of Regulation No 2408/92 — Freedom to provide services*

(a) Restriction of the freedom to provide services

22. The aim of Regulation No 2408/92 is to establish the conditions for application

of the principle of the freedom to provide air transport services. [7] The regulation is to be interpreted in the light of Article 49 EC as construed in case-law. [8]

23. According to case-law, Article 49 EC is inconsistent with national rules which, without any objective justification, restrict a service provider's ability to exercise that freedom. It also precludes the application of national rules which make the provision of services between Member States more onerous than the provision of services entirely within a Member State. [9] Such an impediment arises, for example, where a cross-border service is more expensive than comparable domestic services. [10]

24. The Greek provision at issue, which has since been repealed, imposed a tax in the sum of EUR 10 for flights of between 100 and 750 km, and EUR 20 for flights of over 750 km. The national court found that all domestic routes fall in the category of up to 750 km, and all intra-Community routes, with the exception of the Corfu-Rome route, fall in the second category. The tax imposed for the equivalent domestic service amounts to half of the tax imposed in respect of intra-Community flights. Consequently, it may be concluded that the Greek provision at issue gives rise to a restriction on the freedom to provide air transport services which is protected by Article 3(1) of Regulation No 2408/92 and by Article 49 EC.

25. Merely as a supplementary point, it may be noted that, according to the case-law cited above, and contrary to the position taken by the Italian Government in these proceedings, what matters is not whether the measure constitutes discrimination on grounds of nationality. It is sufficient that the cross-border intra-Community service is made more expensive than the comparable purely domestic service. Article 49 EC lays down a prohibition on restriction, and not purely a prohibition on discrimination.

(b) Justification for the restriction

26. It falls to be considered, next, whether the restriction of the freedom to provide

7 — Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, paragraph 32. See also my detailed reasoning for this position in the Opinion delivered on 6 March 2001 in Case C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, I-4847, paragraphs 27 to 41.

8 — Case C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, paragraph 22.

9 — Case C-381/93 *Commission* v *France* (cited in footnote 5), paragraphs 16 et seq.; Case C-70/99 *Commission* v *Portugal* (cited in footnote 8), paragraph 27.

10 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 28; Case C-70/99 *Commission* v *Portugal* (cited in footnote 8), paragraph 28.

services which has been identified may be justified. The freedom to provide services may, as a fundamental principle of the Treaty, only be restricted by rules which are justified for overriding reasons relating to the public interest and which apply to all persons or undertakings operating in the territory of the host Member State. Furthermore, the national provision in issue is only justified if it is suitable for ensuring that its objective is realised, and does not go beyond what is necessary for that purpose. [11]

27. There is no indication that the Greek provisions result in discrimination against service providers on the basis of their nationality. The distinction arises solely from the distance of the flight route. To this extent, the first of the conditions referred to above, that the restriction should apply to all persons and undertakings, is satisfied.

28. It is questionable, however, to what extent the discrimination is justified as being in the public interest.

29. The Greek Government states that the income generated by the imposition of the taxes is applied for the benefit of airport development and modernisation. Two thirds of the taxes imposed go to the airport at which they were levied, and one third is available to the Greek Government for distribution among all Greek airports. However, as the Commission aptly points out, according to case-law, economic aims do not, as a matter of principle, constitute public-policy grounds within the meaning of Article 46 EC which could justify different treatment of domestic and cross-border services. [12] The modernisation and development of Greek airports could just as well be financed by a tax regime under which domestic and intra-Community flights are treated equally.

30. As possible grounds for justification, the Commission mentions the statement of the YPA that the number of passengers clearing customs per hour is greater for domestic flights than for cross-border flights.

31. In that respect, it must first be stated that the facts underlying that statement are not undisputed. The Commission in any event doubts the statement of the YPA and considers that the number of passengers

11 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraphs 11 and 13; Case C-108/96 *Mac Quen* [2001] ECR I-837, paragraph 26; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraphs 21 and 25.

12 — Case C-288/89 *Collectieve Antennevoorziening Gouda ('Mediawet')* [1991] ECR I-4007, paragraph 11.

clearing customs is not dependent on the type or route of the flight, but on the terminal through which they are cleared. The order for reference and the written observations of the governments participating in these proceedings and of the Commission do not, in any event, disclose sufficient grounds for justification. The Greek Government has not put forward any further statistical data or other facts to justify a differentiated taxation according to the length of flight routes.

32. Instead, the conclusion to be drawn is that the passenger receives nothing directly in return for the tax imposed on him. The tax is really used for the general development and modernisation of Greek airports. The national court has found in this respect that the tax is one for which nothing is given in return.

33. As far as the obligation of the Greek Government towards the company promoting Spáta airport is concerned, reference may be made to the arguments set out above. Economic considerations are not suitable justification for differentiated tax burdens.

34. As a provisional conclusion it may accordingly be said that the Greek provision in question is incompatible with the principle of freedom to provide services within the meaning of Article 49 EC and Article 3(1) of Regulation No 2408/92.

2. *Interpretation of Article 18 EC — Freedom of movement for citizens of the Union*

35. The national court goes on to ask whether Article 18 EC is to be interpreted as precluding a national provision such as the Greek provision at issue here.

36. This question would appear to be redundant in the light of current case-law on the relationship of Article 18 EC to other non-discrimination provisions of the Treaty. In its judgment in *Skanavi and Chryssanthakopoulos*, the Court held that Article 18 EC, in which the right of every citizen of the Union to move and reside freely within the territory of Member States is laid down in general terms, finds specific expression in Article 43 EC. In so far as the facts fall within one of the more specific provisions of the Treaty, it is not necessary to determine the interpretation of Article 18 EC. [13] Since in this case, as mentioned above, Article 49 EC applies to the facts of this case, no further comment on Article 18 EC is called for.

13 — Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22. Similarly, the Opinion of Advocate General Tizzano in Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 18, on the relationship between Articles 18 and 39.

37. Purely in the alternative, should the Court not concur with this system-based argument, it should be noted that it is extremely doubtful in this case to what extent Article 18 EC is applicable at all. If this provision is taken literally and understood as the right to move and reside freely within one of the Member States, it appears doubtful whether Article 18 is applicable at all to the measure under consideration here. The tax regime concerns neither residence in Greece nor the right to move freely within that Member State.

38. The area of application of Article 18 EC could at most be affected if the provision were deemed to constitute a right to move and reside freely within the whole of the Union, and thus also between Member States. [14] In this respect, it must first be observed that the disputed tax regime does not preclude the right to cross a border into another Member State. It continues to be possible to leave Greece otherwise than by air. It does not, however, appear that Article 18 EC guarantees an unlimited right to move from one Member State to another by any particular means of transport.

39. Even if one focuses on the mode of transport specifically in issue, however, it should be observed that the exercise of the right to freedom of movement between Member States is at most made more difficult by the fact that it can only be exercised on payment of a tax which is twice as high as in the case of free movement within Greece. However, the amount of the charge levied here, EUR 20, compared with the price of the corresponding flight ticket required, seems negligible. It does not make the exercise of the right under Article 18 EC so difficult that there would seem to be justification for considering that the right to freedom of movement within the Union is impaired.

40. A possible incompatibility of the tax provision with Article 18 EC is, however, contradicted above all by the following consideration. That article is a particular expression of the general prohibition of discrimination enshrined in Article 12 EC. [15] The tax provision in issue does not, however, distinguish according to the nationality of the passenger or to that of the carrier. The only criterion for determining the payment due is the distance flown. The tax is levied without distinction in respect of all flights over 750 km. This, however, is an objective criterion whose application does not lead to discrimination. It must therefore be concluded that Article 18 EC does not preclude the application of the disputed tax provision.

14 — See the Opinion of Advocate General La Pergola of 1 July 1997 in Case C-85/96 *Martínez Sala* [1998] ECR I-2691, I-2694, paragraph 18.

15 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 62 to 63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 30 to 32.

VII — Conclusion

41. On the basis of foregoing considerations it is proposed that the Court reply to the question referred to it as follows:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 3(1) of Council Regulation No 2408/92 are to be interpreted as precluding the application of a national provision which imposes a differentiated fiscal charge on domestic and intra-Community flights, with the direct result that an amount of tax is charged on intra-Community flights which is double that charged on flights within the Member State.