OPINION OF ADVOCATE GENERAL MISCHO

delivered on 19 October 2000 [1]

1. The Portuguese Republic is seeking the annulment of a Commission decision based on Article 90(3) of the EC Treaty (now Article 86(3) EC) in which the Commission found that the system of landing charges operated by the public undertaking which administers Portuguese mainland airports constituted a measure incompatible with Article 90(1) of the Treaty read in conjunction with Article 86 (now Article 82 EC) thereof.

Legal background

2. Article 18 of Portuguese Decree-law No 102/90 of 21 March 1990 provides that airport charges are to be determined, at airports administered by Aeroportos e Navegação Aérea — Empresa Publica (the public undertaking responsible for airports and air navigation, hereinafter 'ANA-EP'), by ministerial order. Article 18(3) states that the charges may differ according to the category, function and utilisation of the airport in question.

3. Implementing Decree No 38/91 of 29 July 1991 lays down the conditions governing landing charges. Article 4(1) thereof provides that a landing charge is to be paid for each landing and is to be calculated on the basis of the maximum take-off weight stated on the airworthiness certificate. Article 4(5) provides that domestic flights are to be allowed a reduction of 50%.

4. Every year the government issues an order updating the charges. Under a system of discounts introduced by Implementing Order No 352/98 of 23 June 1998, which was adopted pursuant to Decree-law No 102/90, a 7.2% discount is allowed at Lisbon Airport (18.4% at other airports) after 50 landings each month. After 100 and 150 landings discounts of 14.6% and 22.5% respectively are allowed at Lisbon Airport (24.4% and 31.4% at other airports). A discount of 32.7% is allowed after 200 landings (40.6% at other airports).

5. ANA-EP is a public undertaking responsible for administering the three mainland airports (Lisbon, Faro and Oporto) that form the subject of the contested decision.

1 — Original language: French.

Facts of the case and contested decision

6. By letter of 2 December 1996, the Commission informed the Portuguese Republic that it had begun an investigation into the way in which discounts were allowed on landing charges at the airports of the Member States. It asked the Portuguese authorities to send it all the information available on the Portuguese legislation on landing charges so that it could determine whether the discounts were compatible with the Community rules on competition.

7. Having received the information requested, the Commission warned the Portuguese authorities, in a letter dated 28 April 1997, that it considered that the system of discounts on landing charges at Portuguese airports administered by ANA-EP was discriminatory. The Commission requested the Portuguese Government to inform it of the measures it intended to take in this connection and to submit its observations. The contents of the letter concerned were communicated to ANA-EP and to the Portuguese airlines TAP and Portugalia so they could also submit their observations.

8. In its reply dated 3 October 1997, the Portuguese Republic asserted, first, that the differentiation of the charges according to the origin of the flight was justified by the fact that some domestic flights served island airports, for which there was no alternative to air transport, and that other domestic flights involved very short distances and low fares. Secondly, the current system of landing charges was designed to meet the overriding requirements of economic and social cohesion. Lastly, for international flights the Portuguese airports were in competition with airports at Madrid and Barcelona, which employed the same charging mechanism. The current system was also intended to achieve economies of scale as a result of more intensive use of Portuguese airports and to promote Portugal as a tourist destination.

9. In its reply to the Commission, ANA-EP contended that the system of charges in question was justified by the need to apply a pricing policy similar to those in operation at Madrid and Barcelona airports, and the desire to reduce operating costs for the most frequent and most regular users of the airports it administered.

10. Following a further exchange of letters between the Commission and the Portuguese Republic, the Commission adopted Decision 1999/199/EC[2] on 10 February 1999. In that decision the Commission made essentially the following points:

— ANA-EP is a public undertaking within the meaning of Article 90(1) of the

2 — Decision relating to a procedure pursuant to Article 90 of the Treaty (IV/35.703 — Portuguese airports) (OJ 1999 L 69, p. 31).

Treaty, which enjoys the exclusive right to administer the airports of Lisbon, Oporto and Faro and the four airports in the Azores;

— ANA-EP's pricing policy is based on legislative and regulatory provisions which constitute a State measure within the meaning of Article 90(1) of the Treaty;

— the relevant markets are those in services linked to access to airport facilities at each of the seven airports administered by ANA-EP;

— as the great majority of the traffic at the three mainland airports (Lisbon, Oporto and Faro) is between Portugal and the other Member States, the charging system in question affects trade between Member States; however, this is not the case as regards the four airports in the Azores, whose traffic is entirely domestic or from non-member States;

— the three mainland airports have a considerable volume of traffic and cover the whole of mainland Portugal, so that, taken together, the three airports which operate intra-Community services can be regarded as a substantial part of the common market;

— since ANA-EP enjoys an exclusive right in respect of each airport it administers it occupies a dominant position in the market for aircraft landing and take-off services for which a charge is levied;

— the system of landing charges in question has the effect of applying dissimilar conditions to airlines for equivalent operations, thereby placing them at a competitive disadvantage;

— on the one hand, the system of discounts based on landing frequency gives the Portuguese companies TAP and Portugalia an average discount of 30% and 22% respectively on all their flights, whilst that rate varies between 1% and 8% for companies of other Member States. There is no objective justification for this difference in treatment since aircraft require the same landing and take-off services regardless of the airline to which they belong and how many aircraft belong to the same company. Moreover, neither the fact that the competing airports at Madrid and Barcelona have themselves imple-

mented this type of system, nor the objective of encouraging more intensive use of facilities and promoting tourism in Portugal can justify discriminatory discounts;

— on the other hand, the 50% reduction enjoyed by domestic flights places airlines operating intra-Community services at a disadvantage, which cannot be justified either by the objective of providing support for flights between the Azores and the mainland or by the short distance of domestic flights. First, the contested decision does not apply to flights in or out of the Azores in any case. Second, the charge is calculated on the basis of the weight of the aircraft rather than the distance, although short-haul international flights do not enjoy the reduction in question;

— for an undertaking occupying a dominant position like ANA-EP to apply the abovementioned conditions with regard to its trading partners constitutes abuse of a dominant position within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty;

— the derogation provided for in Article 90(2) of the Treaty, which was not in any case invoked by the Portuguese authorities, does not apply;

— since the charging system in question is imposed on ANA-EP by a State measure, that measure as applied in the Portuguese mainland airports constitutes an infringement of Article 90(1) of the Treaty read in conjunction with Article 86.

11. The Commission therefore decided that the system of discounts on landing charges differentiated according to the origin of the flight, provided for at the airports of Lisbon, Oporto and Faro by Decree-law No 102/90, Implementing Decree No 38/91 and Implementing Order No 352/98, constituted a measure incompatible with Article 90(1) of the Treaty read in conjunction with Article 86 (Article 1 of Decision 1999/199). The Portuguese Republic was directed to terminate that infringement and to inform the Commission, within two months of the date of notification of the decision, of the measures it had taken to that end (Article 2 of the Decision).

12. In its application the Portuguese Republic relies on pleas which relate to both the form and the procedure adopted by the Commission and to the merits of the contested act.

13. With regard to the former, the applicant puts forward three pleas: failure to state adequate reasons, infringement of the

principle of proportionality and misuse of powers.

17. Lastly, since Article 90(3) of the Treaty provides that the Commission should address appropriate directives or decisions to Member States, as necessary, the Commission was required to justify the need for action on its part and its choice of a decision instead of a directive.

Failure to state adequate reasons

14. The Portuguese Republic argues that the contested decision is vitiated by failure to state adequate reasons in four respects. The Commission should have stated its reasons for acting in this case on the basis of Article 90(3) of the Treaty when, as regards the passenger service tax and the security tax, which like landing charges are also airport taxes, it opted for proceedings for failure to act.

18. The Commission replies that when it has recourse to Article 90(3) of the Treaty it need only state the reasons for which it considers that the conditions laid down in Article 90(1) are met. It is not required to state reasons for either the need to resort to that provision or the choice of instrument used, which lie entirely within its discretion.

19. What is to be said of those arguments?

15. Moreover, it was incumbent on the Commission to explain why, in the contested decision, it considered the matter from the standpoint of the rules on competition and not that of freedom to provide services as in the proceedings for failure to act.

16. Similarly, the Commission should have explained the situation at the airports of the other Member States in much greater detail than it did.

20. As regards the need to state the reasons for the choice the Commission made between Article 90(3) of the Treaty and Article 169 of the EC Treaty (now Article 226 EC), it should be observed that the Court has consistently held that Article 90(3) of the Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 90(1) and expressly empowers it to take action for that purpose by means of directives or decisions. The Court has therefore recognised that the Commission has the power to determine that a given State measure is incompatible with the

rules of the Treaty and to indicate what measures the State to which the decision is addressed must adopt in order to comply with its obligations under Community law. [3]

21. It is therefore indisputable that the Commission was entitled to act on the basis of Article 90(3) of the Treaty, in the light of the particular State measure constituted, in its view, by the adoption of the contested charges.

22. The possibility of resorting to proceedings for failure to act cannot restrict the power of the Commission, recognised under the abovementioned case-law, to opt for Article 90(3) of the Treaty. This is clear from the judgment in *Netherlands and Others* v *Commission*, cited above, in which the Court did not accept the argument that in order to establish a particular infringement of the Treaty rules the Commission should act on the basis of Article 169 of the Treaty.

23. The Commission's right to base its measure on Article 90(3) of the Treaty is also not affected by the fact that it brought proceedings for failure to act in respect of measures regarded by the applicant as being connected with the contested landing charges.

24. I should note first of all, in passing, that the Commission disputes the connection between the various charges concerned and maintains that the definition of the infringement found is neither arbitrary nor illogical. It states, in this connection, that although the various categories of airport charges have features in common, each category corresponds to the provision of a specific service by the bodies that administer the airports and can therefore be the subject of separate consideration, in the light of its own characteristics.

25. At all events, the Court has held that the Commission enjoys a wide discretion to determine whether it is expedient to take action against a Member State and what provisions, in its view, the Member State has infringed, and to judge at what time it will bring an action for failure to fulfil obligations. [4]

26. It follows that the Commission was entitled to limit the subject of its proceedings for failure to act to specific charges and not to include others. As regards the latter, it was, as I said, permissible for it to take a decision based on Article 90(3) of the Treaty once it considered that the substantive conditions laid down in that provision were met.

3 — Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraphs 25 to 28.

4 — Case C-35/96 [1998] ECR I-3851, paragraph 27.

27. Even if it is therefore established that the Commission was entitled to opt for Article 90(3) rather than Article 169 of the Treaty, the applicant's arguments require us to consider whether the Commission was required to state the reasons for the choice it made.

28. The Commission states, in my view quite rightly, that without paralysing its activities it cannot be required in principle to explain in each measure why it is not adopting a different act.

29. It is important in this connection to observe that the obligation to state reasons for a measure is designed to inform the persons concerned of the justification for the measure and to enable the court to exercise its power of review. [5]

30. It follows in the present case that the contested decision should show in sufficient detail the nature of the infringement of which the person to whom the decision is addressed is charged, the reasons why the Commission considers that an infringement has occurred, and the measures it expects the person to whom the decision is addressed to take.

31. The applicant does not contend that the Commission failed to comply with that obligation in the present case. It does not therefore dispute the fact that the text of the decision enables it without any difficulty to understand the nature of, and justification for, the charges made by the Commission.

32. It would be all the more surprising in any case if the applicant did dispute it since, as the applicant has actually admitted, the decision was preceded by numerous contacts between the Portuguese authorities and the Commission. We therefore find ourselves in a situation, frequently encountered in the case-law of the Court, in which it is necessary to take account of the fact that a Member State has been closely associated with the process of drafting the contested measure and is thus aware of the reasons underlying that measure. [6]

33. I should add lastly that at all events, according to the case-law of the Court, the Commission has a discretion to determine whether or not it is appropriate to bring proceedings for failure to act. [7] It follows necessarily that its choice in the matter is not open to judicial review. As I said, the obligation to provide a statement of reasons must be viewed in the context of such a review and cannot therefore extend to aspects of the contested measure that fall

5 — See, as an example of the consistent case-law, Case 250/84 *Eridania and Others* [1986] ECR 117.

6 — See, as an example of the consistent case-law, Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraphs 48 to 50.

7 — Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11.

within the discretion of its author and therefore cannot be the subject of an action.

34. For the reasons stated, I consider that the applicant's first plea should be rejected.

35. The applicant goes on to claim that the Commission should have explained why it relied on the competition rules of the Treaty rather than the rules concerning freedom to provide services.

36. It is clear from what I stated above that the Commission's obligation to state reasons means that it should set out in the contested measure the reasons for which it considers the rules of competition to have been infringed. However, it is not required to explain specifically why it did not challenge the contested State measure on another legal basis.

37. Indeed, whether the person to whom the decision is addressed may challenge it, and the court review its validity, depends solely on the existence of a statement of reasons that will substantiate the conclusion the Commission has reached.

38. This argument should therefore also be rejected.

39. The applicant also claims that the Commission ought to have referred to the situation in the other Member States.

40. This argument cannot be accepted. The purpose of the contested decision is to establish the existence of an infringement of the rules on competition. The existence of such an infringement does not depend in any way on the existence of similar measures in one or more other Member States. Moreover, the applicant does not claim that there is such a link.

41. It is therefore impossible to see why the statement of reasons for the decision should have contained information concerning the situation in the other Member States.

42. The applicant is certainly entitled to consider that, in view of the existence of similar infringements in other Member States, it was inappropriate for the Commission to adopt a decision relating solely to the Portuguese Republic and not to refer to the situation in the rest of the Community.

43. The fact remains that that view has no relevance as regards the dispute as to the validity of the statement of reasons of the contested measure.

44. The Portuguese Republic considers, finally, that the Commission should have stated its reasons for opting for a decision when Article 90(3) of the Treaty also allowed it to adopt a directive, which would have made it possible to resolve the matter in all the Member States and not just in Portugal.

45. It mentions in this context the fact that the Commission, without using its own power to adopt a directive, had submitted to the Council a proposal for a directive on airport charges, [8] which shows that the matter should have been resolved by means of legislation and not an individual decision.

46. One must concur with the Commission, however, when it points out that the Court has held that the purpose of the power conferred on the Commission by Article 90(3) of the Treaty is different to, and more specific than, the purpose of the legislative powers granted to the Council. Hence, the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission. [9]

47. It follows that one cannot rely on the existence of a proposal for a directive on airport charges to dispute the Commission's power to adopt measures in this field.

48. But the applicant's argument relates principally to the Commission's choice to adopt not a directive but a decision.

49. In this connection, let us recall, first of all, that the Court has held [10] that 'it is apparent from the wording of Article 90(3) and from the scheme of Article 90 as a whole that the Commission enjoys a wide discretion in the field covered by paragraphs 1 and 3, both in relation to the action which it considers necessary to be taken and in relation to the means appropriate for that purpose'.

50. It follows that the Commission was on the face of it entitled to resort to a decision.

8 — COM(97) 154 final.

9 — Case C-202/88 *France* v *Commission* [1991] ECR I-1223.

10 — Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, and *Netherlands* v *Commission*, cited above.

As regards the statement of reasons for that choice, the Commission only needed to substantiate its view that it was faced with a State measure which constituted an infringement of the rules on competition.

51. However, as I have already said in the context of the applicant's first argument, it was not incumbent on the Commission when giving its reasons for the content of the measure it had adopted also to explain why it had not adopted a different measure.

52. The first plea relied on by the applicant should therefore be rejected in its entirety.

Breach of the principle of proportionality

53. The applicant claims that by adopting a decision on the basis of Article 90(3) of the Treaty the Commission chose the most onerous and the least appropriate course of action. Since it is not disputed that at the time the contested decision was taken a large number of Member States were operating similar systems of discounts on airport charges, the Commission should have adopted a general measure rather than a decision which, by definition, affects only the Portuguese Republic.

54. In that context, the applicant emphasises that the principle of proportionality was infringed because by taking a decision the Commission required the Portuguese authorities alone to change their system; the consequence of this is that Portuguese carriers are facing unfair conditions of competition in other Member States which are not prevented from maintaining their systems, which are, however, similar to the one in Portugal criticised by the Commission.

55. The Portuguese Republic contends, therefore, also under this head of claim, that the Commission should have been satisfied with instigating the adoption by the Council of a directive governing this matter or, failing that, with adopting a directive on the basis of Article 90(3) of the Treaty.

56. That was the only appropriate measure, since it was the only way to ensure that all Member States would simultaneously bring their systems of airport charges in line with Community law.

57. In this regard, the Commission claims, correctly in my view, that this is not the

case. A directive based on Article 90(3) of the Treaty could only apply to State measures and would have no effect therefore on schemes that were attributable not to a Member State but merely to undertakings administering an airport.

58. The Portuguese Republic contends that all such undertakings in fact meet the conditions for coming within the scope of Article 90, but it does not produce any evidence of this, or question the validity of the example quoted by the Commission in support of its view, namely the Finnish airports, which, having adopted a similar system of discounts on their own initiative, were the subject of a decision based on Article 86 of the Treaty alone, without the Commission having recourse to Article 90.

59. The Commission also points to the case-law cited above, which grants it a wide discretion in the use of Article 90(3) of the Treaty.

60. I consider that it is apparent from that case-law that, where the Commission is faced with a specific State measure which appears to it to constitute an infringement of Article 90 in conjunction with another provision of the Treaty, it is entitled to adopt a decision in order to put an end to the infringement.

61. The fact that the infringement exists in other Member States is irrelevant in that regard.

62. Thus, the Court held in *Netherlands* v *Commission*, cited above, that a Commission decision based on Article 90(3) of the Treaty is 'adopted in respect of a specific situation in one or more Member States'. It is not therefore, contrary to what the applicant's argument implies, dependent on the infringement's existing only in the Member State to which the decision is addressed.

63. In addition, and even if the applicant denies it, its argument amounts to upholding the right of a Member State to maintain in force a measure that is contrary to Community law on the pretext that similar measures exist in other Member States.

64. The only argument raised by the Portuguese Republic in support of its plea of infringement of the principle of proportionality is the situation in other Member States, which means that the Commission cannot act without infringing that princi-

ple, and, necessarily, implies that a Member State may enjoy impunity.

65. It goes without saying that such an argument is incompatible with the established case-law of the Court, which states that a Member State cannot be allowed to rely in its defence on the infringement of Community law by other Member States. [11]

66. The second plea relied on by the applicant should therefore also be rejected.

Abuse of process

67. The applicant claims in this connection that the Commission does not have unfettered freedom to decide whether to adopt a decision on the basis of Article 90(3) of the Treaty or to bring proceedings for failure to act.

68. Indeed, if it is established that the alleged infringement exists in several Member States the Commission is obliged, if it is not to commit an abuse of process, to have recourse to Article 169 of the Treaty.

69. The applicant does not explain, however, why the fact that the infringement exists in several Member States means that the Commission can no longer have recourse to Article 90(3) of the Treaty.

70. Let us remember also in this connection that the case-law of the Court I have cited lays down the principle that the Commission has freedom of choice in the matter, and does not in any way indicate that such freedom is to be limited by considerations regarding the situation in Member States other than the Member State to which the proceedings instituted by the Commission relate.

71. I therefore propose that the plea of abuse of process should be rejected and shall make the following remarks purely for purposes of completeness.

72. The Commission liberally interprets the applicant's arguments as an allegation of infringement of the rights of the defence, arising from the fact that Article 169 of the Treaty provides for a pre-litigation procedure that the Commission would not be required to follow if it had recourse to Article 90(3) of the Treaty.

11 — Case 232/78 *Commission* v *France* [1979] ECR 2729.

73. The applicant does not, however, make any reference to respect for the rights of the defence. At all events, and as the Commission explains, the principle of the rights of the defence applies in any proceedings, even in the absence of express provisions. Hence, the fact that the Commission has recourse to Article 90(3) rather than to Article 169 of the Treaty cannot in itself constitute an infringement of the rights of the defence. Lastly, it is not maintained by the applicant that the Commission committed a specific infringement of the rights of the defence during the procedure for adopting the contested decision.

74. The applicant alludes in its reply to a possible misuse of powers. Since this is a new plea it must be regarded as inadmissible.

75. At all events, according to the case-law of the Court, there is misuse of powers only where the contested act appears, on the basis of objective, relevant and consistent evidence, to have been adopted for the exclusive or at least the main purpose of achieving ends other than those stated or pursued by the enabling provision in question. The applicant does not give any indication that this is so in the present case. [12]

12 — Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447.

76. As regards the merits of the case, the applicant puts forward two pleas, which must be considered in turn.

Absence of discrimination on grounds of nationality

77. The applicant claims that the contested decision should be annulled because the Commission does not demonstrate the existence of discrimination on grounds of nationality, although Article 90(3) of the Treaty refers particularly to Article 6 of the EC Treaty (now, following amendment, Article 12 EC), which prohibits discrimination on grounds of nationality.

78. It is true, as the Portuguese Government states, that the contested discounts do not create direct discrimination on grounds of nationality, since they may be obtained irrespective of the origin or nationality of the aircraft. Moreover, since the carriers of other Member States have the same opportunity under Community law to operate domestic services, the fact that the discounts are reserved for such services cannot constitute direct discrimination on grounds of nationality.

79. The fact remains, as the Commission states in the contested decision, that in

practice Portuguese carriers receive much larger discounts, 30 % and 22 % on average respectively, than those granted to carriers from other Member States, which vary between 8 % and 1 %. These figures are not challenged by the applicant.

80. Even if one may therefore question whether the discounts in question are really not discriminatory, it is quite clear that there should not be any debate on this. The wording of Article 90(3) of the Treaty does not leave room for any doubt and makes it quite clear that application of Article 90(3) is not restricted to cases where a State measure infringes Article 6 of the Treaty. It also refers expressly to Article 86 of the Treaty.

81. It is therefore quite permissible for the Commission to rely on that provision to sanction a measure which, although the Commission does not state that it is a case of formal discrimination, it still considers to be incompatible with Article 86 of the Treaty. In this case that is precisely what it has done.

82. It follows that I should base my analysis on Article 86.

Absence of abuse of a dominant position

83. We have seen that the contested discounts are criticised by the Commission on two counts. First, a 50% discount is granted only to domestic flights. Secondly, the contested regulations provide for the granting of progressive discounts to carriers making a large number of take-offs and landings at the airports concerned.

84. It is appropriate to consider first of all the issue of the differentiation between domestic and international services.

Domestic services

85. The applicant states first of all that Community carriers, who may operate such domestic services under Community regulations, enjoy those discounts in the same way as their Portuguese competitors. The system does not therefore involve discrimination but, on the contrary, establishes a distinction on the basis of an objective criterion justified by reasons that have nothing to do with seeking to favour local airlines.

86. It is not disputed that an airline of another Member State flying between two Portuguese cities enjoys the 50% reduction on landing charges.

87. The Portuguese Republic claims that with regard to flights between the airports of mainland Portugal (Lisbon, Oporto and Faro) the discount is justified by the fact that these are short-haul flights on which it is necessary to keep prices as low as possible.

88. The Commission claims in this connection that if the contested system were designed to favour short-haul flights the discounts would also have to be allowed for flights from Portugal to Madrid, Seville, Malaga and Santiago, and the 'distance' factor would have to be included when calculating the charge.

89. I consider that that argument should be accepted. In fact it is difficult to see that Article 86 of the Treaty leaves any room for doubt. An undertaking in a dominant position is not entitled, as subparagraph (c) of the second paragraph of Article 86 states, to apply 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

90. The applicant does not dispute the finding in the contested decision that a dominant position is held in this case.

91. Moreover, it cannot be disputed that the services provided in exchange for the landing fee are the same for both a domestic flight and an intra-Community flight over a comparable distance.

92. The situation in this regard is similar to that in *Corsica Ferries*. [13] In that case the Court, observing that the piloting services in question were the same regardless of whether the vessel operated on a domestic route or not, concluded that the application of different tariffs on the basis of that criterion constituted abuse of a dominant position.

93. As regards routes between the mainland and the autonomous regions, or between one autonomous region and another, the applicant relies on the reference to the objective of economic and social cohesion in Article 3 of the EC Treaty (now, following amendment, Article 3 EC), and on the status as an ultra-peripheral region granted to the Azores and Madeira under Article 227 (now, following amendment, Article 299 EC).

13 — Case C-18/93 [1994] ECR I-1783, paragraph 45.

94. The Commission is correct, however, in stating that such considerations would only be relevant if, under the terms of Article 90(2) of the Treaty, the rules on competition prevented the undertakings concerned from performing their public service duties, which is not claimed in this case.

95. In addition, Community regulations [14] permit the Portuguese Republic to impose public service obligations in order to take account of specific features of the destinations concerned.

96. Lastly, the contested decision does not apply to routes to the Azores and between the airports of that archipelago in any way.

97. I therefore consider that the Commission is correct in considering that allowing discounts solely on domestic flights constitutes abuse of a dominant position.

14 — See Article 4 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).

Quantity discounts

98. As far as quantity discounts are concerned, the applicant puts forward various arguments, one of which seems to me to be of particular interest.

99. The applicant states, first of all, that the practice of quantity discounts is a commercial policy option that ANA-EP should not be deprived of on the pretext that it enjoys a dominant position.

100. It is clear, however, that both the wording of Article 86 of the Treaty and the case-law of the Court indicate that commercial policy options open to undertakings in general are not necessarily available to an undertaking in a dominant position. The second paragraph of Article 86 lists as examples of abuse a number of different types of conduct, some of which at least are perfectly lawful when not adopted by an undertaking occupying a dominant position.

101. It follows also that by stating that quantity discounts must not be allowed in the case of an undertaking whose dominant position is not in doubt, like ANA-EP, the Commission is not infringing the principle of neutrality which the applicant infers

from Article 222 of the EC Treaty (now Article 295 EC) [15], under which undertakings must not be treated less favourably by Community law on the pretext that a Member State has granted them special or exclusive rights.

102. The Commission is not criticising such action and, moreover, quotes itself the case-law of the Court under which, if an undertaking granted such exclusive rights is likely, as a result, to be in a dominant position, it does not follow that the granting of such rights in itself constitutes abuse. [16]

103. It is not therefore the existence of the exclusive rights accorded to ANA-EP which is the subject-matter of the Commission's decision, but the use of the resultant dominant position, a matter quite foreign to the ambit of Article 222 of the Treaty, the article invoked by the applicant.

104. The applicant stresses, moreover, the need to develop routes using the airports in question, which would also benefit the regions concerned.

105. That argument is linked to the one put forward by the Portuguese Republic to justify quantity discounts on the ground that they promote intensive use of the airports concerned. 'The frequency or intensity of the use of such costly facilities as regards both their initial cost and their maintenance, is decisive in the conduct of a strategic policy of (re)investment in the development of such airport facilities; besides which, it also has a bearing on the final cost of writing off investment'. [17]

106. In this connection, may I point out first of all that, as the Commission also states in the contested decision, [18] the prohibition on an undertaking in a dominant position offering quantity discounts is not absolute. It is clear from the case-law of the Court that if increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. [19]

107. Are we dealing with a similar case here? Are there, to use the Commission's words, objective reasons in terms of the

15 — 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.'

16 — See *Corsica Ferries*, cited above.

17 — Paragraph 64 of the application.

18 — See paragraph 27 et seq of the grounds.

19 — Case 27/76 *United Brands* v *Commission* [1978] ECR 207 and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461.

cost of the service provided that would justify the granting of quantity discounts?

108. I share the Commission's view that the cost of the service provided by the undertaking administering the airport is the same whether it is a company's first or its hundredth flight.

109. I consider, however, that this does not entirely answer the point made by the Portuguese Republic. From a general point of view, it is undeniable that, on the face of it and all things being equal, intensively-used facilities make it possible to achieve unit costs that are lower than those of under-used facilities.

110. Similarly, there seems to me to be no doubt that it would be easier for the operator of the facilities to plan its investment if it were guaranteed a volume of activity as the result of a carrier choosing a particular airport as a base.

111. Should it therefore be considered that the applicant has demonstrated that ANA-EP enjoys economic advantages that would justify the discounts accorded?

112. I do not think so. In fact the applicant provides no specific evidence to contradict the points the Commission made in order to demonstrate the lack of such advantages.

113. According to the Commission, the objective of encouraging the intensive use of airports is not likely to be affected by the contested discounts. As a result of the large number of landings each month that they assume, the discounts are of almost exclusive benefit, as we have seen above, to Portuguese operators who are based at the airports in question and who would therefore use them any way. A scale of discounts which did not involve such thresholds would not incur the same criticism and would therefore be more appropriate to achieve the objective in question.

114. It is true that this reasoning cannot be subject to proof since it is merely a hypothesis. The fact remains that it is all the more plausible when one considers that it is difficult to imagine how operators based at the airports in question, who cannot realistically establish themselves elsewhere, could be encouraged to make more intensive use of the airports concerned by the contested discounts, unless they were to make landings there purely in order to receive the discounts. Although it is clear that the profitability of some flights is affected by the level of the charges, it is hardly likely that their number would be such that the additional volume of traffic they generated would have a measurable impact on the airport.

115. It seems at first sight much more likely that the number of flights depends primarily on the volume of traffic on the route concerned. The way in which that number of flights is divided between the various carriers should be irrelevant as far as the airport's operator is concerned.

116. That number may certainly be reached by one or two carriers each operating many flights, but it could also be attained by a larger number of carriers each engaging in a smaller number of landings. It is therefore quite conceivable that, by structuring its tariffs in a way that would enable a larger number of carriers to benefit from the discounts, the airport operator would in fact be able to increase the airport's rate of use.

117. To this must be added the fact that the figures quoted in point 79 of this Opinion, put forward by the Commission and not disputed by the applicant, in fact show that the discounts in question tend to favour very clearly carriers established at the airports concerned.

118. So, in the light of all this evidence, the general reference made by the applicant to the favourable financial effects resulting from intensive use of the facilities cannot be regarded as providing evidence that the discounts in question represent genuinely and specifically lower costs for the airports' operator.

119. The Portuguese Republic also claims that it is a case of providing an incentive to make refuelling stops, to compete with other Community airports. Such stops are by nature not dependent on the amount of traffic.

120. The Commission replies, and is not contradicted on this point, that the contested discounts do not in any case apply to refuelling stops.

121. Lastly, the applicant also considers that the fact that no Community carrier has complained indicates clearly that the discount system applied by ANA-EP does not harm other Community operators.

122. Be that as it may, the Commission is entitled to take decisions on competition matters on its own initiative.

123. It is clear from the above considerations that this plea relied on by the applicant should also be rejected.

Conclusion

124. I propose that the application should be dismissed in its entirety and that the applicant be ordered to pay the costs.