# COMMISSION

## COMMISSION DECISION

**of 28 June 1995**

**relating to a proceeding pursuant to Article 90 (3) of the Treaty**

**(Only the Dutch and French texts are authentic)**

**(Text with EEA relevance)**

(95/364/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Having regard to the complaint lodged by British Midland on 8 February 1993 in respect of the system of discounts on landing fees at Brussels National Airport (Zaventem),

Having given the Belgian authorities, the Belgian airways authority (Régie des Voies Aériennes/Regie der Luchtwegen) and the airlines Sabena and Sobelair notice to submit their comments concerning the objections formulated by the Commission with regard to the system of discounts on landing fees at Brussels National Airport (Zaventem),

Whereas :

### THE FACTS

This proceeding relates to the system of discounts granted on landing fees at Brussels National Airport (Zaventem).

British Midland (BM) considers that the system of stepped discounts, which increase in line with an airline's volume of traffic, favours carriers with a high volume of traffic at Brussels Airport and thereby places small carriers competing with them at a disadvantage. Moreover, according to BM, there is no objective justification in granting such discounts since the services which an arriving or departing aircraft requires are the same, however many times they are supplied.

BM states that, although it operates 144 movements a week, it is unable to reach the minimum monthly amount of fees that triggers discounts. It therefore receives no reduction on its airport charges, while Sabena, its main competitor, obtains a annual reduction of Bfrs 74 million.

### The State measure in question

(1) Article 1 of the Royal Decree (Arrêté Royal/Koninklijk Besluit) of 22 December 1989 [1] authorizes the Airways Authority to charge the fees laid down therein for the use of Brussels National Airport. Article 2 of the same Royal Decree fixes landing fees at a certain amount per tonne according to whether or not the aircraft carries only cargo. Paragraph 2 of that Article establishes the system of discounts se out below :

The fees due per calendar month are reduced by :

— 7,5 % on the portion of the amount due between Bfrs 5 million and Bfrs 10 million,

— 15 % on the portion of the amount due between Bfrs 10 million and Bfrs 15 million,

— 20 % on the portion of the amount due between Bfrs 15 million and Bfrs 20 million,

— 30 % on the portion of the amount due above Bfrs 20 million.

In 1991 and 1992 only three airlines qualified for these reductions, the amounts they received being as follows :

[1] Moniteur Belge [Official Gazette], 30. 12. 1989, p. 21517.

| Annual discount actually granted (in Bfrs '000) | 1991 | 1992 |
|---|---|---|
| Sabena | 66 114 | 74 047 |
| Sobelair (1) | 286 | 1 319 |
| TEA | 103 | — |
| British Airways | 0 | 4 |

### The undertakings and services in question

(2) The airways authority is a Belgian public body entrusted by the State with two public-service functions to be performed in the public interest and according to commercial principles: (i) the construction, development, maintenance and exploitation of Brussels National Airport and associated infrastructures, and (ii) ensuring the safety of air transport within Belgian airspace. In this respect, it carries on an economic activity, at least as far as the activities at point (i) are concerned, which might be carried on, at least in principle, by a private enterprise for profit.

(3) Sabena is a Belgian group, 62,11 % of which is owned by the Belgian State and 37,58 % by Finacta (Air France Group). However, an agreement was concluded on 4 May 1995 between the Belgian State and Swissair concerning the acquisition of a 49,5 % holding by the latter in Sabena's capital. Negotiations are currently in progress concerning the withdrawal of Air France from Sabena's capital. Sabena's main activity is the transport of passengers and freight on the basis of scheduled services. It also operates non-scheduled air-transport (via its subsidiary Sobelair) and ground-handling services and is active in the hotel and tourism sectors. It carries 38 % of the passengers using Brussels Airport (2).

(4) In its airport economics manual, the ICAO (International Civil Aviation Organization) recommends its members to calculate landing fees on the basis of the maximum weight on take-off. It defines the landing fee as:

'... charges and fees collected for the use of runways, taxiways and apron areas, including associated lighting, as well as for the provision of approach and aerodrome control.'

The fee covers 'all operation and maintenance costs, and administrative costs attributable to these areas and their associated vehicles and equipment, including the expense of all labour, maintenance materials, power and fuels (3).'

(5) Brussels Airport serves a large number of destinations throughout the world. According to the study produced by Cranfied University (4), 15 % of passengers used Brussels as a connecting airport in 1992. The airlines principally serve Brussels to meet the requirements of 85 % of passengers for whom Brussels is the final destination or actual point of departure. For short and medium-haul flights (i.e. of less than two hours) within the Community, such as services between the southern areas of the Community and the Brussels catchment area, there is no realistic alternative to Brussels Airport. This is because the only other international airports in the geographical area are more than 100 km from Zaventem. Consequently, the airlines have no alternative means of meeting this demand other than by operating to/from Brussel Airport.

(6) Brussels Airport may therefore be considered an airport with limited substitutability with other airports for medium-haul services to or from the Brussels catchment area.

## THE COMMISSION'S ASSESSMENT

### Article 90 (1)

(7) Article 90 (1) lays down that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules contained in the Treaty.

The Airways Authority is a public undertaking within the meaning of Article 90 (1).

The Royal Decree of 22 December 1989 laying down the fees payable for the use of Brussels National Airport, in particular Article 2 (2) thereof, which establishes a system of discounts on landing fees, as referred to in recital 1, is a State measure within the meaning of Article 90 (1).

(1) Sabena's charter subsidiary.
(2) Figures taken from the Air France/Sabena merger decision of 1992.
(3) Airport Economics Manual — document 9562. 1991 ICAO.
(4) 'A comparative study of user costs at selected European airports', Department of Air Transport, College of Aeronautics, Cranfield University, February 1994.

**Article 86**

*The relevant market*

(8) The relevant market is the market in services linked to access to airport infrastructures for which a fee is payable, i.e. the exploitation and maintenance of runways, taxiways and aprons, and approach guidance.

As the Court of Justice has held, the organization of port facilitites for third parties at a single port may constitute a relevant market within the meaning of Article 86 (judgment of 10 December 1991 in Case C-179/90, Porto di Genova SpA v. Siderurgica Gabrielli SpA [1], paragraph 15). Likewise, the Court considered piloting services in the Port of Genoa to constitute the relevant market in its judgment of 17 May 1994 in Case C-18/93, Corsica Ferries v. Corpo dei Piloti del Porto di Genova [2].

The Court based its reasoning on the fact that, if an operator wishes to offer a transport service on a given maritime route, access to port installations situated at either end of that route is essential to the provision of the service.

This reasoning can easily be transposed to the air-transport sector and access to airports.

In the case at issue, there is no genuine alternative offering the same advantages as Brussels Airport for short and medium-haul transport services to or from the Brussels catchment area.

(9) Moreover, short and medium-haul air services within the Community constitute a neighbouring but distinct market which is affected by the conduct of the undertaking active on the market in landing and take-off services.

As emerges from the explanations supplied in recital 5, Brussels Airport is, for short and medium-haul services within the Community operating from or to the Brussels catchment area, of limited substitutability with other available routes and faces only minor competition from them (see the judgment of 11 April 1989 in Case 66/86, Ahmed Saeed v. Zentrale zur Bekämpfung unlauteren Wettbewerbs [3]).

*Substantial part of the common market*

(10) Brussels Airport handled 10 million passengers and 313 137 tonnes of freight in 1993. It is the eleventh busiest airport in the Community in terms of passengers carried and the fifth busiest in terms of freight. It has been considered by the Commission to be an airport of common interest in the context of the trans-European airport network [4]. It therefore constitutes a substantial part of the common market.

*Dominant position*

(11) According to the case-law of the Court of Justice, an undertaking which has a legal monopoly to provide certain services holds a dominant position within the meaning of Article 86 of the Treaty (judgment of 3 October 1985 in Case 311/84 [5], 'Telemarketing').

Such is the case with the Airways Authority, a public enterprise which, by virtue of the exclusive right granted by Article 1 of the Royal Decree of 5 October 1970, holds a dominant position — in its capacity as airport authority — on the market in aircraft landing and take-off services, for which the fee in question is charged.

*Abuse of a dominant position*

(12) The system of discounts on landing fees established by the Royal Decree of 22 December 1989 has the effect of applying dissimilar conditions to airlines for equivalent transactions linked to landing and take-off services, thereby placing some of them at a competitive disadvantage.

(13) The system of discounts, which operates by reference to the monthly amount of fees due, is based on the number of movements in a month and on the weight of the aircraft.

Taking account of these two parameters, the table below indicates the number of daily frequencies (one landing and one take-off) necessary to qualify for the first step (7,5 %), the third step (20 %) and the final step (30 %) of discounts, calculated on the basis of the monthly amount exceeding Bfrs 5 million, for four different types of aircraft.

[1] [1991] ECRI, 5889, 5923.
[2] [1994] ECR I-1783.
[3] [1989] ECR 803.
[4] That is, an airport exercising the function of a connecting point between the Community and the rest of the world whose annual volume af passenger movements is no less than 5 million minus 10 % or whose annual volume of commercial aircraft movements is no less than 100 000 ; whose annual volume of freight is no less than 150 000 tonnes or whose annual volume of extra-Community passenger movements is no less than 1 million (proposal for a Parliament and Council Decision on Community guidelines for the development of the trans-European transport network, COM(94) 106, March 1994).
[5] [1985] ECR 3261.

| Type of aircraft (average weight) | Fee per movement (Bfrs) | Minimum number of daily frequencies for a discount of 7,5 % | Minimum number of daily frequencies for a discount of 20 % |
|---|---|---|---|
| DC9 (55 t) | 12 100 | > 7 (1 515 pax (1)/day) | > 21 (4 545 pax/day) |
| A320 (67 t) | 14 740 | > 6 (1 696 pax/day) | > 17 (5 088 pax/day) |
| 757 (104 t) | 22 880 | > 4 (1 711 pax/day) | > 11 (5 135 pax/day) |
| 747 (395 t) | 86 900 | > 1 (798 pax/day) | > 3 (2 394 pax/day) |

(1) Pax = passengers.

| Type of aircaft (average weight) | Fee per movement (Bfrs) | Minimum number of daily frequencies for a discount of 30 % |
|---|---|---|
| DC9 (55 t) | 12 100 | > 28 (6 061 pax (1)/day) |
| A320 (67 t) | 14 740 | > 23 (6 784 pax/day) |
| 757 (104 t) | 22 880 | > 15 (6 847 pax/day) |
| 747 (395 t) | 86 900 | > 4 (3 191 pax/day) |

(1) Pax = passengers.

The theshold of Bfrs 5 million in monthly fees to be attained in order to qualify for a discount is so high that only a carrier based at the airport can benefit, to the detriment of other Community carriers. This is because the minimum number of daily frequencies required is very high. In the case of Community routes, for example, the airlines use small or medium-sized aircraft (with between 50 and 200 seats, i.e. the DC9, A320, 757 or similar). This means that, in order to reach the level of Bfrs 5 million in fees, which triggers a 7,5 % discount, an average carrier must offer more than seven frequencies per day (example of a DC9 with 110 seats). On Saturdays and Sundays, the number of frequencies is lower, and this therefore increases the number of frequencies necessary during the week to eight or nine. On average, a route on which there is heavy traffic carries four frequencies per day, whereas a regional service will have only two. To obtain a reduction of 7,5 % on the amount of fees exceeding Bfrs 5 million, a carrier providing regional services must offer more than three daily routes to and from Brussels with medium-sized or large aircraft. For example, although Lufhansa flies direct from Brussels to six German cities and accounted in 1992 for more than 2 % of movements at the airport and for 3,3 % of arriving or departing passengers, it does not achieve the amounts of fees necessary to obtain a reduction.

Likewise, airlines using large aircraft such as the Boeing 747 must operate more than one flight a day (principally an intercontinental flight) to obtain a discount.

This system, with its high threshold and progressive steps, in non-linear. The reductions offered increase more than proportionally to the number of landings/take-offs, a fact which merely accentuates the differences between heavy-traffic carriers and the rest. Moreover, it is disadvantageous to regional carriers, which, although carrying out a large number of movements per month, use small aircraft and generally fly to Brussels via one route only.

In 1992 Sabena received final-step discounts (30 %) equivalent to an overall reduction of 18 % on its fees, whereas the other qualifying airlines (Sobelair and BA) were eligible for only a first-step discount (7,5 %). No other airline operating at Brussels Airport qualifies for a reduction in its landing fees.

On a route such as Brussels-London, on which Sabena, BM and other carriers compete using the same type of aircraft, Sabena receives a discount of some 18 % on its take-off and landing fees for an equivalent service from the Airways Authority, and this places BM at a competitive disadvantage.

For the above reasons, the fact that the Airways Authority, given its position, applies dissimilar conditions to commercial partners for equivalent transactions, thereby placing some of them at a competitive disadvantage, constitutes an abuse of a dominant position within the meaning of point (c) of Article 86. Since, in the case at issue, a Member State has established this system by way of an administrative act, a State measure of this nature constitutes an infringement of Article 90, read in conjunction with point (c) of Article 86 of the Treaty.

(14) Although the Airways Authority is responsible for proving the take-off and landing services for which the fees are payable, it does not determine the amount of those fees or of any discounts that might be applicable. The Court has held that a Member State infringes Articles 90 and 86 of the Treaty when it requires the undertaking to exploit its dominant position in an abusive fashion by applying to its commercial partners dissimilar conditions for equivalent transactions within the meaning of point (c) of the second subparagraph of Article 86 of the Treaty (judgment of 17 May 1994 in Case C-18/93).

(15) This reasoning applies where the State measure reduces or eliminates the room for manoeuvre of undertakings through which Member States themselves exercise an influence on the structure of competition in the common market [1]. This doctrine was developed by the Court in its judgment of 4 May 1988 in Case 30/87, Bodson v. Pompes funèbres [2], in which it held that Article 90 (1) of the Treaty must be interpreted as precluding public authorities from imposing on undertakings to which they have granted exclusive rights any conditions as to price that are contrary to Articles 85 and 86.

(16) The airways authority has justified the introduction of this system on the following grounds:

— the right of an undertaking to introduce a system of reductions as part of its commercial policy,

— the right to grant larger discounts to its loyal customers, particularly in view of the financial security they provide,

— economies of scale in that it costs less (in terms of administration and staff) to supply services to a national carrier with a large volume of traffic at the airport,

— the airport becomes more attractive with the presence of a national carrier offering an extensive network of destinations.

In reply to the first two grounds given, it can be stated that the Court has, on several occasions, held that commercial conduct which is considered normal may constitute abuse within the meaning of Article 86 of the Treaty if it is attributable to an undertaking in a dominant position. Moreover, as stated above, an airline will not choose to serve Brussels rather than another airport in the surrounding area on account of the loyalty-based commercial policy pursued by Brussels Airport. If the airways authority wished to attract airlines seeking an airport to serve as a regional link, the thresholds would have been set in such a way as to enable such airlines to qualify for the system, and this is not the case.

As for the third ground given, the Commission considers that such a system could be justified solely by economies of scale achieved by the airways authority. This does not apply in the case at issue. The airways authority has not demonstrated to the Commission that handling the take-off or landing of an aircraft belonging to one airline rather than to another gives rise to economies of scale. The handling of the landing or take-off of an aircraft requires the same service, irrespective of its owner or the number of aircraft belonging to a given airline. The airways authority might, at most, argue that economies of scale occur at the level of invoicing since a single invoice covering a large number of movements can be issued to a carrier with a high level of traffic whilst many invoices covering only a few movements are needed for other carriers. Such economies of scale are, however, negligible.

As for the final ground given, there is no link with the system in question.

(17) While most of the abuses committed by undertakings in a dominant position are designed to maximize their profits or strengthen their dominance, Article 86 also applies to cases in which an undertaking in a dominant position discriminates against its partners for reasons other than its own interest. This may involve, for example, giving preference to

[1] Opinion of Advocate-General Van Gerven in Joined Cases C-48/90 and C-66/90, Netherlands and Others v. Commission [1992] ECR I-565.
[2] [1988] ECR 2479.

another undertaking from the same State or to an undertaking which is pursuing the same general policy. One example of an abuse committed by an undertaking in a dominant position for reasons other than its own interest is afforded by the pilots in the Port of Genoa, who applied preferential tariffs approved by the State to maritime-transport undertakings operating between ports situated on the national territory (see Case C-18/93).

Thus, in the case at issue, unlike in the case of the systems of so-called loyalty rebates examined by the Court (judgment of 13 February 1979 in Case 85/76, Hoffman La Roche, v. Commission [1], and judgment of 9 November 1983 in Case 322/81, Michelin v. Commission [2]), the airways authority is not attempting to obtain the loyalty of its customers or to attract new ones, as has been demonstrated in recitals 13, 14 and 15, but rather the State, acting through its intermediary, is giving preferential treatment to a specific undertaking, i.e. the national airline Sabena.

(18) In this regard, the Belgian authorities have stated that the policy of landing fees as imposed by the Royal Decree in question even goes against the interests of the airways authority since the discounts reduce the revenues which the airways authority might obtain from the fees. The system was therefore introduced in order to benefit certain airlines since only Sabena, Sobelair, and, to a lesser extent, British Airways, are able to qualify for them, and this in breach of Article 86.

*Effect on trade between Member States*

(19) As applied, the system of discounts adversely affects the price of short and medium-haul air transport within the Community for those carriers which do not qualify for it. Airport charges are a major item of expenditure in the operating costs of an airline. They are estimated by the 'Comité des Sages de l'aviation civile' to make up between 4 % and 6 % (including the air-traffic control tax) of the operating costs of Community airlines. Reductions of up to 18 % of the amount of the fees for intra-Community flights are liable to affect trade between Member States by giving a significant advantage to the undertakings which receive them, since more than 10 million passengers passed through Brussels Airport in 1993, 75 % of whom were travelling to or from a city within the Union.

In its judgment in Case C-18/93, the court acknowledged that 'inasmuch as ... discriminatory practices' applied to an identical service 'affect undertakings providing transport services between two Member States, they may affect trade between Member States' [3].

**Article 90 (2)**

(20) The Belgian authorities have not invoked the derogation provided for in Article 90 (2) of the Treaty to justify the introduction and maintenance of such a system of discounts. Moreover, the Commission considers that, in the case at issue, application of the competition rules does not obstruct the specific purpose of the airways authority, which is to construct, develop, maintain and exploit Brussels Airport. Nor would it obstruct any specific public-service function assigned to an airline. The conditions and arrangements governing the imposition by a Member State of public-service obligations on intra-Community scheduled air services are specified in Article 4 of Council Regulation (EEC) No 2408/92 [4].

The derogation provided for in Article 90 (2) does not, therefore, apply.

**Conclusion**

In view of the above, the Commission considers that the State measure referred to in recital 1 infringes Article 90 (1) of the Treaty, read in conjunction with Article 86 thereof,

HAS ADOPTED THIS DECISION:

*Article 1*

The system of discounts on landing fees introduced by Article 2 (2) of the Royal Decree of 22 December 1989 is a measure incompatible with Article 90 (1) of the EC Treaty, read in conjunction with Article 86 thereof.

(1) [1979] ECR 461.
(2) [1983] ECR 3461.
(3) Paragraph 44.
(4) OJ No L 240, 24. 8. 1992, p. 8.

*Article 2*

The Belgian Government shall bring to an end the infringement referred to in Article 1 of this Decision and shall inform the Commission of the measures it has taken to that end within two months of the notification of this Decision.

*Article 3*

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 28 June 1995.

*For the Commission*

Karel VAN MIERT

*Member of the Commission*