

COMMISSION DECISION

of 10 February 1999

relating to a proceeding pursuant to Article 90 of the Treaty

(Case No IV/35.703 — Portuguese airports)

(notified under document number C(1999) 243)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(1999/199/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community, and in particular Article 86 and Article 90(1) and (3) thereof,

Having given the Portuguese authorities, Aeroportos e Navegação Aérea — Empresa Publica (ANA), TAP Air Portugal and Portugalia the opportunity to make known their views on the objections raised by the Commission,

Whereas:

I. THE FACTS

(a) The relevant State measure

- (1) This proceeding relates to the system of discounts on landing charges in use at Portuguese airports and the differentiation of these charges according to the origin of the flight.

Article 18 of Decree-law No 102/90 of 21 March 1990 provides that the amount of aeronautical charges at airports administered by Aeroportos e Navegação Aérea — Empresa Publica (ANA) is

fixed by order in Council, following consultation with the Directorate-General for Civil Aviation. The third paragraph of Article 18 states that the charges may be differentiated according to the category, function and degree of utilisation of the airport in question.

Implementing decree (Decreto regulamentar) No 38/91 of 29 July 1991 lays down the conditions governing landing charges:

'Article 4(1): A landing and take-off charge shall be due for each landing by an aircraft, and shall be based on the maximum take-off weight stated in the airworthiness certificate.

Article 4(5): Domestic flights shall be granted a reduction of 50 %'.

Every year the Government issues an order updating the levels of the charges.

- (2) The following system of discounts was introduced by order in Council (Portaria) No 352/98 on 23 June 1998, pursuant to Decree-law No 102/90.

Lisbon airport	Charges (PTE/t)	Discount relative to charge for first 50 flights (%)
First 50 flights (landings per month)	1 146	
Second 50 flights	1 063	-7,2
Third 50 flights	979	-14,6
Fourth 50 flights	888	-22,5
Thereafter	771	-32,7
Airports at Oporto, Faro and the Azores		
First 50 flights	1 146	
Second 50 flights	938	-18,4
Third 50 flights	866	-24,4
Fourth 50 flights	786	-31,4
Thereafter	681	-40,6

Source: Letter from Portuguese authorities, 16 July 1998.

(b) The relevant undertaking and the relevant services

- (3) ANA is a public undertaking responsible for administering Portugal's three mainland airports (Lisbon, Faro and Oporto), the four airports in the Azores (Ponta Delgada, Horta, Santa Maria and Flores), aerodromes and air traffic control services. The airports of the archipelago of Madeira are administered by ANAM SA.

According to Article 3(1) of Decree-law No 246/79, which provides the legal basis for the creation of ANA:

'ANA-EP shall be responsible for operating and developing, on a public-sector basis, auxiliary services for civil aviation, taking the form of an undertaking with responsibility for directing, guiding and controlling air traffic movements, and providing services associated with the departure and arrival of aircraft, the boarding, debarkation and transport of passengers and the loading, unloading and transport of freight and mail.'

- (4) ANA issues authorisations to the airlines which require access to the airport facilities that it administers, and provides these airlines with landing and take-off services for their aircraft, in return for which it levies charges, the level and amount of which are set by order in Council ⁽¹⁾.

(c) The landing charges

- (5) In its Airport Economics Manual ⁽²⁾, the International Civil Aviation Organisation (ICAO) recommends that its members base their charges on the maximum take-off weight (MTOW) of the aircraft. The landing charge is defined as follows:

'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.'

- (6) The charge is imposed to cover all 'operation and maintenance costs, and administrative costs attributable to those areas and their associated vehicles and equipment, including the expense of all labour, maintenance materials, power and fuels'.

(d) The main arguments of the Portuguese authorities and ANA

- (7) The Portuguese authorities justify the differentiation of charges according to the origin of the flight on the grounds that:

- domestic flights serve the island airports, for which there is no alternative to air transport,
- the other domestic flights involve very short distances and low fares.

- (8) The Portuguese authorities emphasise the economic and social cohesion aspects on which the system is based.

- (9) As regards international flights, the Portuguese airports are in competition with the airports at Madrid and Barcelona, which employ the same type of charging mechanism. The Portuguese authorities also wish to encourage the economies of scale deriving from more intense use of the airports, and to promote Portugal as a tourist destination.

- (10) ANA asserted that the system of differentiated discounts on landing charges had been introduced for two reasons:

- in order to apply a pricing policy similar to those in operation at the Madrid and Barcelona airports, which are situated in the same geographical area and
- in order to reduce operating costs for the most frequent and regular users of the airports administered by ANA.

II. LEGAL ASSESSMENT**(a) Article 90(1)**

- (11) Article 90(1) of the Treaty states that 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94'.

- (12) Decree-law No 246/79 confers on ANA the exclusive right to administer the airport facilities at Lisbon, Oporto, Faro and the Azores.

According to its articles of association, ANA is a public undertaking within the meaning of Article 90(1) of the Treaty.

- (13) Moreover, Article 21 of Decree-law No 246/79 states that the State is responsible for approving the prices and charges proposed by ANA.

ANA's current pricing policy is therefore based on both legislative provisions (Decree-laws Nos 246/79 and 102/90) and regulatory provisions (Decrees

⁽¹⁾ See recitals 1 and 2.

⁽²⁾ Document 9562. 1991 ICAO.

Nos 38/91 and 24/95) and was established by the Government by order in Council No 352/98.

These legislative and regulatory provisions can therefore be regarded as State measures within the meaning of Article 90(1).

(b) **Article 86**

The relevant market

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

As the Court of Justice of the European Communities has held in the 'Port of Genoa case' ⁽³⁾, the organisation of port activities for third parties at a single port may constitute a relevant market within the meaning of Article 86. Likewise, the Court considered piloting services in the Port of Genoa to constitute the relevant market in its judgment in 'Corsica Ferries II' ⁽⁴⁾.

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. The market definition is the same as that applied in the Commission Decision 95/364/EC of 28 June 1995 relating to a proceeding pursuant to Article 90(3) of the Treaty ⁽⁵⁾ on the system of discounts on landing charges in operation at Brussels National Airport.

- (15) Moreover, the markets for passenger and freight transport on short and medium-haul air services within the Community constitute a neighbouring but distinct market which is affected by the impact of an abuse on the part of the undertaking in question on the market for landing and take-off services. The effect of the abuse of the dominant

position held by ANA can therefore also be felt in this market.

- (16) Of the seven airports administered by ANA, only three currently handle a significant volume of intra-Community traffic (Lisbon, Oporto and Faro).
- (17) These seven airports are interchangeable only to a limited extent and each can therefore be regarded as a distinct geographic market.

The airlines operating domestic or intra-Community scheduled or chartered flights to and from Portugal are obliged to use the airports administered by ANA. The airports at Lisbon, Faro, Oporto and the Azores are not interchangeable, since they are hundreds of kilometres away from each other and each has its own, well-defined catchment area, corresponding to a different tourist region: Lisbon airport serves the capital and the centre of the country, Oporto the north, Faro the south and Santa Maria, Ponta Delgada, Horta and Flores the Azores archipelago. In addition, the existing road and rail links cannot be considered a viable alternative transport link between Lisbon, Faro and Oporto.

The only international airports that could serve the same geographic area, Madrid and Barcelona airports, being more than 600 km away from the Portuguese mainland airports and, moreover, not linked by an adequate road or rail infrastructure, do not constitute a realistic alternative.

Lisbon and Madrid can, however, be regarded as competitors where an airline uses one or other of them as a hub airport. It should be noted, though, that flights of this type are a negligible proportion of the total volume of traffic at Lisbon.

Likewise, as regards the airports in the Azores, Santa Maria, Ponta Delgada, Horta and Flores are, realistically speaking, scarcely interchangeable, given the fact that each one serves a different island and that the islands are linked by maritime services which are relatively slow and infrequent.

- (18) This being the case, for many passengers to and from Portugal, the domestic and intra-Community flights using the airports administered by ANA are not interchangeable with the flights to and from other Community airports.

⁽³⁾ Case C-179/90 Porto di Genova v. Siderurgica Gabrielli [1991] ECR I-5889, p. 5923, paragraph 15.

⁽⁴⁾ Case C-18/93 Corsica Ferries Italia v. Corpo dei Piloti del Porto di Genova [1994] ECR I-1783.

⁽⁵⁾ OJ L 216, 12. 9. 1995, p. 8.

- (19) Airlines running domestic or intra-Community flights to and from Portugal have no option, therefore, but to use the airports administered by ANA, along with the airport facility access services provided in these airports.

Effect on trade between Member States

- (20) In its judgment in the Corsica Ferries II case⁽⁶⁾, the Court of Justice recognised that discriminatory practices which 'affect undertakings providing transport services between two Member States, (...) may affect trade between Member States'.

The tables below show the volume of intra-Community flights as a proportion of the total traffic for Portuguese airports:

Passenger traffic (excluding transit passengers)

Airport	International passengers (%)	Intra-Community passengers (%)	Domestic passengers (%)	Total (millions)
Lisbon	24	56	20	6,6
Oporto	24	62	14	2,1
Faro	4	92	4	3,7
Santa Maria A	2	0	98	0,04
Ponta Delgada A	18	1	81	0,5
Horta A	0	0	100	0,1
Flores A	0	0	100	0,04

Source: Letter from Portuguese authorities dated 16 July 1998 (1997 figures)

A=airport of the Azores archipelago.

Freight traffic

Airport	International freight (%)	Intra-Community freight (%)	Domestic freight (%)	Total (thousands of tonnes)
Lisbon	41	43	16	100
Oporto	21	72	7	29
Faro	5	75	20	2
Santa Maria A	0	0	100	0,1
Ponta Delgada A	12	0	88	6,8
Horta A	0	0	100	0,9
Flores A	0	0	100	0,2

Source: Letter from Portuguese authorities dated 16 July 1998 (1997 figures)

A=airport of the Azores archipelago.

The figures above for the mainland airports clearly demonstrate the effect on trade between Member States. The great majority of traffic volume is between Portugal and other Member States of the Community.

As regards the four airports on the Azores archipelago, traffic is either entirely domestic or from third countries. In this respect, therefore, the relevant State measure does not affect trade between Member States. This is without prejudice to the application of the Treaty rules and secondary legislation on freedom to provide services.

Substantial part of the common market

- (21) The 1997 traffic volume for ANA-administered airports was as follows:

⁽⁶⁾ Cited above, footnote 4.

Airport	Passengers (millions) (including transit passengers)	Freight (thousands of tonnes)
Lisbon	6,8	99,7
Oporto	2,3	29,3
Faro	3,8	2,0
Santa Maria A	0,1	0,1
Ponta Delgada A	0,5	6,9
Horta A	0,1	0,9
Flores A	0,0	0,2

Source: Letter from Portuguese authorities dated 16 July 1998.
A=airport of the Azores Archipelago

Lisbon, Oporto and Faro airports have a considerable volume of passenger traffic above the 2 million mark (Lisbon 6,8 million, Oporto 2,3 million and Faro 3,8 million) and cover the whole of mainland Portugal. Taken together, therefore, the airports which operate intra-Community services can be regarded as a substantial part of the common market, if one applies the reasoning adopted by the Court in the Crespelle⁽⁷⁾ and Almelo⁽⁸⁾ judgments to the case in hand. In the Crespelle judgment, the Court stated that: 'by thus establishing, in favour of those undertakings, a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market'⁽⁹⁾.

- (22) *A fortiori*, a contiguous series of monopolies controlled by the same undertaking (ANA) may represent a substantial part of the common market.

Dominant position

- (23) In its judgment Corsica Ferries III⁽¹⁰⁾, the Court held that 'an undertaking having a statutory monopoly in a substantial part of the common

market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty'⁽¹¹⁾.

It follows that ANA, a public undertaking which, by virtue of the exclusive rights granted to it under Decree-law No 246/79 in respect of each airport that it administers, holds a dominant position on the market for aircraft landing and take-off services, for which the charge in question is levied.

Abuse of a dominant position

- (24) The system of landing charges and discounts on charges applied by ANA and approved by the Portuguese Government after a process of consultation has the effect of applying dissimilar conditions to airlines for equivalent transactions linked to landing and take-off services, thereby placing them at a competitive disadvantage.

(a) Discounts based on landing frequency

- (25) Airlines which have more than 50 landings per month are granted a discount of 7,2 % at Lisbon airport (or 18,4 % at the other airports on all successive landings). After the 100th monthly landing, the discount increases to 14,6 % at Lisbon (24,4 % at the other airports) and landings after the 150th qualify for a discount of 22,5 % at Lisbon (or 31,4 % in the other airports). From the 200th landing onwards, the discount is 32,7 % at Lisbon and 40,6 % elsewhere.

The following airlines receive these discounts at Lisbon airport (the average discount is calculated by successively applying the different discount percentages. The resulting figure reflects the actual discount obtained by the following airlines from ANA on all of their flights):

(%)

Airline	TAP	Portugalia	Iberia	AF	LH	BA	Swissair	Alitalia	Sabena
Average discount	30	22	8	6	5	4	1	1	1

Source: Monthly landings, by airline — Annex 3 of letter from ANA dated 29 July 1997.

⁽⁷⁾ Case C-323/93 Crespelle [1994] ECR I-5077.

⁽⁸⁾ Case C-393/92 Almelo [1994] ECR I-1477.

⁽⁹⁾ Paragraph 17.

⁽¹⁰⁾ Corsica Ferries France v. Gruppo Antichi Ormeggiatori del porto di Genova [1998] ECR I-3949, paragraph 39.

⁽¹¹⁾ See also Case C-41/90 Hofner and Elser v. Macrotron [1991] ECR I-1979, paragraph 28; Case C-260/89 ERT v. DRP [1991] ECR I-2925, paragraph 31; the Port of Genoa case, cited in footnote 3, paragraph 14; and Case C-163/96 Silvano Raso and others [1998] ECR I-0533, recital 25.

(26) Every landing after the 200th qualifies for a discount of 32,7 % at Lisbon and 40,6 % at the other airports, with no limit on the number of landings thereafter. Thus, airlines which carry out significantly more than 200 landings a month, such as TAP and Portugalia, benefit from a proportionally higher overall discount. On any given route on which TAP or Portugalia are in competition with other carriers, using the same type of aircraft, they receive average discounts of 30 % and 22 % respectively on their landing and take-off charges, in return for equivalent services provided by ANA, thereby placing the other carriers at a competitive disadvantage. The discounts granted to the other carriers vary between 8 % and 1 % (Iberia 8 %, Air France 6 %, Lufthansa 5 %, British Airways 4 %, Swissair, Alitalia and Sabena 1 %) and are therefore negligible. The *de facto* effect of this system, therefore, is to favour the national carriers, i. e. TAP and Portugalia.

(27) The Court of First Instance has held ⁽¹²⁾ that business practices considered to be normal may constitute an abuse within the meaning of Article 86 of the Treaty if they are carried out by an undertaking which holds a dominant position.

There must be an objective justification for any difference in treatment of its various clients by an undertaking in a dominant position.

There is no objective justification whatsoever for the difference in treatment applied by ANA to services (such as approach control and use of apron areas) which have the same substantive content for all airlines. As the only means available to a carrier of providing air transport services to a given town, airports have a natural monopoly as regards a very high proportion of their traffic.

No evidence has been supplied by the Portuguese authorities to demonstrate that there exist economies of scale in this instance. Aircraft receive the same landing and take-off services, regardless of the airline to which they belong and whether they are the first or the 10th aircraft belonging to the carrier.

(28) The Portuguese authorities put forward three main justifications for the implementation of the discount system:

— competition from Madrid and Barcelona airports, which themselves have implemented this type of discount system,

— the economies of scale associated with intensive use of the facilities,

— the promotion of Portugal as a tourist destination.

(29) As regards the first justification, the Commission has also initiated proceedings concerning the system in use at Spanish airports and sent a letter of formal notice on 28 April 1997. What is more, the Court of Justice, in particular in its judgment in *Hedley Lomas* ⁽¹³⁾, has held that a Member State cannot justify an infringement of Community law on its own part by invoking the fact that another Member State has likewise failed to comply with its obligations under Community law.

(30) As regards the second justification, the Portuguese authorities did not refer to any specific economies of scale, stating instead that the airport needed to promote greater utilisation of its facilities. In its Decision 95/364/EC ⁽¹⁴⁾, the Commission responded to the economies of scale argument thus: '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'. The same reasoning applies in the case in hand, since the handling of landing and take-off requires the same service, irrespective of the number of aircraft belonging to a given airline.

(31) The goal of promoting increased usage of the facilities, and the third justification, i.e. the promotion of Portugal as a tourist destination, cannot be accepted, since these objectives could be achieved by non-discriminatory discounts accessible to all airlines operating services to and from the airports in mainland Portugal.

⁽¹²⁾ Case T-65/89 *BPB Industries and British Gypsum v. Commission* [1993] ECR II-389, paragraph 69.

⁽¹³⁾ Case C-5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland)* [1996] ECR I-2553.

⁽¹⁴⁾ Cited in footnote 5, recital 16.

- (32) The Court has held that where a Member State induces an undertaking to abuse its dominant position by applying dissimilar conditions to equivalent transactions with other trading parties, within the meaning of indent (c) of the second paragraph of Article 86 of the Treaty, this constitutes an infringement of the provisions of Articles 90 and 86 of the Treaty (judgments in *Corsica Ferries II* ⁽¹⁵⁾, *Raso* ⁽¹⁶⁾ and *Corsica Ferries III* ⁽¹⁷⁾).

Where an undertaking in the position of ANA applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, this constitutes an initial abuse of a dominant position within the meaning of indent (c) of the second paragraph of Article 86.

- (b) The differentiation of charges according to type of flight (domestic or international)

- (33) Article 4(5) of implementing decree No 38/91 specifies that 'domestic flights are eligible for a reduction of 50 %'. The system of differentiated charges according to type of flight, i.e. either domestic or intra-Community, is also an infringement of the Treaty.

- (34) In this respect, the judgment of the Court of Justice in *Corsica Ferries II* ⁽¹⁸⁾ case is unequivocal:

'Article 90(1) and Article 86 of the EEC Treaty prohibit a national authority from inducing an undertaking which has been granted the exclusive right of providing compulsory piloting services in a substantial part of the common market, by approving the tariffs adopted by it, to apply different tariffs to maritime transport undertakings, depending on whether they operate transport services between Member States or between ports situated on national territory.'

In his opinion, advocate general Van Gerven stated, moreover, that ⁽¹⁹⁾:

'What is important is that there is no connection between those differences in tariffs and the nature of the piloting service offered, which is precisely the same in both cases (. . .). For my part, I consider that what is involved here is clearly an instance of the form of abuse of a dominant position which is covered by indent (c) of the second paragraph of Article 86 of the EC Treaty, namely "applying dissimilar conditions to equivalent transactions

with other trading parties, thereby placing them at a disadvantage" (*).

(* Footnote 61: In this respect, a parallel may be drawn with the situation at issue in the case of *United Brands* (judgment in case 27/76 *United Brands* [1978] ECR 207): there the Court held that the discriminatory pricing policy practised by UBC, which invoiced distributor/ripeners at prices which differed from one Member State to another for identical quantities and types of bananas constituted an abuse of a dominant position on the ground that "these discriminatory practices, which varied according to the circumstances of the Member States, were just so many obstacles to the free movement of goods" paragraph 232) and that "a rigid partitioning of national markets was thus created at price levels which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been, competition had thereby been distorted" (paragraph 233). The same reasoning can be applied *mutatis mutandis* in the present case: the differentiated tariffs charged by the corporation constitute an obstacle to freedom to provide intra-Community shipping transport services and place persons providing such services at a disadvantageous competitive position.'

- (35) Applying this line of reasoning to the airports sector, it becomes apparent that the system of differentiated landing charges established by ANA has the effect of applying dissimilar conditions for equivalent landing and take-off services supplied to airlines, thereby placing them at a competitive disadvantage, and thus constitutes an abuse of a dominant position within the meaning of indent (c) of the second paragraph of Article 86.

It is obvious that such a system has the direct effect of placing airlines operating intra-Community services at a disadvantage by artificially altering the cost to the undertakings, depending on whether they operate domestic or intra-Community services.

- (36) As regards this second infringement of the Treaty, the Portuguese authorities claim that the objective of the measure was to provide support for the flights linking the Azores with the mainland, there being no alternative to them, and for the domestic services operating from mainland airports, in view of their short distances and low fares.

The amount of traffic from Member States other than Portugal landing at the Azores airports is negligible. This is why, in recital 20, it is held that the relevant State measure, inasmuch as it applies

⁽¹⁵⁾ Cited above, footnote 4.

⁽¹⁶⁾ Cited above, footnote 11.

⁽¹⁷⁾ Cited above, footnote 10.

⁽¹⁸⁾ Cited above, footnote 4.

⁽¹⁹⁾ See recital 34.

to flights serving the Azores, is unlikely to effect trade between Member States. There is therefore no need to formulate a response to the argument put forward by the Portuguese authorities as regards the application of this system to flights serving the Azores.

(37) However, it is clear that if, as a consequence of the liberalisation, as from 1 July 1998, of air traffic to and from the Azores archipelago, under Article 1(4) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes⁽²⁰⁾, as amended by the Act of Accession of Austria, Finland and Sweden, Community traffic⁽²¹⁾ were to develop between the Azores airports and the other airports in the Community, there could be a case for examining the relevant State measure as to its compliance with Articles 90(1) and 86 of the Treaty.

(38) As regards the other domestic flights, the argument put forward by the Portuguese authorities is that, since they are so short, the landing charges would account for too high a proportion of the transport costs. However, the charge is based on the weight of the aircraft rather than distance.

(39) If this line of argument were accepted, flights from Portugal to Madrid, Seville, Malaga and Santiago would also have to qualify for this reduction, since these destinations are situated at a comparable distance to that involved in domestic flights. Distance should therefore also be factored into the calculation of the charge.

(40) Where an undertaking in the position of ANA applies dissimilar conditions to equivalent transactions with other trading parties as regards flights to and from the mainland Portuguese airports, thereby placing them at a competitive disadvantage, this constitutes a second abuse of a dominant position within the meaning of indent (c) of the second paragraph of Article 86 of the Treaty.

(c) Article 90(2)

(41) The Portuguese 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 on landing charges.

(42) Moreover, the Commission considers that, in the case at issue, application of the competition rules does not obstruct performance of the particular task assigned to ANA, which is to maintain and operate the Portuguese airports. Nor would it obstruct any specific public-service task 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 Regulation (EEC) No 2408/92.

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

(d) Conclusion

(44) The foregoing analysis establishes that the system of landing charges used by ANA entails the levying, for no objective reason, of different charges, depending on the number of monthly landings or the origin of the flight (domestic or intra-Community), in respect of the same runway, taxiway, apron area and approach control services.

(45) In view of the above, the Commission considers that the State measure referred to in points 1 and 2, as applied in the mainland Portuguese airports, in so far as it obliges the public undertaking ANA to apply the abovementioned system, constitutes an infringement of 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 charges, differentiated according to the origin of the flight, provided for at the airports of Lisbon, Oporto and Faro by Decree-law (Decreto-Lei) No 102/90 of 21 March 1990, implementing decree (Decreto Regulamentar) No 38/91 of 29 July 1991 and order in Council (Portaria) No 352/98 of 23 June 1998 constitutes a measure incompatible with Article 90(1) of the Treaty, read in conjunction with Article 86 thereof.

Article 2

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

⁽²⁰⁾ OJ L 240, 24. 8. 1992, p. 8.

⁽²¹⁾ According to the timetables published for November 1998 in the Official Airline Guide (OAG), there are still no direct flights between any of the airports in the Azores and any Community airport outside Portugal.

Article 3

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 10 February 1999.

For the Commission
Karel VAN MIERT
Member of the Commission
