

JUDGMENT OF THE COURT (Sixth Chamber)

6 February 2003 *

In Case C-92/01,

REFERENCE to the Court under Article 234 EC by the Monomeles Diikitiko Protodikio Irakliou (Greece) for a preliminary ruling in the proceedings pending before that court between

Georgios Stylianakis

and

Elliniko Dimosio,

on the interpretation of Articles 8a and 59 of the EC Treaty (now, after amendment, Articles 18 and 49 EC) and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8)

* Language of the case: Greek.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber,
R. Schintgen, V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Greek Government, by M. Apessos and N. Dafniou, acting as Agents,
- the Italian Government, by U. Leanza, acting as Agent, assisted by M. Fiorilli,
avvocato dello Stato,
- the Commission of the European Communities, by M. Patakia and
M. Huttunen, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 October 2002,

gives the following

Judgment

- 1 By order of 31 October 2000, received by the Court on 22 February 2001, the Monomeles Diikitiko Protodikio Irakliou (Administrative Court of First Instance, Heraklion, Single Judge) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 8a and 59 of the EC Treaty (now, after amendment, Articles 18 and 49 EC) and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8).
- 2 That question was raised in proceedings brought by Mr Stylianakis against the Elliniko Dimosio (Greek State) seeking a finding that the Greek State is obliged to refund to him the amount of GRD 3 450, which is equivalent to half of the airport modernisation and development tax which he was required to pay when flying from Heraklion to Marseilles (France).

Relevant legislation

Community law

- 3 Article 8 of the EC Treaty (now, after amendment, Article 17 EC) states:

‘1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.’

- 4 Article 8a(1) of the Treaty provides:

‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.’

- 5 The first subparagraph of Article 59 of the Treaty provides:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.’

- 6 Article 61(1) of the EC Treaty (now, after amendment, Article 51(1) EC) states:

‘Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.’

- 7 The first subparagraph of Article 84(2) of the EC Treaty (now, after amendment, the first subparagraph of Article 80(2) EC) provides:

‘The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.’

- 8 Regulation No 2408/92, which was adopted on the basis of Article 84(2) of the Treaty, is part of the third ‘package’ of measures adopted by the Council to

establish an air transport policy for the internal market over a period expiring on 31 December 1992. The regulation provides, *inter alia*, for free access for Community air carriers to intra-Community routes. Article 3(1) of the Regulation states:

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

National law

- 9 Article 40(9) of Law No 2065/1992 (FEK A’ 113), as amended by Law No 2668/1998 (FEK A’ 282, ‘Law No 2065/1992’), provides:

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

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

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

The main proceedings and the question referred for a preliminary ruling

- 10 The applicant in the main proceedings, Mr Stylianakis, travelled by aeroplane from Heraklion to Marseilles on 10 August 1998. For that journey, he paid, in addition to the price of his ticket, the sum of GRD 6 900 by way of airport modernisation and development tax. He subsequently brought an action before the Monomeles Diikitiko Protodikio Irakliou asking that court to find that the Greek State is obliged to refund to him half of that sum, namely GRD 3 450.
- 11 According to the national court, the airport modernisation and development tax, levied by airlines on a passenger's departure, does not constitute consideration for a performed service but, rather, a fiscal charge. That tax is used, *inter alia*, to finance construction work and the provision of facilities in airports, in particular for the construction of Spáta airport (Greece).
- 12 Mr Stylianakis claimed that Article 40(9) of Law No 2065/1992, which provides for the doubling of the tax in accordance with a distance criterion, establishes a distinction between domestic flights in Greece and international flights, including those to other Member States. According to him, that distinction is contrary to Article 8a and Article 59 of the Treaty and to Article 3 of Regulation No 2408/92. Mr Stylianakis bases his arguments, in particular, on Case C-381/93 *Commission v France* [1994] ECR I-5145.

- 13 In its defence, the Greek State, referring to its reply to a reasoned opinion of the Commission of the European Communities questioning the compatibility of Article 40 of Law No 2065/1992 with Article 59 of the Treaty and Article 3(1) of Regulation No 2408/92, submits that the flight between Corfu and Rome (Italy), that is to say between Greece and another Member State, is less than 750 km and that it is taxable at the lower rate. The Greek State added that passengers on international flights, including flights to other Member States, benefit from more extensive services than those on internal flights and that the tax difference, which in any event involves small sums, is therefore justified.
- 14 The national court nevertheless considers that the doubled tax applicable to flights to Member States other than Greece may constitute a restriction of the freedom of movement of citizens of the Union and an infringement of the provisions of Regulation No 2408/92.
- 15 Accordingly, the Monomeles Diikritiko Protodikio Irakliou decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

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

- 16 It should be noted that the Commission's reasoned opinion, referred to in paragraph 13 of this judgment, was followed by the bringing of an action before the Court under Article 226(2) EC for a declaration confirming the alleged failure by the Greek State to fulfil its obligations. That case was registered at the Court Registry under the number C-272/00.

- 17 However, during those proceedings for failure to fulfil obligations, the Hellenic Republic amended the contested legislation by Article 16 of Law No 2892/2001 (FEK A' 46, p. 1161), which abolished, with respect to domestic flights and flights between Greece and other Member States or contracting parties to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), the difference in the amount of airport modernisation and development tax determined in accordance with distance and fixed that amount at the equivalent of EUR 12. Accordingly, the Commission withdrew its action and Case C-272/00 was removed from the register of the Court.

Article 8a of the Treaty

- 18 Article 8a(1) of the Treaty, which lays down in general terms the right of every citizen of the Union to move and reside freely within the territory of the Member States, is specifically applied in the provisions guaranteeing the freedom to provide services.

- 19 The freedom to provide services confers rights on both providers of services and recipients and any restriction of that freedom may thus undermine the rights of a recipient of services. A recipient may therefore rely on those provisions against the measure concerned (see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 35, and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 34).
- 20 In light of the facts of the main proceedings, it is therefore unnecessary to rule on the interpretation of Article 8a of the Treaty (see, with respect to freedom of establishment, Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22, and, with respect to freedom of movement for workers, Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26).

Article 59 of the Treaty and Article 3(1) of Regulation No 2408/92

Observations submitted to the Court

- 21 The Italian Government contends that the tax at issue in the main proceedings affects the provision of air transport services between Member States but, observing that that tax is applied without discrimination on the grounds of

nationality and in accordance with an objective criterion, concludes that it is not contrary to Article 59 of the Treaty since that provision prohibits only discrimination based on nationality or residence. It further submits that application of the distance criterion is not a disguised restriction. It adds that the tax does not infringe Regulation No 2408/92 since payment of that tax is not a condition of authorisation to exercise traffic rights.

- 22 The Commission contends that the tax system at issue in the main proceedings imposes the most onerous tax principally on international flights, including those between Member States, because, with one exception, the flights of less than 750 km are domestic flights within the territory of Greece. That system makes the provision of air transport services between Member States more difficult than the provision of the same services within Greece and is consequently a restriction contrary to Article 59 of the Treaty, since that article applies to air transport pursuant to Regulation No 2408/92. The need to finance Spáta airport, relied on by the Greek State before the national court, cannot justify such a restriction. The Commission, on the basis of its understanding of a document of the Greek Civil Aviation authority (YPA) on passenger-processing capacity in airports, disputes the claim that passengers on international flights benefit from more extensive services than those on domestic flights, a situation which might have justified the imposition of a higher tax on those passengers. It maintains that, in any event, the purpose of the tax at issue in the main proceedings is not to compensate the costs of the services actually provided in airports.

The Court's answer

- 23 Even though, having regard to Article 61 of the Treaty, Article 59 of the Treaty is not applicable as such to transport services, since those services are governed by the provisions of the title relating to transport, the principle of the freedom to provide services is none the less applicable to that sector.

- 24 As is clear from the case-law of the Court, the very purpose of Regulation No 2408/92, which was adopted on the basis of Article 84(2) of the Treaty, is to define the conditions for applying in the air transport sector the principle of the freedom to provide services (see, to that effect, Case C-361/98 *Italy v Commission* [2001] ECR I-385, paragraph 32).
- 25 That freedom precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, irrespective of whether there is discrimination on the grounds of nationality or residence (see, to that effect, *Commission v France*, cited above, paragraph 17 to 21).
- 26 As regards the tax at issue in the main proceedings, those air journeys which cover a distance of more than 750 km from a Greek airport, on which the most onerous tax is imposed, are all journeys between Member States or to third countries, whereas those covering a distance of less than 750 km, which are subject to the lower tax, are, with one exception, all domestic flights within Greece. It must therefore be held that, despite the ostensible neutrality of the criterion used to differentiate the amount of tax imposed, the most onerous tax specifically concerns non-domestic flights (see, by analogy, Case C-205/98 *Commission v Austria* [2000] ECR I-7367).
- 27 Moreover, in the light of the documents before the Court, it does not seem that the tax in question contains an element of compensation for airport services necessary for the processing of passengers and that the cost of those services provided to passengers on flights of more than 750 km is double that of those provided to passengers on flights of less than 750 km.

- 28 Accordingly, since airport taxes directly and automatically influence the price of the journey, differences in the taxes to be paid by passengers will automatically be reflected in the transport cost, and thus, in the case in the main proceedings, access to domestic flights will be favoured over access to intra-Community flights (see Case C-70/99 *Commission v Portugal* [2001] ECR I-4845, paragraph 20).
- 29 The answer to the question referred by the national court for a preliminary ruling must therefore be that Article 3(1) of Regulation No 2408/92 precludes a measure adopted by a Member State, such as that at issue in the main proceedings, which imposes on, for the most part, flights to other Member States higher airport tax than that applicable to domestic flights within that Member State unless it is shown that those taxes compensate airport services necessary for the processing of passengers and that the cost of those services provided to passengers flying to other Member States is proportionately higher than the cost of those services necessary for the processing of passengers on domestic flights.

Costs

- 30 The costs incurred by the Greek and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Monomeles Diikitiko Protodikio Irakliou by order of 31 October 2000, hereby rules:

Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes precludes a measure adopted by a Member State, such as that at issue in the main proceedings, which imposes on, for the most part, flights to other Member States higher airport tax than that applicable to domestic flights within that Member State unless it is shown that those taxes compensate airport services necessary for the processing of passengers and that the cost of those services provided to passengers flying to other Member States is proportionately higher than the cost of those services necessary for the processing of passengers on domestic flights.

Puissochet

Schintgen

Skouris

Macken

Cunha Rodrigues

Delivered in open court in Luxembourg on 6 February 2003.

R. Grass

J.-P. Puissochet

Registrar

President of the Sixth Chamber