JUDGMENT OF THE COURT (Third Chamber)

12 May 2011 *

In Case C-176/09,

APPLICATION for annulment under the first paragraph of Article 230 EC, brought on 15 May 2009,

Grand Duchy of Luxembourg, represented by C. Schiltz, acting as Agent, assisted by P. Kinsch, avocat,

applicant,

supported by:

Slovak Republic, represented by B. Ricziová, acting as Agent,

intervener,

* Language of the case: French.

v

European Parliament, represented by A. Troupiotis and A. Neergaard, acting as Agents, with an address for service in Luxembourg,

Council of the European Union, represented by E. Karlsson and M. Moore, acting as Agents,

defendants,

supported by:

European Commission, represented by K. Simonsson and C. Vrignon, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2010,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

Judgment

1 By its action, the Grand Duchy of Luxembourg requests the Court to annul Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ 2009 L 70, p. 11), on the ground that it constitutes an infringement of the principles of equal treatment, proportionality and subsidiarity.

Legal context

2 Directive 2009/12 was adopted on the basis of Article 80(2) EC.

3 According to the third sentence of recital (1) in the preamble to that directive, '[a]irport managing bodies providing facilities and services for which airport charges are levied should endeavour to operate on a cost-efficient basis'.

4 The first sentence of recital (2) in the preamble to that directive states that '[i]t is necessary to establish a common framework regulating the essential features of airport charges and the way they are set, as in the absence of such a framework, basic requirements in the relationship between airport managing bodies and airport users may not be met'.

5 With regard to the scope of Directive 2009/12, recitals (3) and (4) in the preamble thereto state:

'(3) This Directive should apply to airports … that are above a minimum size as the management and the funding of small airports do not call for the application of a Community framework.

(4) In addition, in a Member State where no airport reaches the minimum size for the application of this Directive, the airport with the highest passenger movements enjoys such a privileged position as a point of entry to that Member State that it is necessary to apply this Directive to that airport in order to guarantee respect for certain basic principles in the relationship between the airport managing body and the airport users, in particular with regard to transparency of charges and non-discrimination among airport users.'

6 Recital (15) in the preamble to Directive 2009/12 reads as follows:

‘Airport managing bodies should be enabled to apply airport charges corresponding to the infrastructure and/or the level of service provided as air carriers have a legitimate interest to require services from an airport managing body that correspond to the price/quality ratio. However, access to a differentiated level of infrastructure or services should be open to all carriers that wish to avail of them on a non-discriminatory basis. If demand exceeds supply, access should be determined on the basis of objective and non-discriminatory criteria to be developed by an airport managing body. Any differentiation in airport charges should be transparent, objective and based on clear criteria.’

7 Recital (19) in the preamble to that directive states:

‘Since the objective of this Directive, namely to set common principles for the levying of airport charges at Community airports, cannot be sufficiently achieved by the Member States as systems of airport charges can not be put in place at national level in a uniform way throughout the Community and can therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.’

8 According to Article 1(1) and (2) thereof, the directive ‘sets common principles for the levying of airport charges at Community airports’ and is to ‘apply to any airport located in a territory subject to the Treaty and open to commercial traffic whose

annual traffic is over 5 million passenger movements and to the airport with the highest passenger movement in each Member State'.

9 Under Article 2(4) of Directive 2009/12, 'airport charge' means 'a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight'.

10 The first sentence of Article 3 of that directive provides that 'Member States shall ensure that airport charges do not discriminate among airport users'.

11 To that end, Directive 2009/12 provides for the establishment by the managing body of the airport concerned of a compulsory procedure for consultation between the airport managing body and airport users or the representatives or associations of airport users and a claim procedure. With regard to those procedures, Article 6 of the directive provides:

'1. Member States shall ensure that a compulsory procedure for regular consultation between the airport managing body and airport users or the representatives or associations of airport users is established with respect to the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. Such consultation shall take place at least once a year, unless agreed otherwise in the latest consultation. Where a multi-annual agreement between the airport managing body and the airport users exists, the consultations shall take place as foreseen in such agreement. Member States shall retain the right to request more frequent consultations.

2. Member States shall ensure that, wherever possible, changes to the system or the level of airport charges are made in agreement between the airport managing body and the airport users. To that end, the airport managing body shall submit any proposal to modify the system or the level of airport charges to the airport users, together with the reasons for the proposed changes, no later than four months before they enter into force, unless there are exceptional circumstances which need to be justified to airport users. The airport managing body shall hold consultations on the proposed changes with the airport users and take their views into account before a decision is taken. The airport managing body shall normally publish its decision or recommendation no later than two months before its entry into force. The airport managing body shall justify its decision with regard to the views of the airport users in the event that no agreement on the proposed changes is reached between the airport managing body and the airport users.

3. Member States shall ensure that in the event of a disagreement over a decision on airport charges taken by the airport managing body, either party may seek the intervention of the independent supervisory authority referred to in Article 11 which shall examine the justifications for the modification of the system or the level of airport charges.

4. A modification of the system or the level of airport charges decided upon by the airport managing body shall, if brought before the independent supervisory authority, not take effect until that authority has examined the matter. The independent supervisory authority shall, within four weeks of the matter being brought before it, take an interim decision on the entry into force of the modification of airport charges, unless the final decision can be taken within the same deadline.

5. A Member State may decide not to apply paragraphs 3 and 4 in relation to changes to the level or the structure of the airport charges at those airports for which:

(a) there is a mandatory procedure under national law whereby airport charges, or their maximum level, shall be determined or approved by the independent supervisory authority; or

(b) there is a mandatory procedure under national law whereby the independent supervisory authority examines, on a regular basis or in response to requests from interested parties, whether such airports are subject to effective competition. Whenever warranted on the basis of such an examination, the Member State shall decide that the airport charges, or their maximum level, shall be determined or approved by the independent supervisory authority. This decision shall apply for as long as is necessary on the basis of the examination conducted by that authority.

…'

12 On every occasion when consultations are to be held, pursuant to Article 7(1) of Directive 2009/12 the airport managing body is to provide each airport user, or the representatives or associations of airport users, with information on the components serving as a basis for determining the system or the level of all charges levied at each airport by the airport managing body.

13 As regards the establishment and operation of the independent supervisory authority, Article 11(1) to (3) and (5) of Directive 2009/12 provides:

'1. Member States shall nominate or establish an independent authority as their national independent supervisory authority in order to ensure the correct application of the measures taken to comply with this Directive and to assume, at least, the tasks assigned under Article 6. Such an authority may be the same as the entity entrusted by a Member State with the application of the additional regulatory measures referred to in Article 1(5), including with the approval of the charging system and/or

the level of airport charges, provided that it meets the requirements of paragraph 3 of this Article.

2. In compliance with national law, this Directive shall not prevent the independent supervisory authority from delegating, under its supervision and full responsibility, the implementation of this Directive to other independent supervisory authorities, provided that implementation takes place in accordance with the same standards.

3. Member States shall guarantee the independence of the independent supervisory authority by ensuring that it is legally distinct from and functionally independent of any airport managing body and air carrier. Member States that retain ownership of airports, airport managing bodies or air carriers or control of airport managing bodies or air carriers shall ensure that the functions relating to such ownership or control are not vested in the independent supervisory authority. Member States shall ensure that the independent supervisory authority exercises its powers impartially and transparently.

…

5. Member States may establish a funding mechanism for the independent supervisory authority, which may include levying a charge on airport users and airport managing bodies.'

14 By virtue of Article 12(1) of Directive 2009/12, the European Commission is to submit to the European Parliament and the Council, by 15 March 2013, a report on the application of the directive assessing progress made in attaining its objective.

15 In accordance with the first subparagraph of Article 13(1) of that directive, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 15 March 2011.

Forms of order sought by the parties and the procedure before the Court

16 The Grand Duchy of Luxembourg claims that the Court should:

— principally, annul Article 1(2) of Directive 2009/12 inasmuch as it provides that it applies to the airport with the highest passenger movement in each Member State;

— in the alternative, annul Directive 2009/12 in its entirety; and

— order the Parliament and the Council to pay the costs.

17 The Parliament and the Council contend that the Court should:

— principally, dismiss the application as unfounded, and

— order the Grand Duchy of Luxembourg to pay the costs, and

— in the alternative, in the event that the Court annuls Directive 2009/12, order that its effects be maintained until a new measure has been adopted.

18 By order of the President of the Court of 14 October 2009, the Slovak Republic and the Commission were granted leave to intervene in support of the forms of order sought by the Grand Duchy of Luxembourg and the Parliament and Council respectively.

The action

The first plea in law, alleging infringement of the principle of equal treatment

Arguments of the parties

19 The first plea in the action, alleging infringement of the principle of equal treatment, consists of two different parts. By the first part of that plea, the Grand Duchy of Luxembourg, supported by the Slovak Republic, submits that it is treated differently from the Member States in which large regional airports, with between 1 and 5 million passenger movements a year, do not fall within the scope of Directive 2009/12, despite the fact that they are in the same situation as the only Luxembourg commercial airport, namely Luxembourg-Findel, which has 1.7 million passenger movements per year. The airports of Hahn (Germany) and Charleroi (Belgium) which have around 4 million and 2.9 million passenger movements respectively, are located within the same catchment area as the Luxembourg airport, that is to say less than 200km away by road, and are in direct competition with it. There are, in addition, large regional airports located close to urban centres of a certain size or having a certain level of

economic activity, such as the airports of Turin (Italy) or Bordeaux (France) with 3.5 million and 3.4 million passengers respectively.

20 By the second part of the first plea, the Grand Duchy of Luxembourg argues that it is being treated in the same way as Member States on whose territories there are airports with a passenger movement volume of over 5 million per year, such as, for example, the Federal Republic of Germany or the Kingdom of Belgium.

21 In the submission of the Grand Duchy of Luxembourg, it is appropriate, in this context, to refer to the classification which follows from the Communication from the Commission of 9 December 2005 on Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1) and to limit the scope of Directive 2009/12 to categories of airports which have passenger movements in excess of 5 million per year.

22 Neither the difference in treatment as regards the large regional airports which are excluded from the scope of Directive 2009/12 nor the identical treatment of the airport of Luxembourg-Findel to that of airports whose passenger movements exceed 5 million per year is justified. As rightly follows from recital (3) in the preamble to the directive, the management and the funding of small or medium-sized airports, with fewer than 5 million passenger movements per year, do not call for the application of a 'Community framework'. However, the assertion that the airport 'with the highest passenger movements enjoys such a privileged position as a point of entry to that Member State that it is necessary to apply [Directive 2009/12] to that airport' is in reality irrelevant to the objective thereof, namely the prevention of abuse of a dominant position by certain airports. The 'privileged position' can be taken into account only if it actually creates, as regards the operators, an advantage of the same order as that represented by the fact of handling more than 5 million passengers per year. That is not automatically the situation of the largest airport in each Member State.

23 So far as, in particular, the airport of Luxembourg-Findel is concerned, it does not enjoy such a position as a privileged point of entry to Luxembourg and there is no risk of an abuse of dominant position as regards the operators, having regard to the competitive situation in which that airport finds itself in relation to a number of nearby airports which handle low-cost airlines and in relation to airports which are hubs, such as those of Frankfurt (Germany) or Brussels (Belgium). Furthermore, in economic terms, the Luxembourg airport cannot be classified alongside airports with more than 5 million passenger movements per year, even if it sells a greater proportion of business class tickets than those airports. Consequently, the strong position of its airport managing body cannot be regarded as equivalent to that of the management body responsible for an airport which handles more than 5 million passengers.

24 Conversely, the risk of abuse of a dominant position is more real in other larger regional airports which do not fall within the scope of Directive 2009/12, which are located close to urban centres of a certain size or have a certain level of economic activity, such as the airports of Turin and Bordeaux.

25 It is indeed the case that, in areas where the European Union legislature has to carry out complex economic assessments, only a manifest error of assessment by the latter can affect the legitimacy of its action. None the less, that principle presupposes that the legislature did indeed carry out a complex assessment in the dispute, which is not the case here. Even if the view were to be taken that, on certain points, the legislature did assess a complex situation, the assessment concerning the airport of Luxembourg-Findel, whose catchment area is particularly small, is not complex. It is, therefore, in the view of the applicant, evident that, by including that airport, whose number of passenger movements per year amounts to barely a third of the number above which it is regarded as necessary normally to apply the Community framework, the legislature has committed a manifest error of assessment.

26 The Slovak Republic adds that the data on the situation of the airport of Bratislava (Slovakia), which shares the same geographical area as the airport of Vienna (Austria), call into question the assertion that the largest airport of a Member State is the 'point of entry' which is always used by a large section of travellers. The fact that an airport is the largest in a Member State thus cannot be a decisive factor in assessing the competitive position of that airport in a given market.

27 In the submission of the Council, in the light of the objective of Directive 2009/12, the European Union legislature in effect regarded as obvious the fact that the main airports, that is to say, those like the airport of Luxembourg-Findel, which have the highest passenger movements per year in a Member State, enjoy a privileged position in the Member State in whose territory they are established, such that they are comparable to airports which have more than 5 million passenger movements per year.

28 However, the large regional airports, such as those of Charleroi and Hahn, do not enjoy the privileged position of the main airports in their respective Member States. Those airports do not constitute the main point of entry in their respective States in the same way as the airport with the highest passenger movements per year in its Member State, such as that of Luxembourg-Findel.

29 In the submission of the Parliament, the objectives of Directive 2009/12 are, as is apparent from recitals (1) and (2) in the preamble thereto, to make it possible for the airport managing bodies to endeavour to operate on a cost-efficient basis and to establish a common framework regulating the essential features of airport charges. The directive therefore seeks to ensure that airport users have access to airport services,

on payment of charges which meet the conditions laid down in the directive, thus ensuring non-discrimination and transparency.

30 Referring to the Proposal for a Directive of the European Parliament and of the Council of 24 January 2007 on airport charges (COM(2006) 820 final; 'the Proposal for a Directive'), the Commission submits that the objective of that common framework is to facilitate discussions on airport charges between airports and airlines. Directive 2009/12 seeks to avoid the possibility that an airport managing body might find itself in a position of strength vis-à-vis the airlines as regards the fixing of airport charges, having regard to an airport's 'privileged position'. Two categories of airport might find themselves in such a position, namely the main airports of each Member State, since they are, as a general rule, located near to the capital and constitute the 'points of entry' into that country, and airports which, because of their size, are in a situation comparable to that of airports in the first category. Airports in the first category clearly benefit, particularly because of their location immediately adjacent to densely populated urban areas, the quality of their infrastructures and the existence of business customers not over-sensitive to changes in ticket prices, but, conversely, unwilling to waste time travelling to airports located more than 100km from those urban areas.

Findings of the Court

31 The general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Joined

Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraphs 50 and 51; Case C-313/04 *Franz Egenberger* [2006] ECR I-6331, paragraph 33, and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23).

32 The comparability of different situations must be assessed with regard to all the elements which characterise them. These elements must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, paragraphs 25 and 26 and the case-law cited).

33 In that regard, it must be noted that Directive 2009/12 was adopted on the basis of Article 80(2) EC, which provides that the Council may decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

34 Thus, by empowering the Council to decide when, how and to what extent it should intervene as regards sea and air transport, the Treaty confers broad legislative powers on it as regards the adoption of appropriate common rules (see, to that effect, Case C-440/05 *Commission* v *Council* [2007] ECR I-9097, paragraph 58; see also, with regard to the legislative powers of the Council concerning the common transport policy, Case 97/78 *Schumalla* [1978] ECR 2311, paragraph 4, and Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 23).

35 When reviewing the exercise of such a power, the European Union Court may not substitute its own assessment for that of the European Union legislature, and must

confine itself to examining whether the legislature's assessment contains a manifest error or constitutes a misuse of powers or whether the legislature clearly exceeded the bounds of its legislative discretion (see, to that effect, Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 18; Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; *SAM Schiffahrt and Stapf*, paragraph 24; and Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 64).

36 The Court will examine, by reference to the criteria set out in paragraphs 31 to 35 above, the first plea relied on by the Grand Duchy of Luxembourg, which submits, by the first part of the plea, that comparable situations have been treated differently and, by the second part of the plea, that different situations have been treated in the same way.

The first part of the first plea in law, alleging different treatment of comparable situations

37 With regard to different treatment of comparable situations, the Grand Duchy of Luxembourg argues, in essence, that the airport of Luxembourg-Findel is treated differently from airports which are excluded from the scope of Directive 2009/12 and whose annual traffic is over 1 million but under 5 million passenger movements per year and which are, like the Luxembourg airport, included in the category of large regional airports under the guidelines laid down in the Commission Communication of 9 December 2005. In particular, it is treated differently from the airports of Charleroi

and Hahn and from those which are located close to urban centres of a certain size or have a certain level of economic activity, such as the airports of Turin or Bordeaux.

38 In that regard, it is apparent from recitals (3) and (4) in the preamble to Directive 2009/12 that, when it was adopted, the European Union legislature considered that it was not necessary to include all European Union airports in its scope but that only two categories of airports should be covered by the directive, that is to say, those which exceed a certain minimum size and those with the highest passenger movements per year in Member States where no airport reaches that minimum size, such as that of Luxembourg-Findel.

39 Pursuant to Article 1(1) thereof, that directive 'sets common principles for the levying of airport charges' at airports. Its purpose is thus to govern the relationship between airport managing bodies and airport users as regards the fixing of airport charges.

40 The European Union legislature, by adopting a common framework, has sought to improve the relationship between airport managing bodies and airport users and to avoid a failure to meet certain basic requirements in that relationship, such as transparency of charges, consultation of airport users and non-discrimination among airport users, as is apparent from recitals (2), (4) and (15) in the preamble to Directive 2009/12.

41 The comparability of the airports referred to in paragraph 37 of the present judgment must therefore be assessed in the light, in particular, of their situation as regards the users of those airports, that is to say, the airlines.

42 As follows from recital (4) in the preamble to Directive 2009/12, the legislature considered that airports in Member States where no airport reaches the minimum size laid down in the directive and which have the highest passenger movements per year, such as that of Luxembourg-Findel, enjoy a privileged position as regards the airport users, inasmuch as they constitute the point of entry into those Member States. It thus took the view, as the Council and Commission have pointed out in particular, that, in the case of those airports, there is a risk that their managing bodies might find themselves in a position of strength vis-à-vis the airport users and, accordingly, that there is a risk of abuse of that position as regards the fixing of airport charges.

43 Those airports can be regarded as the main airport in the Member States where they are established. As a general rule, as the Commission has pointed out, those airports are located near to large political and/or economic centres of the Member States and, to a great extent, attract business customers for whom the ticket price is only one criterion among others and who can be particularly sensitive to the location of the airport, to connections with other means of transport and to the quality of the services provided.

44 As the Advocate General has observed in point 64 of his Opinion, in particular as regards business customers and the average or top segment of the market, it is more strategically advantageous for airlines of other Member States and non-Member States to offer flights to and from a main airport such as that of Luxembourg-Findel, the amount of the airport charges or even the actual volume of passenger movements per year not being regarded as decisive criteria for those companies.

45 In addition, if it is strategically advantageous for an airline to offer flights to and from a certain Member State, the main airport is the sole point of entry for it into Member States which have only one airport, which is the case, inter alia, of the Grand Duchy

of Luxembourg. In Member States where there are a number of airports, it clearly appears reasonable to consider that an airline interested in serving only one point of entry into a Member State will prefer the airport with the highest passenger movements per year.

46 Although the actual number of passenger movements per year and the amount of the airport charges can indeed be important criteria for airlines offering flights to or from a particular airport in a Member State, as a general rule there is a strategic interest for those airlines in offering such flights, so that those criteria cannot be regarded as decisive for those airlines when they choose the airports from which to fly.

47 In those circumstances, having regard to the broad legislative discretion enjoyed by the European Union legislature in matters of air transport policy, its assessment that, in Member States where no airport reaches the minimum threshold laid down in Directive 2009/12, the airport with the highest passenger movements per year must be regarded as the point of entry into the Member State concerned — which confers on it a privileged position as regards airport users — cannot be called into question.

48 However, airports which do not fall within the scope of Directive 2009/12 cannot, irrespective of the actual number of passenger movements per year, be regarded as the main airports of the Member States in which they are established. As the Advocate General also observed in points 65, 74 and 77 of his Opinion, such airports can be

regarded as secondary airports of the Member States which, in principle, are of different strategic importance to airlines from the main airports, which puts them in a different situation as regards airport users when airport charges are fixed.

49 In particular, a secondary airport cannot, in principle, having regard to what has been stated in paragraph 45 of the present judgment, be regarded as the point of entry, within the meaning of that directive, into the Member State where it is established, even if it is a large regional airport located near to an urban centre, like the airports of Bordeaux or Turin. What is more, those secondary airports, in particular those which are not located near to an urban centre, may be more attractive to so-called 'low-cost' airlines. Those airlines serve customers whose requirements are, in principle, different from those of business customers and who are more sensitive to ticket prices and more willing to travel farther between the airport and the city it serves. Such airlines, for which the amount of airport charges is decisive, can be regarded as being capable of exerting a certain pressure enabling them to influence the fixing of those charges.

50 In those circumstances, the exercise by the European Union legislature of its powers is not vitiated by a manifest error or by a misuse of power, and it has not manifestly exceeded the limits of its broad legislative discretion in this field by considering that Member States' secondary airports are not in the same situation, as regards airport users, as the main airports. In any event, it is open to the legislature to resort to categorisation according to objective criteria and on the basis of general findings in order to introduce a general and abstract system of rules (see, to that effect, Case C-485/08 P *Gualtieri* v *Commission* [2010] ECR I-3009, paragraph 81). That is even more the case where implementation by the European Union legislature of a common policy involves the need to evaluate a complex economic situation, as is generally the case in questions of air transport (see, to that effect, *SAM Schiffahrt and Stapf*, paragraph 25 and the case-law cited, and *Omega Air and Others*, paragraph 65).

51 In those circumstances, the first part of the first plea in law, alleging different treatment of comparable situations, must be rejected.

The second part of the first plea in law, alleging that different situations have been treated in the same way

52 With regard to the second part of the first plea in law, alleging that different situations have been treated in the same way, the Grand Duchy of Luxembourg submits, in essence, that the airports with the highest passenger movements per year in Member States where no airport reaches the minimum size of 5 million passenger movements per year are treated in the same way as airports which handle more than 5 million passengers per year, despite the fact that the former have neither the same position of strength as regards airport users nor the same economic power as the latter airports.

53 In that regard, it is common ground between the parties to the dispute that the airports whose annual traffic exceeds 5 million passenger movements per year, precisely because of that number of movements, have a privileged position as regards airport users and that inclusion of that category of airports in the scope of Directive 2009/12 was justified having regard to both the subject-matter and purpose thereof.

54 The fact that the situation of those airports is not the same as that of airports with the highest passenger movements per year in Member States where no airport reaches the number of 5 million of such movements does not mean, as the Advocate General observes in point 82 of his Opinion, that the inclusion of those airports in the scope of Directive 2009/12 is contrary to the principle of equal treatment. Those two categories of airports are, rightly, assumed to have a privileged position as regards users

of those airports, as has been stated in paragraphs 47 and 53 of the present judgment, and thus are in comparable situations. The fact that the origin of that situation lies, in one case, in the strategic position of the airports concerned and, in the other, in the volume of annual traffic is not, having regard to the subject-matter and purpose of the directive, a defect capable of vitiating the assessment carried out by the European Union legislature.

55 In those circumstances, the second part of the first plea in law, alleging that different situations are treated in the same way, must be rejected and, accordingly, that plea in law must be rejected in its entirety.

The second plea in law, alleging breach of the principle of proportionality

Arguments of the parties

56 In the submission of the Grand Duchy of Luxembourg, Article 1(2) of Directive 2009/12 constitutes a breach of the principle of proportionality, having regard to the fact that the criterion defining the scope of that directive is irrelevant to its objectives. In addition, although the application of the principles of cost-relatedness, non-discrimination and transparency to the airport of Luxembourg-Findel does not pose any problems, the administrative procedures and burdens and the formal procedures under that directive are excessive and disproportionate to the size of the airport. The procedures for consultation and supervision engender costs for the airport of Luxembourg-Findel and for the Luxembourg State. Thus, the cost of application of that directive to airport charges has been estimated at EUR 839 500 which, after having

been passed on to passengers, entails an increase of 16% in the current charges for services to passengers.

57 In the submission of the Slovak Republic, the Parliament and the Council have failed to justify, by objective criteria proportionate to the objective pursued by Directive 2009/12, the inclusion in its scope of airports located in Member States where no airport reaches the threshold of 5 million passenger movements per year and which have the highest number of such movements in the Member State concerned. To include such an airport in the scope of that directive on the sole ground that it is the largest airport in that Member State does not assist in achieving the principal objective of the directive, which is to improve competition between airports and to limit abuse of dominant positions. Nor does the guarantee that, in each Member State, the directive will apply to at least one airport, regardless of whether or not that airport holds a dominant position on the market or whether its position is entirely insignificant, contribute to the achievement of that directive.

58 The Council refers to the case-law, which states that the legality of such a measure can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. In its submission, the application has not shown that Directive 2009/12 is manifestly inappropriate having regard to the objective which it pursues.

59 The Parliament submits that the fact that the European Union legislature merely adopted minimal rules and provided Member States with the tool of flexible application of those rules must be taken into account. In addition, the fact that Directive 2009/12 does not apply to all airports does not prove that the system laid down in the Directive is not necessary.

60 The Commission states that, when Directive 2009/12 was being drafted, a number of options were considered. It is apparent from both the Proposal for a Directive and the

impact assessment (SEC(2006) 1688) that the most restrictive of the options studied was rejected, in particular, because it would have caused a not-insignificant rise in administrative costs. The option finally adopted, being limited to laying down common principles, was preferred because of its smaller financial impact, despite its lower level of effectiveness.

Findings of the Court

61 It is settled case-law that the principle of proportionality is one of the general principles of European Union law and requires that measures implemented through provisions of European Union law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 51 and the case-law cited).

62 As regards the judicial review of compliance with those conditions, in the fields in which the European Union legislature has a broad legislative power, such as air transport matters (see *Commission* v *Council*, paragraph 58), the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate, having regard to the objective which the competent institutions are seeking to pursue (see, to that effect, *Omega Air and Others*, paragraph 64).

63 However, even though it has such a power, the European Union legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences

for certain operators (*Arcelor Atlantique et Lorraine and Others*, paragraph 58, and *Vodafone and Others*, paragraph 53 and the case-law cited).

64 Accordingly, it is for the Court to examine, on the basis of the criteria referred to in the preceding three paragraphs, whether, as argued in particular by the Grand Duchy of Luxembourg, Directive 2009/12 infringes the principle of proportionality by including in its scope airports located in Member States where no airport reaches the minimum size laid down in that directive and which have the highest passenger movements per year, regardless of the actual number of such movements.

65 In that regard, it must be borne in mind that, before preparing the Proposal for a Directive, the Commission carried out an impact assessment, the options studied also being summarised in that proposal. It is apparent therefrom that it examined various options for that field, including, inter alia, the drafting and adoption by air operators of voluntary self-regulation measures, the adoption of a legal framework requiring compliance with common principles for the establishment of airport charges at national level and the introduction of a legal framework requiring receipt and fixing of the charges on the basis of a single method of calculation.

66 As regards whether the adoption of a framework requiring compliance with common principles for the establishment of airport charges at national level, which is the approach finally adopted in Directive 2009/12, is appropriate to achieve the objective of that directive, it is common ground between the parties that, where there is a risk that the airport managing bodies would find themselves in a privileged position in relation to airport users and, accordingly, a risk of abuse of that position in the fixing of airport charges, such a framework is likely, in principle, to prevent such a risk from becoming reality. That conclusion is also valid as regards airports located in Member

States where no airport reaches the threshold of 5 million passenger movements per year and which have the highest number of such movements.

67 As regards the necessary form of such a framework, it must be noted that the Grand Duchy of Luxembourg has not proposed any less restrictive measures which would ensure that this objective is attained as effectively as a framework laying down common principles on airport charges.

68 The proportionality of Directive 2009/12 is disputed on the ground that that directive imposes procedures and administrative burdens which are excessive and disproportionate to the size of airports located in Member States where no airport reaches the threshold of 5 million passenger movements per year and which have the highest number of such movements, such as that of Luxembourg-Findel.

69 In that regard, there is nothing to support a finding that the charges under the system introduced by Directive 2009/12, for the airports concerned or for Member States, are manifestly disproportionate to the advantages which that system brings.

70 Firstly, with regard to the effects of Directive 2009/12 on the functioning of the airports concerned, it must be held that Article 6 thereof provides only that Member States are to ensure that airport managing bodies institute a procedure for regular consultation between them and airport users, which is to take place, in principle, at least once a year, without stipulating the actual details of that consultation procedure. Thus, in principle, those airports are free to organise that procedure according to their size and financial and personnel resources. Article 6(5) states that Member States may decide, in certain circumstances, not to seek the intervention of the national independent supervisory authority referred to in Article 11 of that directive.

71 Secondly, as regards that authority, Article 11 of the directive merely places an obligation on Member States to nominate or establish such an authority and does not require them to provide for specific measures of organisation which imply that that authority must be of a certain size. Moreover, by virtue of Article 11(2), it is possible to delegate the implementation of the directive to other independent supervisory authorities. Finally, as the Advocate General observed in point 103 of his Opinion, it does not appear that the costs which would be engendered by the implementation of Directive 2009/12 would cause airlines to decide to abandon an airport such as that of Luxembourg-Findel.

72 It follows from the foregoing that the second plea in law raised by the Grand Duchy of Luxembourg in support of its action, alleging infringement of the principle of proportionality, must be rejected as unfounded.

The third plea in law, alleging infringement of the principle of subsidiarity

Arguments of the parties

73 By its third plea, the Grand Duchy of Luxembourg submits that the fact that a situation which could be regulated at national level is being regulated at European Union level, if the threshold of 5 million passenger movements per year is not reached, is incompatible with the principle of subsidiarity. That incompatibility is shown by the fact that airports which are in fact larger than that of Luxembourg-Findel are exempted from compliance with the obligations under Directive 2009/12.

74 In that regard, the Council submits that the application has not stated precisely what constitutes the alleged infringement of the principle of subsidiarity. In its submission, it is necessary to examine whether the objective pursued by Article 1(2) of Directive 2009/12 could be better achieved at European Union level. The essential principles of that directive, in particular transparency, non-discrimination and consultation of airport users, directly facilitate the furtherance of the airlines' activities. The same is true of the airports, the position of which would be strengthened as regards the largest airlines, since those airlines would no longer be able to demand the advantage of preferential tariffs. In the light of those factors and of the inherent international nature of the aviation market, the Council submits that the objectives of that directive can be achieved only at European Union level.

75 The Parliament argues that the application does not appear to criticise the fact of the intervention by the European Union legislature. It is therefore difficult to understand the basis on which infringement of the principle of subsidiarity could be founded. If, however, the Grand Duchy of Luxembourg means by subsidiarity the scope for action retained by the Member States, it is appropriate to point out that that scope for action has largely been preserved, given that Directive 2009/12 does not prescribe the method of calculation of the charges, nor does it lay down what revenues are to be taken into account. Furthermore, the requirements as to organisation of the supervisory authority are relatively limited.

Findings of the Court

76 In that regard, it is appropriate to bear in mind that the second paragraph of Article 5 EC refers to the principle of subsidiarity — given actual definition by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty — and which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. That protocol, in paragraph 5, also lays down guidelines for the

purposes of determining whether those conditions are met (*Vodafone and Others*, paragraph 72).

77 As regards legislative acts, the protocol states, in paragraphs 6 and 7, that the Community is to legislate only to the extent necessary and that Community measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty (*Vodafone and Others*, paragraph 73).

78 In addition, it states in its paragraph 3 that the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice.

79 The principle of subsidiarity applies where the European Union legislature uses Article 80 EC as a legal basis, inasmuch as that provision does not give it exclusive competence to regulate air transport.

80 In the present case, the Grand Duchy of Luxembourg has not stated its third plea in law in detail sufficient as to permit review by the Court of the extent to which national rules could be sufficient to achieve the objective pursued by Directive 2009/12 in a Member State in which the main airport does not reach the minimum size laid down in Article 1(2) of that directive.

81 Moreover, the argument advanced by that Member State in support of its third plea that a common framework is not necessary with regard to airports with fewer than 5 million passenger movements per year cannot succeed, in particular having regard to what has been held in paragraphs 47, 48 and 53 to 55 of the present judgment. It follows therefrom that not only airports with more than 5 million passenger movements

per year, but also those which are the main airport of their Member State, irrespective of the actual number of passenger movements per year, are assumed to be in a privileged position.

82 The fact that some airports with annual traffic below 5 million passenger movements per year do not fall within the scope of Directive 2009/12 cannot usefully be relied upon to prove an infringement of the principle of subsidiarity, since such a fact is liable to show only that the European Union legislature considered, rightly in the light of what has been held in paragraphs 38 and 48 of this judgment, that it was not necessary to include such airports in the scope of the directive when they are not the main airport of their Member State.

83 In those circumstances, the third plea in law raised by the Grand Duchy of Luxembourg in support of its action, alleging infringement of the principle of subsidiarity, must be rejected as unfounded.

84 Since none of the pleas in law raised by the Grand Duchy of Luxembourg in support of its action has been upheld, that action must be dismissed.

Costs

85 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament and the Council have applied for costs and the Grand Duchy of Luxembourg has been unsuccessful, the Grand Duchy of Luxembourg must be ordered

to pay the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in these proceedings must bear their own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Grand Duchy of Luxembourg to pay the costs;**

3. **Orders the Slovak Republic and the European Commission to bear their own costs.**

[Signatures]