II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 26 July 2000
relating to a proceeding pursuant to Article 86(3) of the EC Treaty

(notified under document number C(2000) 2267)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2000/521/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) and Article 82 thereof,

Having given the Spanish authorities, Aeropuertos Españoles y Navegación Aérea ('AENA'), Iberia Líneas Aéreas de España ('Iberia'), Aviación y Comercio S.A. ('Aviaco') and Binter Canarias S.A. ('Binter') the opportunity to make known their views on the objections raised by the Commission regarding the system of discounts on landing fees in use at Spanish airports,

Whereas:

I. THE FACTS

(a) The relevant state measure

(1) In 1999, Spanish airports handled 63 million departing passengers, of which 32 million flew to intra-Community and 25 million to domestic destinations. All 41 Spanish airports, which are solely responsible for commercial traffic, are administered by AENA.

(2) According to the Spanish constitution, the Spanish Government is responsible for commercial airports for which there is a 'general interest'. This 'general interest' has been declared to exist for all commercial airports in Spain.

(3) The Spanish airports' landing fees system, as well as its details, are set out by Royal Decrees 1064/1991 ([1]) and 1268/1994 ([2]) as well as by Article 83(3) of Law 41/1994 (the Finance Law ([3])).

(4) Article 7 of Royal Decree 1064/1991 as amended by Article 1 of Royal Decree 1268/94, distinguishes three categories of airports, which are managed by AENA, according to the importance of their traffic.

([1]) BOE (Spanish Official Journal) No 163, 9.7.1991, p. 22730.
([2]) BOE (Spanish Official Journal) No 157, 2.7.1994, p. 21317.
([3]) BOE (Spanish Official Journal) No 312, 30.12.1994, p. 37510.

Table 1

Categories of Spanish Airports

First category	Second category	Third category
Madrid-Barajas/Palma de Mallorca/ Barcelona/Gran Canaria/Málaga/ Tenerife-Sur/Alicante/Lanzarote/ Sevilla/Valencia/Menorca (1)/Ibiza (1)	Fuerteventura/Bilbao/Santiago de Compostela/Tenerife-Norte/ Menorca (2)/Ibiza (2)	Others

(1) From 1 April to 30 September for Menorca and Ibiza.
(2) From 1 October to 31 March for Menorca and Ibiza.

(5) Article 1 of Royal Decree 1064/91 provides that 'The landing fee constitutes a tax which is calculated according to the use of the runway by the aircraft and the provision of services specific to this usage, other than flight assistance...'.

(6) Article 7 of Royal Decree 1064/91 provides the details of the respective fees. For national flights the landing fees are based on the maximum take-off weight corresponding the categories set out in the following table:

Table 2

Domestic landing fees in Spain in 2000

Weight of the aircraft (in tonnes)	First category	Second category	Third category
< 10 t	ESP 694/t	ESP 624/t	ESP 521/t
Between 10 and 100 t	ESP 796/t	ESP 716/t	ESP 597/t
> 100 t	ESP 893/t	ESP 803/t	ESP 670/t

(7) Article 7 distinguishes between domestic, intra-Community and extra-Community flights. As regards international flights, the following table sets out the present landing fees:

Table 3

International landing fees in Spain in 2000

Weight (tonnes)	Extra-Community flights			Intra-Community flights and EEA		
	First category	Second category	Third category	First category	Second category	Third category
< 10 t	ESP 940/t	ESP 833/t	ESP 694/t	ESP 751/t	ESP 676/t	ESP 563/t
Between 10 and 100 t	ESP 1 061/t	ESP 955/t	ESP 796/t	ESP 861/t	ESP 775/t	ESP 646/t
> 100 t	ESP 1 191/t	ESP 1 072/t	ESP 894/t	ESP 967/t	ESP 870/t	ESP 723/t

(8) As a second measure concerning landing fees, Article 7 of Royal Decree 1064/91 grants discounts according to the number of landings per month at a specific airport. For the first 50 landings no discounts are granted. For the 51st to the 100th landing a discount of about 9 % is granted. The discounts increase further with the number of landings per month. As can be seen from the following table, the most important discounts are only available for airlines which have more than 200 landings per month.

Table 4

Discounts on landing fees at Spanish airports in 2000

Number of operations per month	Discount
1 to 50	0 %
51 to 100	9 %
101 to 150	17 %
151 to 200	26 %
More than 200	35 %

(9) Finally, in 1998 the Spanish Government introduced a discount of 15 % to 70 % for scheduled flights to the Canary Islands, the Balearic Islands and Melilla.

(10) Article 9 of Royal Decree 1268/94 states that: 'AENA, a public undertaking responsible for the exploitation and the management of airports, is the managing organisation for the fees imposed by this Royal Decree.'

(11) Article 83(3) of Law 41/1994 (the Finance Law) defines the actual level of landing fees to be paid by the airlines.

(b) **The relevant undertakings and services**

(12) AENA is a public undertaking set up by Article 82 of the Finance Law of 1990. The Finance Law grants AENA the exclusive right to administer the airport infrastructure of 41 airports on the Spanish territory. AENA is also in charge of air traffic control.

(13) AENA receives fees in return for the services it provides in connection with the landing and take-off of aeroplanes, which use the infrastructure, which is managed by AENA.

(14) Iberia is a Spanish airline of which the State holds 84,74 %. Iberia's main activity is passenger transport to and from Spain's 10 main cities, 24 European cities and 34 cities located outside the Community. In 1998, Iberia transported about 21,8 million and 6,2 million passengers worldwide and in Europe, respectively.

(15) Iberia controls 100 % of the airline Binter and about 99,9 % of Aviaco and 99,5 % of Viva Air.

(c) **The landing charges**

(16) In its Airport Economics Manual [4], 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.'

(17) 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' [5].

[4] Airport Economics Manual — Document 9562.1991 ICAO.
[5] See footnote 4.

(d) **The main arguments of the Spanish authorities and AENA**

(18) On 28 April 1997, the Commission sent the Spanish authorities a letter of formal notice, pointing out that the existing system of discounts and the differentiation of landing fees according to the origin of the flight discriminate in favour of national airlines. On 21 October 1997, the Spanish authorities replied that the discount system would apply to all airlines, irrespective of their nationality and that the discounts granted would be smaller than the ones addressed in Commission Decision 95/364/EC concerning the system of discounts on landing fees at Brussels National Airport ([6]). Most of the discounts granted to Spanish airlines would arise from domestic flights. Hence they would not affect trade between Member States.

(19) The Spanish authorities undertook to reduce the difference in landing charges between national and intra-Community flights step by step. By 1999 the price difference would be eliminated.

(20) However, in 1997 landing fees for both domestic and intra-Community flights increased on average by 8 %. While in 1998 intra-Community flights increased slightly less than domestic flights, no further harmonisation has taken place in 1999 and 2000.

(21) On 23 June 1999, the Spanish authorities proposed to abolish price discrimination according to the origin of the flight and to dismantle discounts in several steps, starting on 1 January 2000. By 1 January 2002 the discounts would be completely abolished with the exception of the Canary Islands.

(22) Spain requested a transitional period to phase out the discount system because an immediate elimination of the entire system would have severe repercussions for the Spanish air transport system as a whole. In addition, Spain requested an exception for the Canary Islands. In the view of the Spanish authorities, such an exception, in line with Article 299 of the EC Treaty, is necessary for reasons of economic and social cohesion. It would be justified as compensation for the Islands' remote location and to support their economic development, in particular tourism.

(23) As can be seen from Tables 1 to 4, the differentiation of landing fees according to the origin of the flight has not yet been abolished. In addition, the first step of dismantling the discount system, as announced for 1 January 2000, has not been taken.

II. **LEGAL ASSESSMENT**

(a) **Legal provisions and procedural regulations applicable**

(24) Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty ([7]), as last amended by Regulation EC No 1216/1999 ([8]) was rendered inapplicable to the transport sector by Council Regulation No 141 ([9]), as last amended by Regulation No 1002/67/EEC ([10]), to take account of the distinctive features of the transport sector. Consequently, the scope of Regulation No 141 and, therefore, the procedural regulations specific to the transport sector, are limited to anti-competitive practices arising in connection with the transport market.

(25) Council Regulation (EEC) No 3975/87 ([11]), as last amended by Regulation (EEC) No 2410/92 ([12]), determines the ways in which Articles 81 and 82 of the Treaty are applied to air transport services.

(26) However, services associated with access to airport facilities are not directly part of the air transport services provided to passengers. Those activities are therefore not covered by the procedural regulations specific to the transport sector, but instead fall under Regulation No 17 for the purposes of applying Articles 81 and 82 of the Treaty or Articles 53 and 54 of the EEA Agreement.

([6]) OJ L 216, 12.9.1995, p. 8.
([7]) OJ 13, 21.2.1962, p. 204/62.
([8]) OJ L 148, 15.6.1999, p. 5.
([9]) OJ 124, 28.11.1962, p. 2751/62.
([10]) OJ 306, 16.12.1967, p. 1/67.
([11]) OJ L 374, 31.12.1987, p. 1.
([12]) OJ L 240, 24.8.1992, p. 18.

(b) **Article 86(1)**

(27) Article 86(1) 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 12 and Articles 81 to 89'.

(28) AENA is a public undertaking within the meaning of Article 86(1) of the EC Treaty.

(29) Royal Decrees 1064/1991 and 1268/1994 and Law 41/1994 (Finance Law) (Article 85(3)) which fix the landing fees and the discounts, as referred to in point 3, are State measures for the purposes of Article 86(1).

(c) **Article 82**

(30) There is no doubt that AENA, whose core activity is to provide airlines with access services to civil airport facilities in return for a fee, is, according to the settled case law of the Court, an undertaking within the meaning of Article 82 of the Treaty.

The relevant market

(31) As the Court of Justice held in its judgment in the 'Port of Genoa case' ([13]), the organisation of port activities for third parties at a single port may constitute a relevant market for the purposes of Article 82. Likewise, the Court considered piloting services in the Port of Genoa to constitute the relevant market in its judgment in 'Corsica Ferries II' ([14]):

(32) 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.

(33) This reasoning can easily be transposed to the air transport sector and access to airports. The relevant market is the market in services linked to access to airport infrastructures for which a fee is payable. More specifically, the services in question are those linked to the exploitation and maintenance of runways, the use of taxiways and aprons, and approach guidance for civil aircraft. The market definition is the same as that applied in the Decision 95/364/EC on Brussels National Airport and in Decision ([15]) 1999/198/EC regarding the system of discounts on landing charges in use at Finnish airports and 1999/199/EC ([16]) on landing charges in use at Portuguese airports.

(34) The markets for passenger and freight transport on short and medium-haul routes within the EEA 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 effects of an abuse of a dominant position held by AENA would also be felt in this market.

(35) The 41 airports administered by AENA are interchangeable only to a limited extent and each can therefore be regarded as a distinct geographic market.

(36) The airlines operating domestic or intra-EEA scheduled or charter flights to and from Spain are obliged to use the airports administered by AENA. The distances between the different airports are considerable and each has its own, well-defined catchment area. One of the few international airports not administered by AENA that could serve the same geographic area, i. e. Lisbon, is several hundred kilometres away from Madrid the busiest Spanish airport and even further from other Spanish airports and, moreover, it is not linked by an adequate rail infrastructure. Thus it does not constitute a realistic alternative.

([13]) Case C-179/90 Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA, [1991] ECR I-5889, p. 5923.
([14]) Case C-18/93 Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova. [1994] ECR I-1783.
([15]) OJ L 69, 16.3.1999, p. 24.
([16]) OJ L 69, 16.3.1999, p. 31.

(37) Lisbon and Madrid could possibly be regarded as competitors where an airline uses one or the other as a hub airport. However, this does not have to be established in the present case since flights of this type are a negligible proportion of the total volume of traffic at Madrid.

(38) This being the case, for many passengers travelling to and from Spain, the domestic and intra-EEA flights that use the AENA-administered airports are not interchangeable with the services offered at other EEA airports.

(39) Airlines operating domestic or intra-EEA flights to and from Spain have no option, therefore, but to use the airports administered by AENA, along with the airport facility access services provided in these airports.

Dominant position

(40) The Court of Justice has held that an undertaking vested with a legal monopoly in a substantial part of the common market may be regarded as occupying a dominant position within the meaning of Article 82 of the Treaty ([17]).

(41) Each of the AENA-managed airports is in a dominant position as there is normally only one commercial airport for each geographic market and high entry barriers exist with regard to the construction of new airports. AENA administers all 41 commercial airports in Spain which account for the largest part of civil air traffic in Spain. AENA is a public undertaking which, as a result of the dominant position of the airports it administers and of the exclusive right to administer these airports, holds a dominant position on the market for aircraft landing and take-off services, for which the charge in question is levied.

Substantial part of the common market

(42) In 1999, the AENA-administered airports had a total traffic of 63 million passengers of which intra-Community flights account for approximately 32 million passengers. These airports handled more than 584 000 tonnes of freight. As an illustration, the traffic volume of airports with more than 2 million passengers a year, which account for about 82 percent of total traffic, is set out in the following table:

Table 5

Traffic volume in Spanish airports

Airport	Total passengers (millions)	Freight (tonnes)
Madrid-Barajas	13,708	291 250
Palma de Mallorca	9,498	26 958
Barcelona	8,487	84 413
Gran Canaria	4,484	42 493
Tenerife-Sur	4,286	11 754
Málaga	4,232	9 546
Alicante	2,671	6 353
Lanzarote	2,305	6 645
Ibiza	2,081	4 614

Source: Spanish authorities (1999 figures)

([17]) Case C-41/90 Höfner and Elser v. Macrotron [1991] ECR I-1979, paragraph 28 and Case C-260/89 ERT v DRP [1991] ECR I-2925, paragraph 31.

(43) The relevant Spanish legislation establishes the same fee structure for all airports in Spain. Considering the substantial amount of international traffic in the 16 airports listed in the first and second category of Table 1 each of these airports could be considered to be a substantial part of the common market ([18]).

(44) However, this does not have to be established here, as AENA holds a dominant position on the market for aircraft landing and take-off services on all the 41 airports for commercial civil traffic in Spain and therefore in geographic markets which add up to cover the whole of Spain, which is a substantial part of the common market.

Abuse of a dominant position

(45) The system of landing fees and discounts 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.

(46) This follows from the reasoning of Advocate General Van Gerven on the case 'Corsica Ferries' ([19]), which can be applied to the existing discount system as well as to the price differentiation according to the origin of the flight:

'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(2)c ([20]) of the EC Treaty, namely "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage". 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.'

(a) Discounts based on landing frequency

(47) The lowest discount is granted for between 51 and 100 landings a month. This threshold is sufficiently low to allow a number of airlines, both national and foreign, to benefit from the discount. However, larger discounts benefit Spanish airlines in particular, such as Iberia, Binter Canarias, Spanair, Air Europa or Air Nostrum, which all enjoy the largest category of discounts. This can be seen from the following table.

Table 6

Average discount for the main airlines in 1999

Average discount	Main airlines benefiting from the discount in 1999
0 to 5 %	Swiftair, Easy Jet, Eurowings, Premiair A/S, Aerolloyd, Air Litoral, Air Consul, Debonair, etc.
5 to 10 %	Sabena, Portugalia, KLM, Air Berlin, L.T.U., Britannia Airways, European Air Transport
10 to 15 %	Aero Madrid, Condor, Navegación y Servicios Aéreos, Hapag Lloyd, BA, Altitalia

([18]) Case C-179/90 and Case C-266/96 Corsica Ferries [1998] ECR I-3949.
([19]) Paragraph 34 and footnote 61.
([20]) Now Article 82(2)(c).

Average discount	Main airlines benefiting from the discount in 1999
15 to 20 %	Air Atlantic, Air France, Binter Mediterráneo, Lufthansa, Atlantic Airways
20 to 25 %	Iberia, Binter Canarias, Spanair, Air Europa, Air Nostrum

Source: AENA.

(48) Every landing after the 200th qualifies for a discount of 35 %, with no limit on the number of landings thereafter. Thus, airlines which carry out significantly more than 200 landings a month, such as Iberia, benefit from a proportionally higher overall discount. On any given route on which Iberia is in competition with other carriers, using the same type of aircraft, it receives average discounts of up to 25 % on the landing charges thereby placing the other carriers at a competitive disadvantage. The average discounts received by other airlines, in return for equivalent services provided by AENA, are considerably smaller. The de facto effect of this system, therefore, is to favour the national carriers, in particular, Spanair, Binter, Air Europa, Air Nostrum and Iberia. In 1999, Iberia alone received about 62 % of all discounts on landing fees granted by AENA.

(49) While very different discounts are available, the service provided by AENA requires the same work irrespective of the individual airline. There exists no objective reason which would justify the different treatment since the services provided, such as approach control and use of apron areas, have the same substantive content for all airlines.

(50) Business practices considered to be normal may constitute an abuse within the meaning of Article 82 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 the treatment of its various clients by an undertaking in a dominant position.

(51) As the only means available to a carrier for providing air transport services to a given town, airports have a dominant position as regards a very high proportion of their traffic. Airlines therefore have no choice and, as a result, the airport faces little risk that an airline would change airport as a result of a lower fee offered elsewhere. In these circumstances, unless it can put forward objective reasons, airports are not allowed to favour certain airlines in comparison to others.

(52) The existence of economies of scale, the aim of reducing air traffic noise or air congestion, for example, could be regarded as objective reasons. However, in the case of landing and take-off services such economies of scale do not exist. The services provided do not depend on the individual owner of the aircraft or whether they are rendered to the first or the tenth aircraft of the same airline.

(53) Thus, the fact that AENA has applied dissimilar conditions to its commercial customers for the provision of equivalent services, thereby placing some of them at a competitive disadvantage, constitutes an abuse of a dominant position within the meaning of point (c) of the second subparagraph of Article 82.

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

(54) The differentiation of tariffs according to type of flight, i. e. either domestic or intra-Community, is also an infringement of the Treaty.

(55) In this respect, the judgment of the Court of Justice in the Corsica Ferries ([21]) case is unequivocal:

'Article 90(1) and Article 86 ([22]) of the EC 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.'

(56) Applying the reasoning of Advocate General Van Gerven quoted in point 46 to the airports sector, it becomes apparent that the system of differentiated landing fees has the effect of applying dissimilar conditions for equivalent landing and take-off services supplied to airlines. This places airlines operating EEA services at a competitive disadvantage in comparison to airlines providing domestic services. The differentiation of landing fees according to the origin of the flight therefore constitutes an abuse of a dominant position within the meaning of point (c) of the second paragraph of Article 82.

Effect on trade between Member States

(57) In its judgment in the Corsica Ferries case, the Court of Justice recognised that discriminatory practice which affect undertakings providing transport services between two Member States, may affect trade between Member States.

(58) The following table below shows the volume of intra-Community flights as a proportion of the total traffic for Spanish airports:

Table 7

Passenger traffic for Spanish airports

Airport	International passengers (%)	Intra-Community passengers (%)	Domestic passengers (%)	Total (millions)
Madrid-Barajas	20	29	51	13,708
Palma de Mallorca	3	74	23	9,498
Barcelona	9	38	53	8,487
Gran Canaria	4	64	32	4,484
Tenerife-Sur	3	80	17	4,286
Málaga	6	70	24	4,232
Alicante	3	74	23	2,671
Lanzarote	2	72	26	2,305
Ibiza	3	71	26	2,081

Source: Spanish authorities (1999 figures).

(59) When all airports are taken together, with 32 million passengers the traffic volume between Spain and other Member States of the Community exceeds the domestic traffic volume of 25 million passengers. In the case of the Canary Islands, the intra-Community traffic is more than twice that of the intra-Spain traffic.

(60) The traffic between Spain and EEA countries is also substantial. In 1998 there were about 871 thousand passengers travelling on direct flights between Norway and Spain.

(61) Given the volume of traffic between Spain, the Community and the EEA, the effect of the measures in question on cross-border trade is appreciable.

([21]) Cited above, point 45.
([22]) Now Article 86(1) and Article 82.

(d) **Examination of Article 86(1)**

(62) AENA is a public undertaking within the meaning of Article 86(1). By Royal Decrees 1064/91 and 1268/94 and Law 41/1994 (the Finance Law), the Spanish State obliges AENA to apply landing charges at Spanish airports which differ according to the origin of the flight and to grant discounts depending on the number of landings per month. This measure is incompatible with Article 82 of the Treaty and Article 54 of the EEA Agreement. Since it is enacted by the Spanish State, the latter is therefore infringing Article 86(1) read in conjunction with Article 82 of the Treaty, and Article 59(1) read in conjunction with Article 54 of the EEA Agreement.

(e) **Article 86(2): the justification of the measure**

(63) In their response to the Commission's letter of formal notice, the Spanish authorities pointed out that the system of discounts applies to all airlines, irrespective of whether they are Spanish or foreign. They claim that it does not therefore lead to discrimination. However, while it is correct that the discount system does not discriminate de jure against foreign airlines, as has been pointed out in practice it grants an advantage to Spanish airlines, by lowering their landing charges. There is no economic justification, such as the existence of economies of scale, for the discount system.

(64) As a second justification, the Spanish authorities argue that most of the discounts granted to Spanish airlines stem from domestic traffic or extra-Community traffic, and would thus not affect intra-EEA traffic. However, this justification does not apply in respect of the main beneficiary, Iberia, which receives almost one quarter of its discounts from intra-Community flights, 55 % of discounts are granted for domestic flights, 22 % for extra-Community and 23 % for intra-Community flights. In addition, the present system leads to lower domestic charges while imposing higher charges on intra-EEA traffic for equivalent services. Given the importance of intra-Community flights in total traffic handled at Spanish airports, there is therefore an affect on trade between Member States.

(65) The Spanish authorities have agreed, in principle, to abolish the discount system over a transitional period until 2002. Such a transition appears to be unjustified. The Spanish authorities have not provided any evidence that earlier abolition of the discount system would be technically impossible or that it would cause unreasonably high cost. In addition, as a result of Decisions 95/364/EC, 1999/198/EC and 1999/199/EC, the Spanish authorities have been aware of the Commission position already for a considerable period of time. Granting a period of transition therefore does not seem to be justified.

(66) Spain wishes to continue operating the present discount system for the Canary Islands on the grounds that this would be justified for regional and cohesion reasons and in order to promote the Islands as a tourist destination.

(67) These justifications cannot be accepted. The goal of promoting increased usage of the Canary Islands as a tourist destination could be achieved by nondiscriminatory discounts accessible to all airlines operating services to and from the Canary Island airports.

(68) In addition, it is not obvious that the present system of landing fees would in fact help to develop the Canary Islands as a tourist destination. For the Canary Islands, the intra-Community traffic is more than twice as large as domestic traffic. As pointed out, the present discount system de facto discriminates against (non-Spanish) European airlines. By imposing higher costs on European airlines, the discount system also generates higher travelling costs for the Canary Island's main source of tourists, i.e. European tourists from outside Spain.

(f) **Public service obligations**

(69) The Spanish authorities have not invoked the derogation provided for in Article 86(2) of the Treaty to justify the introduction and maintenance of such a system of discounts on landing charges.

(70) 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 AENA, which is to maintain and operate the Spanish 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 Council Regulation (EEC) No 2408/92 on access to intra-Community air routes ([23]).

(71) The derogation provided for in Article 86(2) of the Treaty does not, therefore, apply.

(g) **Conclusion**

(72) The foregoing analysis establishes that the system of landing charges used by AENA 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-EEA), in respect of the same runway, taxiway, apron area and approach control services.

(73) In view of the above, the Commission considers that the State measure referred to in recitals 1 to 11, as applied in the Spanish airports, in so far as it obliges the public undertaking AENA to apply the above-mentioned system, constitutes an infringement of Article 86(1) of the Treaty, read in conjunction with Article 82 thereof, and with Article 59 of the EEA Agreement, read in conjunction with Article 54 thereof,

HAS ADOPTED THIS DECISION:

Article 1

The system of discounts on landing charges and the differentiation of landing charges according to the origin of the flight, provided for by Royal Decrees 1064/91 and 1268/94 and Law 41/1994, constitute a measure incompatible with Article 86(1) of the Treaty, read in conjunction with Article 82 thereof, and with Article 59 of the EEA Agreement, read in conjunction with Article 54 thereof.

Article 2

Spain 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.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 26 July 2000.

For the Commission

Mario MONTI

Member of the Commission

([23]) OJ L 240, 24.8.1992, p. 8.