II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 February 1999

relating to a proceeding pursuant to Article 86 of the Treaty

(IV/35.767 — Ilmailulaitos/Luftfartsverket)

(notified under document number C(1999) 239)

(Only the Finnish and Swedish texts are authentic)

(Text with EEA relevance)

(1999/198/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ([1]), as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 3 thereof,

Having regard to the Commission's decision on 5 May 1997 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission regarding the system of discounts on landing charges in use at Finnish airports,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

(a) Subject of the Decision

(1) The Commission is currently investigating, in own-initiative proceedings, the various methods used for discounting landing charges at Community airports, following Commission Decision 95/364/EC of 28 June 1995 relating to a proceeding pursuant to Article 90(3) of the Treaty ([2]) on the system of discounts on landing charges in use at Brussels National Airport.

(b) The relevant undertaking

(2) Ilmailulaitos/Luftfartsverket (the Finnish Civil Aviation Administration, hereinafter 'CAA') has since 1991 been a self-financing public undertaking operating under the responsibility of the Ministry of Transport and Communications. It was previously the Finnish Aviation Administration, a centralised department of the Finnish Ministry of Transport.

(3) Law No 1123/90 of 14 December 1990, laying down the statutes of and creating the CAA, sets out the terms of operation and objectives of the CAA. Article 2 lists the various duties of the CAA:

'The Civil Aviation Administration shall provide airport and air navigation services for the requirements of both civil and military aircraft (...).

The task of the Civil Aviation Administration shall be to ensure general flight safety and (...) to deal with aviation authorisations and licences (...)'.

(4) The CAA thus levies charges for the services related to the landing and take-off of the aircraft using the airport facilities which it administers.

([1]) OJ 13, 21. 2. 1962, p. 204/62.

([2]) OJ L 216, 12. 9. 1995, p. 8.

(c) **The relevant system — landing charges**

(5) In its Airport Economics Manual ([3]), the International Civil Aviation Organisation (ICAO) recommends that its members base their charges on the maximum take-off weight (MTOW) of the aircraft. The landing charge is defined as follows: 'Charges and fees collected for the use of runways, taxiways and apron areas, including associated lighting, as well as for the provision of approach and aerodrome control'.

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

(7) According to Article 6 of Law No 1123/90, landing charges in airports administered by the CAA can if necessary be fixed by decree. Since no such decree has been issued, it is the CAA itself that sets the level of landing charges and any applicable discounts.

(8) For 1998, the landing charges set by the CAA were calculated as follows:

— for domestic flights: FIM ([4]) 17 or 20 (depending on the weight of the aircraft) per tonne of the aircraft's MTOW,

— for international flights: FIM 50,50 per tonne of the aircraft's MTOW.

(9) For environmental reasons, charges for landings taking place between 22.00 and 06.00 hrs at any airport in Finland except Helsinki-Vantaa are multiplied by a coefficient of 1,3.

(10) The CAA has also instituted a discount linked to frequency of landing, for international flights only, calculated as follows:

Number of landings at Finnish airports in the last six months for a given airline	Discounts to apply to all landings by that airline over the next six months		
	(in 1996)	(in 1997)	(in 1998)
1 001-3 000	3 %	2 %	2 %
3 001-5 000	5 %	3 %	2 %
5 001-7 000	8 %	6 %	4 %
7 001-	11 %	9 %	4 %

(11) A statement of objections was sent to the CAA on 20 May 1997. Two measures were singled out as being possible infringements of Article 86 of the Treaty: the progressive discount system (see point 10) and the setting of charges according to the country of origin of the flight (see point 8).

(d) **The main arguments of the CAA**

(12) While it maintains that the reasons for the introduction in 1977 of the frequency-based discount system are unknown, the CAA claims that 'large-scale users' have the advantage of offering a guarantee of payment.

(13) The CAA thus argues that:

'As far as the owner of an airport is concerned, one of the advantages offered by large-scale users of airports is that of a customer payment guarantee. The large-scale users have never experienced any difficulties in settling their accounts, nor has it been necessary to make provision for non-payment of amounts outstanding.'

(14) The CAA nevertheless points out that the discounts in question have been reduced significantly over recent years (from 20 % in 1989 to 4 % in 1998).

(15) Moreover, in its reply dated 19 November 1997 to a request for information made by the Commission on 28 October 1997, the CAA stated that the discount system would be abolished on 1 January 1999.

(16) Lastly, according to the CAA, this approach was approved by IATA, which, at a meeting with the CAA in April 1996, gave its 'support to the idea of phased changes to the system' and asked the CAA to refrain from sudden changes to its system, which would have serious financial consequences for certain airlines.

(17) As regards the differentiation of charges according to the country of origin of the flight, the CAA points out that the technical and operational requirements to which airports are subject (length and durability of runways, hours of operation and availability of airports) are different for domestic and for international flights. The different requirements explain the differentiation of the charges.

([3]) Document 9562-1991 ICAO.

([4]) FIM 1 = 0,1681 EUR.

II. LEGAL ASSESSMENT

(a) Legal provisions and procedural regulations applicable

(18) It should be borne in mind that Regulation No 17 was rendered inapplicable to the transport sector by Council Regulation No 141 ([5]), as last amended by Regulation No 1002/67/EEC ([6]), 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.

(19) Council Regulation (EEC) No 3975/87 ([7]), as last amended by Regulation No 2410/92 ([8]), determines the ways in which Articles 85 and 86 of the Treaty are applied to air transport services.

(20) However, services associated with access to airport facilities are not directly part of the air transport services provided to passengers. These 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 85 and 86 of the Treaty.

(b) Concept of an undertaking

(21) The Court of Justice of the European Communities has consistently held ([9]) that the concept of an undertaking in Community competition law encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed.

(22) Articles 85 and 86 of the Treaty apply to the behaviour of a public entity when it is established that, through that entity, the State carries on economic activities of an industrial or commercial nature by offering goods and services on the market. It makes no difference whether the State carries out such activities directly through a body forming part of the State administration or through a body to which it has granted special or exclusive rights. It is therefore necessary to examine the nature of the activities carried out by the public undertaking or entity granted special or exclusive rights by the State ([10]).

([5]) OJ 124, 28. 11. 1962, p. 2751/62.
([6]) OJ 306, 16. 12. 1967, p. 1.
([7]) OJ L 374, 31. 12. 1987, p. 1.
([8]) OJ L 240, 24. 8. 1992, p. 18.
([9]) See in particular Case C-41/90 Höfner and Elser v. Macroton [1991] ECR I-1979, paragraph 21, and Joined Cases C-159 and 160/91 Christian Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon [1993] ECR I-637, paragraph 17.
([10]) See the judgments in Case 118/85 Commission v. Italy [1987] ECR 2599, paragraphs 7 and 8, and in Case C-343/95 Diego Cali & Figli Srl/Servizi ecologici Porto di Genova [1997] ECR I-1547, paragraphs 16, 17 and 18.

(23) In this connection, there is no doubt that the CAA, whose core activity ([11]) is providing airlines with access services to civil airport facilities in return for a fee, is, according to the definition of the Court, an undertaking within the meaning of Article 86 of the Treaty.

(c) Relevant market

(24) As the Court of Justice has pointed out in the Port of Genoa case ([12]), the organisation of port activities for third parties in a single port can constitute a relevant market within the meaning of Article 86. By the same token, in the Corsica Ferries II case ([13]), the Court took the market for piloting services in the Port of Genoa to be the relevant market.

(25) Transposing this line of reasoning to airports, the relevant market in this matter is therefore the market in services linked to access to airport infrastructures for which a fee is payable. The market definition is the same as that applied in Commission Decision 95/364/EC ([14]).

(26) 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.

(27) In addition, the markets for passenger and freight transport on medium and short-haul intra-EEA routes constitute a neighbouring but distinct market which is affected by the impact of an abuse on the part of the undertaking in question on the market for landing and take-off services. The effect of the abuse of the dominant position held by the CAA can therefore also be felt in this market.

(28) Of the 25 airports administered by the CAA, only five have a significant volume of international traffic (Helsinki-Vantaa, Vaasa, Turku, Pori, Tampere). Disregarding Helsinki, the international traffic amounts to several scheduled flights to Stockholm, Hamburg, Copenhagen, Petrozavodsk (Russia), Murmansk (Russia) and Lulea (Sweden), as well as numerous charter flights.

(29) The airports with international traffic are interchangeable only to a limited extent and each can therefore be regarded as a distinct geographic market.

([11]) See points 2, 3 and 4.
([12]) Case C-179/90, Merci convenzionali porto di Genova/Siderurgica Gabrielli [1991] ECR I-5889.
([13]) Case C-18/93, Corsica Ferries Italia/Corpo dei piloti del porto di Genova [1994] ECR I-1783.
([14]) Cited in footnote 2.

(30) The airlines operating domestic or intra-EEA scheduled or charter flights to and from Finland are obliged to use the airports administered by the CAA (of the 29 airports in Finland, only four are private and not under the aegis of the CAA). The other airports are hundreds of kilometres away and located in other Member States.

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

(32) Airlines running domestic or intra-EEA flights, either to or from Finland, have no option, therefore, but to use the airports administered by the CAA, along with the airport facility access services provided in these airports.

(d) **Dominant position**

(33) The Court of Justice has held that an undertaking benefiting from a legal monopoly in a substantial part of the common market may be regarded as holding a dominant position within the meaning of Article 86 of the Treaty ([15]).

(34) This is the case with the CAA, a public undertaking which, as a result of the exclusive rights granted to it under Law No 1123/90 in its capacity as airport authority, holds a dominant position on the market for landing and take-off services in respect of which the charge in question is levied, in each of the five Finnish airports with international traffic.

(e) **Substantial part of the common market**

(35) The five Finnish airports operating intra-EEA flights were used by a total of approximately 9 million passengers in 1996 and handled more than 91 000 tonnes of freight.

(36) The airports which operate intra-EEA services, taken together, can therefore be regarded as a substantial part of the common market, if one applies the reasoning adopted by the Court in the Crespelle ([16]) and Almelo ([17]) judgments. In the Crespelle judgment, the Court stated that, 'by thus establishing, in favour of those undertakings, a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market.' ([18]).

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

(f) **Abuse of a dominant position**

The system of discounts based on frequency

(38) In view of the announcement made by the CAA that this system would be abolished on 1 January 1999, and taking into account the practice established by the Commission in Decision 95/364/EC, the discount system, which was included in the statement of objections pursuant to Article 86 of the Treaty against the CAA, will no longer be dealt with in this Decision.

The differentiation of charges according to type of flight (domestic or intra-EEA)

(39) Article 86 is intended to cover anti-competitive practices engaged in by undertakings on their own initiative. It prohibits undertakings that hold a dominant position in a substantial part of the common market from applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

(40) In this respect, the Corsica Ferries II judgment ([19]) by the Court of Justice is unambiguous. The Court held:

'1. Article 1(1) of Council Regulation No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries precludes the application in a Member State of different tariffs for identical piloting services, depending on whether the undertaking providing maritime transport services between two Member States operates a vessel which is authorised to engage in maritime sabotage, which is reserved to vessels flying the flag of that State.

([15]) Case C-41/90 Höfner and Elser, cited in footnote 9, paragraph 28; Case C-260/89 ERT [1991] ECR I-2925, paragraph 31.
([16]) Case C-323/93, Société agricole du Centre d'insémination de la Crespelle/Coopérative d'élévage et d'insémination artificielle du département de la Mayenne [1994] ECR I-5077.
([17]) Case C-393/92 Commune d'Almelo et autres/Energiebedrijf Ijsselmij [1994] ECR I-1477.
([18]) Paragraph 17.
([19]) Cited in footnote 13.

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

(41) In his opinion in the same case, Advocate-General Van Gerven stated that ([20]):

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

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

([20]) Paragraph 34.

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

(43) It is obvious that such a system has the direct effect of putting at a disadvantage companies providing intra-Community flights by artificially altering the cost to the undertakings, depending on whether they operate domestic or intra-EEA services.

(44) Regarding this infringement of the Treaty, the CAA claims that the implementation of such a system is justified on the grounds that 'the technical and operational requirements applying to airports, and therefore the underlying costs, are different for internal flights and for international flights, primarily as a result of different requirements regarding the following:

(i) the length of the runways;

(ii) the durability of the runways;

(iii) the hours of operation, and

(iv) the availability of the airports.'

(45) More specifically, the CAA argues as follows:

(i) Requirements as to the length of the runways

— the average distance of internal flights in Finland is between 300 km and 400 km, whereas the average flight distance between Finland and the other Member States varies between 1 500 km and 2 000 km, with a maximum of 3 000 km (Helsinki-Madrid),

— the fleet of aircraft used for domestic flights is smaller than that used for intra-EEA flights,

— the actual weight of aircraft used for domestic flights is less since the journeys are shorter than international flights,

— the size of aircraft and the flight distance determine runway length,

— for domestic air traffic, runways of 2 000 m in length are sufficient; however, for intra-EEA flights, runways of at least 2 400 m are required. Thus, for traffic between Finland and the rest of Europe, the runways must be around 25 % longer than those for domestic traffic,

— airports which accommodate large air fleets are subject to more stringent conditions regarding security and emergency arrangements; this requires considerable manpower investment and is expensive.

By way of conclusion: the maintenance and capital investment costs associated with intra-EEA traffic are higher than those for domestic services.

(46) The validity of the arguments advanced by the CAA is debatable, for the following reasons:

— many domestic routes (for example, the Helsinki-Vantaa/Ivalo, Maarianhamina/Kittilä and Turku/Rovaniemi routes) are of a similar distance to intra-EEA flights,

— some of the intra-EEA flights are relatively short: Helsinki/Stockholm (approximately 405 km), Helsinki/Gothenburg (approximately 810 km), Helsinki/Oslo (approximately 810 km) and Helsinki/Copenhagen (approximately 910 km),

— the distance of the route to be flown is not the sole criterion on which airlines base their choice of aircraft,

— the CAA claimed that, whereas a runway length of 2 000 m is sufficient for domestic flights, intra-EEA or international flights would require an additional 400 m of runway. However, most of Finland's airports have already made this investment; of the 25 administered by the CAA, only 6 have runways that are less than 2 400 m long ([21]).

(47) Moreover, according to the figures in the Commission's possession, several of the airports with runways shorter than 2 400 m nevertheless handle intra-EEA traffic. They are in particular the following airports: Lappeenranta (2 000 m), Maarianhamina (1 900 m), Pori (2 000 m) and Vaasa (2 000 m) ([22]). The argument based on runway length is therefore not relevant.

(48) As regards the claim that the aircraft used for domestic traffic are smaller than those used for intra-EEA traffic, the Commission notes that this is not always the case. For example, the airline Finnair uses the same aircraft (MD-80s) for domestic routes (e.g. Helsinki-Oulu) as it does for the intra-Community routes Helsinki-Alicante or Helsinki-Barcelona.

(49) The CAA claims to have 'monitored product costing, and in particular the cost of services associated with manoeuvring areas since 1994', and that 'based on 1995 product costs, the cost per tonne (MTOW) of taxiway services for international traffic has risen by around 50 % compared with the cost of the same for domestic traffic'. According to the CAA, this means that 'landing charges based solely on the MTOW are inaccurate in a system of pricing based on real costs, and therefore the landing charges for international traffic must be higher'.

(50) However, the CAA itself admits that the alleged differential in costs between those incurred by the landing of an intra-EEA flight and those associated with a domestic landing is less than the differential between the landing charge for intra-EEA flights and that for domestic flights.

(ii) Requirements as to the durability of runways

(51) According to the CAA, because heavier aircraft are used for international traffic, 'in order to cater for international traffic, the superstructure of the runways must be around 10 % more stable'.

(52) This argument does not stand, because the runway durability factor is already taken into account, the charge being based on the weight of the aircraft.

(iii) Requirements as to the hours of operation of airports and their availability

(53) The CAA claims that, in view of the fact that 90 % of international air traffic to and from Finland passes through Helsinki, and that the departure and arrival times for international flights are fixed for both the morning and the evening, the provincial airports are also obliged to stay open in the mornings and evenings, for connecting flights. This means that 'the cost of providing services must be included when calculating the cost of passenger charges'.

(54) The CAA claims that 'international traffic requires more space for the passenger terminals and aircraft parking areas than domestic traffic, as well as more services. The CAA is therefore obliged to cover the construction costs when setting the passenger charge'.

(55) The last two arguments are irrelevant to the system in question: given that, according to the CAA, the costs incurred by the requirements regarding airport operating hours and availability are included in the calculation of passenger charges, it follows that it is not possible to include them in the landing charges.

(56) In the light of the above, the Commission holds that none of the arguments put forward by the

([21]) *Source:* ACI Europe Airport Database.
([22]) *Source:* Finnish Civil Aviation Statistics.

CAA justifies the implementation of a system of charges that is discriminatory in nature, according to the origin of the flight (i.e. domestic or intra-EEA), such as that operated by the undertaking in question.

(g) **Effect on trade between Member States**

(57) In its judgment in the Corsica Ferries II case ([23]), the Court of Justice recognised that discriminatory practices which 'affect undertakings providing transport services between two Member States, (...) may affect trade between Member States'.

(58) Following a request under Article 11 of Regulation No 17 for the CAA to provide information, it was ascertained that there are no statistics that separate intra-EEA traffic from the rest of the international traffic for each airport.

(59) As regards Helsinki airport, which handled 7,7 million passengers in 1996, the effect of the system in question on trade between Member States is beyond doubt.

(60) As regards the other Finnish airports operating intra-EEA services (Vaasa, Turku, Tampere and Pori), apart from charter flights to the Mediterranean Member States and the Canary Islands, these airports operate each day to Stockholm six flights (Vaasa and Turku), five flights (Tampere), and two flights (Pori). The flights to Stockholm connect with flights to Amsterdam, Billund, Brussels, Copenhagen, Düsseldorf, Frankfurt, Gothenburg, Hamburg, London, Manchester, Milan, Munich, Paris and Vienna, on either Lufthansa/SAS or Finnair (on a code-sharing basis with its partners).

The table below shows the volume of international flights as a proportion of overall passenger traffic for the airports in question.

(%)

Airport	Domestic traffic	International traffic
Helsinki Vantaa	30	70
Vaasa	66	34
Turku	51	49
Pori	72	28
Tampere	49	51

Source: Finnish Civil Aviation Statistics 1996, p. 9.

(61) It is thus legitimate to regard the system at issue in those five airports as having an effect on trade between Member States.

(h) **Conclusion**

(62) The foregoing analysis establishes that the system for calculating landing charges used by the CAA entails the payment, for no objective reason, of different charges, depending on the origin of the flight (domestic or intra-EEA), in respect of the same approach control, taxiway and apron areas services.

(63) The Commission therefore considers that the system in question is discriminatory and distorts competition on the relevant market, contrary to indent (c) of the second paragraph of Article 86 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

Ilmailulaitos/Luftfartsverket has infringed Article 86 of the Treaty by using its dominant position as Finnish airport administrator to impose discriminatory landing charges in Finnish airports, according to the type of flight, that is either domestic or intra-EEA.

Article 2

Ilmailulaitos/Luftfartsverket must bring to an end the infringement referred to in Article 1 and 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 Ilmailulaitos/Luftfartsverket, PO Box 50, FIN-01531 Vantaa.

Done at Brussels, 10 February 1999.

For the Commission
Karel VAN MIERT
Member of the Commission

([23]) Cited in footnote 13.