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DECISION

Riga, 22 November 2006

No 134

(Minutes No 67, 3 §)

On finding infringement and imposing legal obligation

Case No 897/04/05/9

On potential infringement of Article 82 of the EC Treaty by the Riga International Airport

On 29 October 2004, the Competition Council received a complaint lodged by six airlines (“Austrian Airlines”, “Czech Airlines”, “Finnair”, “British Airways”, “Deutsche Lufthansa AG” and “KLM Royal Dutch Airlines”) concerning the Regulation No 3 “On Charges for Air Navigation Services in the Riga Flight Information Region and Services of the State Joint Stock Company “Riga International Airport”” adopted by the Aviation Department of the Ministry of Transport of Latvia on 23 July 2004. The complaint draws attention to the fact that, according to Paragraph 8 of the above-mentioned Regulation of the Aviation Department, as of 1 November 2004 the State Joint Stock Company “Riga International Airport” (hereinafter - the Airport) introduces a new discount scheme providing discounts of up to 80% on take-off, landing and security services. The complaint states that introduction of such a system of discounts causes dissimilar competition conditions for different airlines, moreover, there is no economic justification for the volume discounts, and it causes unequal costs for airlines operating routes with a comparatively smaller market potential. There are significant differences in costs among competing airlines on several routes. In the complaint, the airlines request to ensure equal competition conditions in the Airport for all airlines.

After obtaining additional information from such airlines as “Czech Airlines”, “Finnair”, “British Airways”, “Deutsche Lufthansa AG”, “KLM Royal Dutch Airlines” and “Air Baltic” as well as from the Airport, on 26 November 2004,

the Competition Council decided to initiate a case No 897/04/05/9 on possible infringement of Article 82 of the EC Treaty by the Riga International Airport when applying the Regulation No 3 adopted by the Aviation Department of the Ministry of Transport of Latvia. The case was initiated on the basis of the complaint lodged by the airlines on 29 October 2004 as well as on the basis of the Competition Law (Subparagraph 1 of Section 8(1), Section 23(1) and Section 28(1)).

After examining information compiled in the case No 897/04/05/9, the Competition Council

ESTABLISHED:

1. Compliance of the Riga International Airport with the concept of “undertaking” within the meaning of Article 82 of the EC Treaty and the concept of “public undertaking” within the meaning of Article 86(1) of the EC Treaty

(1)

According to the Statute (registered in the Commercial Registry on 10 September 2004, No 40003028055), the Riga International Airport is a State joint stock company of the Republic of Latvia (Paragraph 1 of the Statute) and its main objective is to provide ground handling services to airlines and full range of passenger services (Paragraph 6 of the Statute).

The Airport manages the infrastructure of the Riga International Airport and provides the following services to airlines:

- a) Aircraft take-off and landing services;
- b) Apron parking services;
- c) Security services.

According to Section 28(1) of the Law on Aviation, the Airport provides paid services as regards aircraft's access to the infrastructure of the Riga International Airport and services for arriving and departing passengers.

Taking into account the above-mentioned, the Airport performs activities of economic character and is deemed to be an undertaking within the meaning of Article 82 of the EC Treaty.

According to subparagraphs 25.9 and 25.10 of the Cabinet Regulation No 242 of 29 April 2003 “Statute of the Ministry of Transport”, the Ministry of Transport is the State capital share-holder in the State Joint Stock Company “Riga International Airport”. According to the definition of a State joint stock company included in Section 1(4) of the Law on State and Local Government

Capital Shares and Joint Stock Companies (26 September 2002), the State owns all capital shares in this joint stock company.

When describing the concept of “public undertaking”, the European Court of Justice (hereinafter – the ECJ) has stated that public authorities may exercise directly or indirectly a dominant influence over such undertakings through ownership rights, financial participation or by determining rules governing operation of these undertakings. A dominant influence exists when the State holds the major part of the undertaking’s subscribed capital, controls the majority of votes or can appoint more than half of the members of its administrative, managerial or supervisory body¹. Taking into account the status of the Airport, there are no doubts that it is a public undertaking within the meaning of Article 86(1) of the EC Treaty.

In the decision on the Paris Airport case, the European Commission (hereinafter – the Commission), on the basis of the EC case-law, stated that Articles 85 and 86 (now – Articles 81 and 82) of the EC Treaty applied also to public entities when, through such entities, the State carried on economic activities in the market. It is of no importance that the State carries out the activities directly through a body forming part of the State administration or through a body to which it has granted special rights. It is necessary to examine the nature of the activities carried out by the public undertaking or entity granted special or exclusive rights by the State.²

Therefore it is concluded that: a) the Airport is an undertaking within the meaning of Article 82 of the EC Treaty; b) the Airport is a public undertaking within the meaning of Article 86(1) of the EC Treaty and the relevant public institutions have the opportunity to directly or indirectly have a decisive effect on the Airport, including by determining the regulatory framework for its activities.

(2)

The Airport’s services are not regarded as services of general economic interest in the meaning of Article 86(2) of the EC Treaty; thus, there are no grounds to consider that the Airport is an undertaking providing services of general economic interest. Therefore the possible exemption prescribed in Article 86(2) of the EC Treaty as regards the activities defined in Article 86(1) does not apply to the Airport. The concept of “services of general economic interest” is a characteristic of the EC law and its application must be uniform in all Member

¹ Judgment of the Court of 6 July 1982. French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities. Public undertakings - Transparency of financial relations with the State. Joined cases 188 to 190/80. – ECR 1982 I-2545.

² Commission Decision of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 - Alpha Flight Services/Aéroports de Paris), 98/513/EC- OJ L 230 18/08/1998 p.10-27.

States³; it includes activities of economic character performed with the mission of general interest, and for that reason the Member States have subjected these activities to specific public service obligations; in particular they cover such services as transport networks, energy and communications⁴. The Airport's services are not classified as services of general economic interest according to interpretation of this concept in the EC law (it is described in the Commission's communications on services of general interest in Europe on the basis of the ECJ practice⁵) and, even under the conditions that could be the basis for attributing the status of general economic interest to a specific service, the party maintaining this opinion should prove that such an exemption from the EC competition rules (i.e. the exemption defined in Article 86(2) of the EC Treaty) is necessary to ensure the respective services.

2. Description of the system of discounts applied by the Airport

(3)

Section 28(2) of the Law on Aviation that was in effect till 31 December 2005, stated that “the Aviation Department shall confirm the payments referred to in Paragraph 1 of this Section upon proposal of the public undertaking (service) responsible for utilisation of the airspace of the Republic of Latvia and organisation of air traffic or the airport's administration”.

On 23 July 2004, the Aviation Department of the Ministry of Transport adopted the Regulation No 3 “On Charges for Air Navigation Services in the Riga Flight Information Region and Services of the State Joint Stock Company “Riga International Airport”” (hereinafter – the Regulation No 3). On 1 January 2005, it was replaced by the Regulation No 5 under the same title adopted by the Aviation Department of the Ministry of Transport on 24 December 2004 without any significant changes (hereinafter – the Regulation No 5). When comparing the contents of the Regulation No 3 and the Regulation No 5 and taking into account the letter No 14-19/933 of 4 November 2005 of the Aviation Department of the Ministry of Transport to the Competition Council, the change of Regulations was related to recalculation in EUR of costs that were previously defined in USD according to the exchange rate determined by the Bank of Latvia on that date. The Regulation No 5 states:

- Paragraph 4 – the basic rate of fee for aircraft take-off and landing at the Airport is 8.12 EUR per every 1000 kilograms of an aircraft's maximum permissible take-off weight;

³ Judgment of the Court of 14 July 1971. *Ministère Public Luxembourgeois v Madeleine Muller, Veuve J.P. Hein and others*. Reference for a preliminary ruling: Tribunal d'arrondissement de Luxembourg - Grand Duchy of Luxemburg. Port de Mertert. Case 10-71. – ECR 1971 I-723, paragraphs 14 and 15.

⁴ Communication from the Commission “Services of General Interest in Europe”, 2001/C 17/04 - OJ C 17, 19/01/2001., p. 4-23, Annex II – definitions. Also - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 May 2004 “White Paper on Services of General Interest”, COM(2004) 374, Annex I - definitions.

⁵ Ibid.

- Paragraph 5 – the fee for an hour of training flight equals to one take-off and landing; a coefficient of 0.75 is applied for every next hour;
- Paragraph 6 – the fee for apron parking is as follows: no parking fee is charged for the first 3 hours of parking; 1.06 EUR per every 1000 kilograms of an aircraft's maximum permissible take-off weight are charged for every next 24 hours;
- Paragraph 7 – the fee for security services is 12.18 EUR per every departing passenger;
- Paragraph 8 defines the rights of any carrier operating flights to or from the Riga International Airport to receive a discount of 0% to 80% from the charges determined in Paragraphs 4 to 7 based on the number of passengers carried from Riga in a year. The following gradation of discounts is defined in a table included in Paragraph 8 of the Regulation No 5 (similarly as in the Regulation No 3):

Number of departing passengers (thousands)	Discount (%)
<25	0.0
25	10
50	20
75	30
100	40
125	50
150	60
200	70
250	80

According to Section 28(2) of the Law on Aviation that is in effect since 1 January 2006, “the procedures for the specification and distribution of the payments referred to in Paragraph 1 of this Section shall be determined by the Cabinet”⁶. In accordance with Paragraph 3 of the Cabinet Regulation No 20 of 3 January 2006 “Procedures for Specifying Charges for the Services of Air Navigation and the State Joint Stock Company “Riga International Airport” and their Distribution” (hereinafter – the Regulation No 20) that entered into force on 18 January 2006, the services provided by the Airport are charged as follows:

- Subparagraph 3.1 – the basic rate of fee for aircraft take-off and landing at the Airport is 8.12 EUR per every 1000 kilograms of an aircraft's maximum permissible take-off weight;
- Subparagraph 3.2 – the fee for an hour of training flight equals to one take-off and landing; a coefficient of 0.75 is applied for every next hour;

⁶ In accordance with the amendments to the Law on Aviation, which were adopted on 11 May 2006 and entered into force on 13 June 2006 (as regards Section 28(2)) - “The procedures for the specification and distribution of the payments referred to in Paragraph 1 of this Section, except for payments for the services provided by civil aviation aerodromes owned by local governments and private persons, shall be determined by the Cabinet”.

- Subparagraph 3.3 – the fee for apron parking is as follows: no parking fee is charged for the first 3 hours of parking; 1.06 EUR per every 1000 kilograms of an aircraft’s maximum permissible take-off weight are charged for every next 24 hours;
- Subparagraph 3.4 – the fee for security services is 12.18 EUR per every departing passenger;
- Subparagraph 3.5 defines the rights of any carrier operating flights to or from the Riga International Airport to receive a discount of 10% to 80% from the charges determined in Subparagraphs 3.1, 3.2, 3.3 and 3.4 based on the number of passengers carried from Riga in a year. 3rd table of the Regulation No 20 determines the following discounts:

Number of departing passengers (thousands)	Discount (%)
25	10
50	20
75	30
100	40
125	50
150	60
200	70
250	80

Taking into account the facts that the contents of Paragraphs 4, 6 and 7 of the Regulation No 3 and the Regulation No 5 correspond to Subparagraphs 3.1, 3.3 and 3.4 of the Regulation No 20 and that they describe the same services of the Airport and the respective basic charges discounts from which are examined in this decision of the Competition Council, hereinafter these services are referred to as “the Services”. Taking into account the facts that the contents of Paragraph 8 of the Regulation No 3 and the Regulation No 5 correspond to Subparagraph 3.5 of the Regulation No 20 and that they define the same conditions for granting discounts from charges for any of the Services, hereinafter all these discounts are referred to as “the Discounts”.

3. Opinions of process participants and the Aviation Department of the Ministry of Transport

3.1. Complaints of airlines about the Discounts’ system

(4)

In reply to the Competition Council’s requests for additional information necessary to take a decision on initiation of a case as well as during further investigation process, the following additional arguments were received from

the airlines regarding the new Discounts' system that had been in force at the Airport since 1 November 2004:

- Such an approach (the Discounts) causes dissimilar competition conditions and unequal costs for airlines ("Finnair" letter of 15 November 2004, registration No 976); the Airport holds a monopoly position in the territory of Latvia ("Czech Airlines" letter of 13 November 2004, registration No 969), uses its monopoly position ("British Airways" letter of 13 November 2004, registration No 970), destroys fair competition and allows abuse of the Airport's monopoly position ("Deutsche Lufthansa AG" letter of 16 November 2004, registration No 980), regulates fees that are not transparent and not related to costs ("Finnair" letter of 21 June 2005, registration No 616);
- The new Discounts' system is considered economically irrelevant to the Airport's actual costs ("Czech Airlines" letter of 13 November 2004, registration No 969);
- The 80% discount is excessively high, even a 50% discount is rare in any business ("Lufthansa" letter of 6 May 2005, registration No 388); there is a very large difference between 20% and 80% discounts on charges ("Czech Airlines" letter of 4 April 2005, registration No 254);
- The Discounts' system discriminates smaller carriers ("Czech Airlines" letter of 13 November 2004, registration No 969) and stipulates market concentration by creating more favourable conditions for dominating market participants ("KLM Royal Dutch Airlines" letter of 17 November 2004, registration No 981);
- The EU practice, according to which all airlines pay the published rates and thus are protected against an airport's ability to negatively influence competition through its monopoly position, is not followed; there is objection against separately signed bilateral agreements with the Airport ("British Airways" letter of 13 November 2004, registration No 970);
- A State-owned airport offers a system of discounts where the main beneficiary is an airline, in which the State holds 51% of shares (meant - "Air Baltic")⁷; it may be identified as "indirect State subsidies", and it unambiguously influences fair competition ("British Airways" letter of 13 November 2004, registration No 970).

The above-mentioned letters also pointed at the Airport's monopoly position in the territory of Latvia, since it does not allow the airlines to choose services of another airport when flying to Riga ("Czech Airlines", "British Airways" and "Deutsche Lufthansa AG").

3.2. Information and opinion provided by the Airport

⁷ According to the Annex of the 2003 Annual Report of the Joint Stock Company "Air Baltic Corporation" confirmed by the auditing firm "Ernst & Young Baltic" on 29 March 2004, the Republic of Latvia owns 52.6% of "Air Baltic" shares.

(5)

The Competition Council asked the Airport to provide economic justification of the discounts included in Paragraph 8 (letter No 5-1875 of 21 December 2004) and received the following reply (letter of 5 January 2005, registration No 8): “In 2004, the State Joint Stock Company “Riga International Airport” prepared several proposals and their economic justification to attract passengers to the Riga Airport. The Ministry of Transport examined the airport’s proposals as well as other proposals. The Ministry of Transport adopted the discounts’ system defined in Paragraph 8 of the Regulation No 3 as a radical measure to ensure a rapid increase in the number of passengers, thus deciding that the Riga Airport should serve as a tool for economic development of whole Latvia.”

(6)

As regards the request to submit calculations of break-even point (net turnover) of income from the charges described in Paragraphs 4 to 8 of the Regulation No 3 and the corresponding number of departing passengers (letter No 5-1875 of 21 December 2004), the received reply was incomplete. Among other things, it was indicated (letter of 5 January 2005, registration No 8) that it was not possible to carry out detailed calculations regarding future profit or loss at that moment due to the fact that, since the Regulation had been into force only for two months, it was not possible to project the behaviour of airlines – whether they would wish and be able to carry an increased number of passengers and to receive discounts, what proportion of passengers of airlines operating flights to and from the Airport at that moment would be taken over by “Ryanair”, “Easy Jet” and other new low-cost airlines, what actual discount volume would be received by every respective airline.

(7)

In order to examine the Airport’s income, profit or loss after introduction of the Discounts’ system, in its letter No 152 of 27 January 2006, the Competition Council requested to submit calculations and explanation regarding the obtained or expected savings due to increase in the number of passengers served, if the effective Discounts were maintained, and calculations or assessment of unit costs of the Services.

The Airport’s reply to these requests was as follows (letter No 1.0/245 of 10 February 2006): “The Aviation Department of the Ministry of Transport did not introduce discounts on charges for the Airport’s services with the goal to obtain additional savings or profit for the Airport. Their goal is to encourage airlines to transport passengers for a lower price, thus increasing the number of foreign tourists coming to the Republic of Latvia and promoting development of other economic sectors of the Republic of Latvia. The goal is not to ensure profit for the Airport, but to ensure that foreign guests come to Riga and Latvia. It

has been justified. Accommodation, tourism, public catering, retail trade and other companies have increased turnover and pay larger taxes. Increase in the Airport's savings or profit is not expected. At the same time it may be indicated that, in general, there are no significant changes in the Airport's profit or loss after introduction of the discounts and they are not planned as indicated by the calculations of the company's profit or loss from 2004 to 2005 (...)." Information on annual profit is given further: 185 000 LVL in 2004 and 177 000 LVL in 2005 (according to provisional data).

Calculations or assessment of unit costs of the Services requested by the Competition Council were not submitted. Instead, it was explained why it was not possible to define calculations of costs per one departing passenger or per one metric tonne of aircraft's weight and why there was no economic basis for assessment of unit costs of the Services. Additionally, it was emphasised that "validity of economic assessment of discounts on charges for the airports' services can be determined by comparing the company's performance results in 2004 and 2005. It is evident that, in 2005, the financial results did not worsen. It confirms the economic validity of application of discounts and its accuracy. Different methods may be used to assess performance of a company, and they will result in different assessments. However, the only true assessment is the one that is based on the actual data. By introducing discounts, the Airport's total profit has not significantly changed; it corresponds to the one confirmed by the company's owner – the Ministry of Transport."

3.3. Opinion of the Aviation Department of the Ministry of Transport

(8)

In reply to the Competition Council's letter No 5-1638 of 8 November 2004, the Aviation Department of the Ministry of Transport furnished incomplete information in its letter No 14-17/781 of 7 December 2004. As regards the request to provide economic validation of the Discounts, it was replied: "(...) in our opinion, economic validity of the discounts or lack of it is not linked with fair competition opportunities." It is described further in the letter that there were consultations with the Airport's Board of Directors and the political leadership of the transport sector regarding the principles and volume of the Discounts. The draft of the Regulation No 3 was accordingly approved (a copy of the Regulation No 3 with an approving signature of A.Slesers, acting Minister of Transport, was enclosed). The issues of the Discounts, their economic validation and changes in the Airport's strategy were discussed from every point of view in the extraordinary meeting of the Airport's Board with participation of the Minister of Transport on 23 July 2004.⁸ The Board, taking into account the information provided by the Board of Directors, unanimously accepted the

⁸ Economic validation of the Discounts was not found in the enclosed copy of minutes of this meeting.

strategic guidelines on the Airport's development for next 10 years as proposed by the Minister of Transport. The guidelines envisage:

- To reach a annual passenger volume of 5 to 6 million in 10 years;
- To maintain the charges for the Airport's services adopted by the Aviation Department;
- To attract credit resources necessary for the Airport's development by not planning additional State guarantees.

4. Relevant markets

4.1. Relevant product market

(9)

The Competition Council examined the following Airport's services that are provided to airlines:

- a) Aircraft take-off and landing services;
- b) Apron parking services;
- c) Security services.

The above-mentioned Services are not interchangeable or substitutable by other services of the Airport. An airline wishing to provide services of passenger transportation has to use all the above-mentioned Services every time when an aircraft takes off or lands and it cannot access the Airport's infrastructure without use of these Services. Therefore **the relevant product market** is the market for the Services that are provided by the Airport to airlines as regards access to the Airport's infrastructure, namely, aircraft take-off and landing services, apron parking services and security services.

4.2. Relevant geographic market

(10)

In order to define the Airport's relevant geographic market, it should be clarified whether the Airport's Services are interchangeable in the geographic aspect. It depends on substitutability of airports from the point of view of end-users, namely, whether the Airport has significant competitors in providing a service to end-users or whether it has a dominant position.

(11)

According to the Commission's classification,⁹ airports are divided into four categories based on their size:

- Category A – large Community airports with more than 10 million passengers a year;

⁹ Communication from the Commission "Community guidelines on financing of airports and start-up aid to airlines departing from regional airports", OJ C312, 09.12.2005, Paragraph 15.

- Category B – national airports with an annual passenger volume of between 5 to 10 million;
- Category C – large regional airports with an annual passenger volume of between 1 to 5 million;
- Category D – small regional airports with an annual passenger volume of less than 1 million.

In a report on competition between airports,¹⁰ competition opportunities of airports, to a large extent, are linked with the airports' size. There is a rather significant competition between closest airports of a similar kind in the largest international centres. There can also be competition between large regional airports, while small and isolated airports, in general, do not compete with other airports, except for situations when neighbouring airports of a similar size have overlapping areas from which passengers are attracted.

The Airport served 712 thousand passengers in 2003, 1.060 million passengers in 2004 and 1.878 million passengers in 2005. The Riga Airport is a third category or category C airport since 2005. Therefore, taking into account the size, the possibility that there could be competition between the Airport and other neighbouring airports is less likely than in a situation when it could be regarded as a category A or B airport.

(12)

Competition opportunities between airports are directly dependent on whether and to what extent their catchment areas overlap and, consequently, on the extent to which the airports are substitutable. In the above-mentioned report on competition between airports, the catchment area is defined as a territory in which the majority of an airport's actual or potential passengers reside. Basically, it concerns overlapping catchment areas of two or more airports with regard to competing air carriers.

The catchment area is larger for long distance and transfer flights when compared to short or medium distance flights. It is concluded in Paragraph 5 of the Commission's decision in the case of the Brussels National Airport (Zaventem) (95/364/EC)¹¹ that, as regards short and medium distance flights (i.e. of less than two hours) within the European Community, there is no realistic alternative to the Brussels Airport because the closest international airport is more than 100 kilometres from Zaventem.

¹⁰ Study on Competition between Airports and the Application of State Aid Rules. Final Report. Volume 1, September 2002, European Commission, Directorate-General Energy and Transport, Directorate F - Air Transport. Air Transport Group, School of Engineering, Cranfield University, Cranfield, Beds MK43 0AL, United Kingdom. With: Alan Stratford and Associates (SKM Europe), INECO, Gruppo CLAS, Denton Wilde Sapte.

¹¹ Commission Decision of 28 June 1995 relating to a proceeding pursuant to Article 90 (3) of the Treaty, 95/364/EC - OJ L216 12/09/1995 p. 8-14.

The catchment area is increased by faster and more convenient facilities to reach the respective airport. As regards the Riga Airport, the closest airport is in Kaunas, but it is more than twice as far as the distance mentioned in the case of the Brussels Airport. Besides, duration of a trip by car from Riga to Kaunas is longer than duration of flights from Riga to cities of the European Union (hereinafter – the EU) on almost any of the Airport’s scheduled routes. Even to a larger extent it pertains to the airports of Vilnius and Tallinn.

(13)

When examining from the point of view of demand (passengers) whether a flight from Riga to a specific destination is replaceable by a flight from another airport to the same destination, the Competition Council concludes that:

- 1) According to the Airport’s information for the management report of 2004, the State Joint Stock Company “Riga International Airport” is the only company among the airports and aerodromes of Latvia that ensures regular air traffic to other countries of the world;
- 2) Distances to the closest neighbouring international airports are the following – 263 kilometres to Kaunas, 277 kilometres to Palanga, 296 kilometres to Vilnius and 330 kilometres to Tallinn;
- 3) Majority of flights are to the EU cities. Scheduled passenger flights to the EU comprised 82.7% of the total passenger volume at the Airport in 2005. Mainly these are short or medium distance flights or slightly longer, while long distance flights, which usually include intercontinental flights, comprise an inessential part of the total number of flights from or to Riga.

(14)

The Airport is convenient for passengers from Riga and its surroundings and they comprise a significant part of the potential passengers. In such a situation, these passengers cannot see the airports of Kaunas, Vilnius, Palanga and Tallinn as alternatives. Competition between the Baltic airports is possible only as regards the potential passengers residing in places from which the distance to Riga and Kaunas, Riga and Vilnius or Riga and Tallinn is about the same and where the catchment areas of these airports overlap. However, it is considered that persons residing in such territories comprise an insignificant part of the potential passengers.

Accordingly, it is concluded that the Airport is a separate **relevant geographic market**.

4.3. The relevant market and relevant affected markets

(15)

Thus, **the relevant market** is the market in aircraft take-off and landing services, apron parking services and security services at the Airport.

(16)

However, the Airport's Services that are provided to airlines are intermediate services. Final services are provided by airlines transporting passengers on specific routes. According to the Commission's decision,¹² every combination of scheduled passenger flights is regarded as a separate market from the point of view of customers (passengers). It means that, for example, the route from Riga to London cannot be substituted by the route from Riga to Brussels, etc., because the demand is determined by a passenger's need to arrive in a particular point of destination. Competition conditions can be influenced in this market in final services, including by applying Discounts on charges for the Airport's Services.

As it is stated in Paragraph 15 of the Commission's decision 1999/199/EC,¹³ the markets for passenger and freight air transport constitute a neighbouring but distinct market which is affected by the impact of an abuse of a dominant position in the relevant market by providers of the respective services (airports).

Scheduled passenger transportation that is offered on every particular route operated by airlines from Riga to the EU cities and from these cities to Riga forms a separate **relevant affected market**, in which the Airport, using its dominant position and applying different Discounts, causes comparatively less favourable competition conditions and profit opportunities for a part of airlines.

5. The dominant position of the Airport and effect of the Discounts on trade between Member States

(17)

According to the definition used in the EC case-law, a dominant position is "a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."¹⁴

Taking into account the relevant market defined in this case as well as the facts that there are high entrance barriers in this relevant market and that airlines operating flights from and to Riga on the EU routes have no other alternatives to

¹² Commission Decision of 5 July 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/37.730 - AuA/LH), 2002/746/EC - OJ L 242 , 10/09/2002 p. 25 - 43, Paragraph 46.

¹³ Commission Decision of 10 February 1999 relating to a proceeding pursuant to Article 90 of the Treaty (Case No IV/35.703 – Portuguese airports), 1999/199/EC - OJ L69, 16/03/1999 p. 31-39.

¹⁴ Judgment of the Court of 14 February 1978, United Brands Company and United Brands Continental BV v Commission of the European Communities. Chiquita Bananas. Case 27/76. - European Court reports (ECR) 1978 I-00207.

the Airport's Services, it is established that the Airport has a dominant position in this market.

The case was examined in accordance with Article 82 of the EC Treaty prohibiting abuse of a dominant position for the reason that the Airport's behaviour can affect trade between Member States. Article 82 prescribes: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in (...) (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (...)."

(18)

As it is established in the ECJ judgement in the Corsica Ferries II case (C-18/93),¹⁵ discriminatory practices, which affect undertakings providing transport services between two Member States, may affect trade between Member States.

When examining the facts found in the case according to the Commission's "Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty,"¹⁶ it was clarified that ten of thirteen airlines, which operated scheduled passenger flights to or from the Airport at the end of 2005, were foreign companies registered in a Member State of the EU and that scheduled passenger flights on the EU internal routes comprised 82.7% of passenger volume in 2005. In accordance with the above-mentioned Commission's Guidelines (in particular, Paragraph 74) and the approach followed in the Commission's decision 1999/199/EC in a similar case of Portuguese airports (Paragraph 20), the Competition Council considers that, as a result of the Discounts applied by the Airport, trade between Member States is affected.

6. Assessment of the Discounts applied by the Airport

(19)

The Competition Council establishes that the potential infringement of Article 82(c) of the EC Treaty in the Airport's conduct has occurred by fulfilling the legally binding requirements of Paragraph 8 of the Regulation No 3 (from 1 November 2004 to 31 December 2004), Paragraph 8 of the Regulation No 5 (from 1 January 2005 to 17 January 2006) and Subparagraph 3.5 of the Regulation No 20 (since 18 January 2006).

¹⁵ Judgment of the Court of 17 May 1994. Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova. Case C-18/93 - ECR 1994 I-1783. Paragraph 4 of Summary.

¹⁶ Commission Notice. Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07).

The ECJ has stated that commercial conduct accepted in the case of undertakings that are not in a dominant position may be regarded as abusive if it is attributable to undertakings in a dominant position¹⁷. This statement must be taken into account as regards the Discounts system introduced in the Airport in accordance with Subparagraph 3.5 of the Regulation No 20, according to which Discounts on charges for the Airport's services depend on the annual number of passengers transported by an airline from Riga.

(20)

The Competition Council has obtained information about the number of departing passengers from the Airport and the actual discount on charges for the Airport's services granted to airlines from 1 November 2004 to 31 October 2005 (see table 1).

Table 1

Number of passengers transported by airlines from Riga (1 November 2004 – 31 October 2005) and amount of discount granted by the Airport

Airline	Departing passengers, in total	Amount of discount granted, %
Air Baltic Corporation	374 767	80
Ryanair	190 951	60
L charter	46 587	10
CSA	43 857	10
KLM	41 709	10
British Airways	39 137	10
Easy Jet Airlines	38 162	10
Lufthansa	35 167	10
Finnair/Aero	24 190	0
LOT Polish Airlines	12 029	0
Austrian Airlines	12 014	0
Aeroflot	13 370	0
Uzbekistan Airways	5221	0
ISRAIR	2596	0
Lithuanian Airlines	1469	0
Other	5924	0
In total	887 150	

As it is seen in the table 1, the maximum 80% discount has been granted only to one airline (“Air Baltic”), a 60% discount has also been granted to one airline

¹⁷ Judgment of the Court of First Instance (Second Chamber) of 1 April 1993. BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities. Competition - Abuse of a dominant position - Exclusive purchase contract - Loyalty payments - Effect on trade between Member States - Attributability of the infringement. Case T-65/89 - ECR 1993 II-389. 1999/199/EC, Paragraph 27.

(“Ryanair”), a 10% discount has been granted to 6 airlines and no discount has been granted to all other airlines.

“Air Baltic” can receive the maximum discount primarily due to the fact that the Airport is its home base and, as a flag carrier, “Air Baltic” has obtained the largest number of routes from the Airport (26 routes in July 2005) unlike other airlines for which Riga is one of many destinations in their route network. The rapid increase in the number of passengers transported by “Ryanair” that was based on low-cost tickets could be observed also as a result of the Airport’s discount policy favourable to this company.

The situation in the Airport is similar to that examined in the case of Portuguese airports.¹⁸ In that case, the Commission recognised that two national carriers receiving average discounts of 30% and 22% were in a particularly favourable situation, but discounts granted to all other carriers varied between 8% and 1%. In this respect it was established that the above-mentioned highest discounts obtained by two carriers on charges for equivalent landing and take-off services placed the other carriers at a competitive disadvantage. The ECJ also recognised that, in the absence of any specific objective justification, such maximum discounts were excessive in comparison with the lower discounts¹⁹.

In the case of the Airport, similarly as in the case of Portuguese airports, the highest discounts are obtained only by two airlines, additionally, the difference between the highest and lowest discounts applied by the Airport is even more substantial. Consequently, with regard to competition, unjustified differences between airlines are also more significant in this case.

(21)

The Discounts applied by the Airport were not justified by volume of transactions or volume effect. It can be concluded from the above-mentioned description of the Discounts applied by the Airport that:

- 1) In the relevant market, the Airport does not have the volume effect, which would be given by the largest costumers in comparison with the smaller ones, and it is not planned;
- 2) The goal of introducing the Discounts is to ensure that foreign guests come to Riga and Latvia.

As it is stated in the Commission’s decision in the case of the Brussels Airport,²⁰ such a system (i.e. the discounts system applied in the Brussels Airport) could be justified solely by economies of scale achieved by the airways authority. This did not apply in the case of the Brussels Airport because the airways authority

¹⁸ 1999/199/EC, Paragraphs 25 and 26.

¹⁹ Judgment of the Court (Sixth Chamber) of 29 March 2001. Portuguese Republic v Commission, Case 163/99. - ECR 2001 I-02613, Paragraph 54.

²⁰ 95/364/EC, Paragraph 16.

had not demonstrated to the Commission that handling of an aircraft belonging to one airline rather than to another would give rise to economies of scale. The handling of the landing or take-off of an aircraft requires the same service, irrespective of its owner or the number of aircraft belonging to a given airline.

In the case of the Airport, the discounts are calculated on the basis of the total number of passengers departing from the Airport that is ensured by every airline in a year. The Airport has not demonstrated to the Competition Council that handling of an aircraft belonging to one airline rather than to another would give rise to its economies of scale. In this case, there are no grounds to consider that the Airport would have economies of scale if, for example, instead of ten airlines, one airline ensured 100 000 passengers (or 1 000 aircraft).

The fact that discounts were not justified by the volume effect in the case of the Brussels Airport (similarly as in the case of the Riga Airport) was one of the arguments against discounts in the ECJ judgement in the case of Portuguese airports.²¹

(22)

The Commission's decisions in several cases have established practice for determining charges for services provided by airports and clearly declared the principles, application of which in determining charges is incompatible with the EU competition rules. The above-mentioned case and the Commission's decision on the discounts policy of Portuguese airports (1999/199/EC) deals with the charges for services provided by the administration of Portuguese airports as regards access to airports' infrastructure and facilities. The Commission established infringement of Articles 90 and 86 of the EC Treaty (now Articles 86 and 82) and ordered to abolish two components of the discounts' system applied by the administration of Portuguese airports:

- 1) 50% discount on charges for landing for domestic flights as opposed to international flights;
- 2) 7% to 40% discount on charges for take-off and landing depending on the number of landings each month.

The Competition Council concludes that these discounts, in essence, are similar to the Discounts applied by the Airport depending on the number of departing passengers.

The ECJ accepted the Commission's position in the above-mentioned case and declared that "where, as a result of the thresholds of the various discount bands and the levels of discount offered, discounts (or additional discounts) are enjoyed by only some trading parties, giving them an economic advantage

²¹ Judgment of the Court (Sixth Chamber) of 29 March 2001. Portuguese Republic v Commission, Case 163/99. - ECR 2001 I-02613, Paragraph 52.

which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors a system of quantity discounts leads to the application of dissimilar conditions to equivalent transactions.²²

The Commission has taken similar decisions in such cases as the above-mentioned case of the Brussels Airport (95/364/EC), the case of Spanish airports (2000/521/EC) and the case of Finnish airports (1999/198/EC).²³ The airports, regulations of which were examined in the Commission's decisions, have amended their rules about charges for their services.

Taking into account the above-mentioned, at present, the Commission's practice as regards application of competition law in the issues related to airports is clearly defined. For that reason the EU airports must develop their pricing policies in accordance with the decisions previously adopted by the Commission and the ECJ case-law.

In accordance with the EU law, the situation in the Airport, where only some airlines gain the main advantages from application of the Discounts' system and which is not justified by the volume effect, is classified as application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

(23)

As regards the goal of introducing the Discounts, in reply to the Competition Council's letter No 1038 of 5 May 2006 inviting to examine the evidence compiled in the case (letter No 1.1/761 of 11 May 2006), the Airport explained its position as follows: "(...) we would like to emphasise once more that the goal of the introduced discounts was to facilitate decrease in prices for air transportation, a broader array of routes and entry of low-cost airlines in the Latvian market, thus making the air transport more accessible to a wider public." Such a goal of introducing the Discounts is similar to the one used by the administration of Portuguese airports when trying to justify the discounts applied in Portuguese airports.²⁴ As the Commission indicated in its decision, such a justification cannot be accepted, since this goal could be achieved by non-discriminatory discounts.²⁵

²² Judgment of the Court (Sixth Chamber) of 29 March 2001. C-163/99, Paragraph 52.

²³ Commission Decision of 26 July 2000 relating to a proceeding pursuant to Article 86(3) of the EC Treaty (2000/521/EC) - OJ L208 18/08/2000 p.36-46; Commission Decision of 10 February 1999 relating to a proceeding pursuant to Article 86 of the Treaty (IV/35.767 - Ilmailulaitos/Luftfartsverket) (1999/198/EC) - OJ L 069 16/03/1999 p.24-30.

²⁴ "The promotion of Portugal as a tourist destination" - 1999/199/EC, Paragraph 28.

²⁵ Ibid, Paragraph 31.

In its letter No 1.1/761 of 11 May 2006, the Airport refers to the above-mentioned Commission's guidelines on financing of airports and start-up aid²⁶ indicating that these guidelines "(...) allow public aid to be paid temporarily to airlines under certain conditions, if this provides them with the necessary incentive to create new routes or new schedules. When analysing statistical data, it is evident that the numbers of new routes and flights have increased since introduction of the discounts."

As regards the Commission's guidelines referred to in the Airport's letter and the indication that they allow temporary public aid under certain conditions, the Competition Council clarifies that the Commission has listed the conditions under which regional aid can be considered compatible with the common market in accordance with Article 87(3)(a) and (c) of the EC Treaty. In line with these provisions, operating aid granted to airports or airlines (such as start-up aid) can only be declared compatible under exceptional circumstances and under strict conditions in underprivileged regions covered by the derogation set out in Article 87(3)(a) of the EC Treaty, the most remote regions and sparsely populated areas.²⁷

However, also in these cases the Commission obliges to ensure strict compliance with the principles of transparency, non-discrimination and proportionality so as to prevent any distortion of competition, which would not be in the common interest in terms of public funding to regional airports and State aid to airlines. Consequently, these guidelines also emphasise the necessity to observe the competition rules when granting State aid. In accordance with Article 88(3) of the EC Treaty, any State aid must be notified to the Commission.

As regards increase in the numbers of new routes and flights characterised by the Airport's data submitted to the Competition Council (letter No 1.0/245 of 10 February 2006), it is concluded that, except for "Air Baltic" and "Ryanair", only two other airlines opened new routes from December 2004 to January 2006. In March 2005, "Czech Airlines" started flights to Rome, but already in September 2005 stopped these flights. In November 2005, "Aer Lingus" opened a new route to Dublin. In January 2006, "Ryanair" also started to operate flights to Dublin.

These facts do not confirm that the Airport has provided airlines with a sufficiently effective incentive to open new routes. Most important, it as well as the goal of introducing the Discounts (to ensure that foreign guests come to Riga and Latvia) cannot serve as a justification for application of dissimilar

²⁶ Communication from the Commission "Community guidelines on financing of airports and start-up aid to airlines departing from regional airports", OJ C312, 09.12.2005, p. 1-14.

²⁷ Ibid, Paragraph 27.

conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

(24)

After assessing the economic validity of the Discounts, the Competition Council establishes that all airlines receive equivalent Services in equivalent amount and quality from the Airport, however, as a result of application of the Discounts, the charges for these Services differ (up to 5 times in case of the 80% discount). Consequently, these discounts cause dissimilar conditions to equivalent transactions with other airlines.

The basic rate for only one of the Services (security services) is determined depending on the number of departing passengers. Other services (aircraft take-off and landing services and apron parking services) are charged per every 1000 kilograms of an aircraft's maximum permissible take-off weight. Nonetheless, the Discounts on all Services are determined only on the basis of the number of departing passengers.

(25)

The maximum amount of the Discounts (80%) means that charges for equivalent Services may be up to five times lower.

The excessively high thresholds of the Discounts impose unfair charges on majority of air carriers. The Competition Council calculated charges paid by airlines to the Airport for security services from 1 November 2004 to 31 October 2005. These calculations demonstrate that, during this period, the airlines receiving the maximum Discounts of 60 to 80% ("Air Baltic" and "Ryanair") transported 565 700 departing passengers in total and paid 1 843 000 EUR to the Airport for security services, while all other airlines receiving no or only minimum Discounts of 10% transported 321 400 passengers and paid 3 617 000 EUR. It must be noted that a higher number of transported passengers requires more costs to ensure the Airport's Services.

Accordingly, there are grounds to conclude that airlines receiving the maximum Discounts pay less than the actual cost of the Services, while the remaining unpaid proportion of costs is covered by other airlines.

(26)

After comparing the Discounts applied by the Airport with the ones examined in the above-mentioned Commission's decisions,²⁸ it is established that the discounts examined and abolished in these decisions, which were set at 30% to 40% from the charges for services, were identified as excessively high as

²⁸ 95/364/EC; 1999/199/EC; 2000/521/EC.

regards their amount. In the case of Portuguese airports, the ECJ judgement²⁹ confirmed the Commission's decision that the maximum discounts (32.7% in the Lisbon Airport and 40.6% in other airports) were excessive in comparison with the lower discounts.

Accordingly, it is concluded that the Discounts applied by the Airport, due to which charges differ up to five times, are not discounts in their essence, but discriminatory charges for equivalent Services. Only some airlines benefit from these discounts, which cause dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Moreover, sound arguments justifying the Discounts have not been submitted. Such differences lead to doubts about economic validation of charges for the Services in general.

(27)

To clarify the minimum charge for the Services that would cover the costs, the Competition Council (letter No 152 of 27 January 2006) requested the Airport to submit calculations or assessment of costs of the Services. Instead of calculations or assessment, the Airport indicated in its reply (letter No 1.0/245 of 10 February 2006) that there was no economic basis for such calculations.

Regulatory provisions on the Discounts prescribe that "any carrier" can receive the maximum discount (80%). The Competition Council establishes that the maximum discounts are not commensurate with the actual financial resources and capacity of the Airport and, consequently, are not regarded as economically justified. After assessing approximate costs of the Services, the Competition Council establishes that, when providing services with the 80% discount, charges are considerably lower than the actual costs.

The Airport's return on net turnover was 3.6% in 2003 (but, if interest and similar income is not included, its commercial activity was unprofitable), 1.8% in 2004 and 1.3% in 2005 (according to provisional data). Income from the Services comprised 45.6% of the total income from the Airport's commercial activity in the first six months of 2005. Taking into account low return and significant proportion of income from the Services in the total income from commercial activity, the assumption that the 80% discount covers costs could be valid only if charges for the Services were several times higher than costs before introduction of the Discounts, but such a situation would be contrary to the actual data.

When assessing systems of discounts applied by airports in the above-mentioned cases, the Commission referred to recommendations of the International Civil Aviation Organisation (the ICAO) on defining charges for services according to costs. The ICAO recommends its members (Airport Economics Manual; 9652.

²⁹ Judgment of the Court (Sixth Chamber) of 29 March 2001. C-163/99, Paragraph 54.

1991 ICAO) to ensure that charges for use of approaches, taxiways and landing areas, including lights and access to aerodrome and air navigation services, cover all relevant costs of operation, maintenance and administration. Similarly the ICAO recommends airports and providers of air navigation services to develop and maintain costing systems that permit users and providers to understand the true costs of providing services.³⁰

Thus the ICAO does not deny the possibility of assessing costs of services provided by airports (as the Airport does in respect of its Services), but, quite the opposite, even encourages doing that.

(28)

The Airport's behaviour has a negative effect on competition between airlines operating flights and mutually competing on particular routes as well as on potential competition between airlines, particularly in the current market situation characterised by fierce competition between airlines regarding prices. In the above-mentioned decision in the case of the Brussels Airport,³¹ the Commission established that airports' charges comprised approximately 4 to 6% of an airline's operating costs and recognised that these charges formed a significant proportion of operating costs. Airlines receiving no or significantly lower discounts face dissimilar competition conditions in comparison with airlines receiving the maximum discounts. In a longer term, application of such discounts can significantly affect performance of air carriers that operate competing flight routes. Airlines are regarded as competitors not only on a route where two or more airlines operate side-by-side, but also as potential competitors on other routes since there are no legal obstacles to creating new routes. Application of a several times higher charge for the Airport's services to a group of airlines hinders competitiveness and capacity of airlines to develop, open new and unprecedented routes and effectively compete with the airlines receiving a several times higher amount of discounts. It has a negative effect on the entry of new participants in the relevant affected markets.

(29)

The Airport applies the Discounts on the basis of the total number of departing passengers transported on all routes from Riga by each airline. Under such rules, "Air Baltic" is an exclusive beneficiary, which, as a flag carrier, operates the largest number of routes from the Riga Airport already for many years and, accordingly, had the largest number of transported passengers already from the beginning of introduction of the Discounts. However, when assessing separate routes, on which there is competition between airlines and competitors of "Air

³⁰ ICAO's Policies on Charges for Airports and Air Navigation Services. Seventh Edition - 2004. ICAO, Paragraph 16.

³¹ 95/364/EC, Paragraph 19.

Baltic” receive lower discounts, it is established that “Air Baltic” does not ensure the largest number of passengers on these routes (see table 2).

Table 2

Actual performance results of “British Airways” and “Air Baltic” on route Riga – London from 1 November 2004 to 31 October 2005

Number of departing passengers	Number of flights	MTOW, metric tonnes	Operating costs, EUR	Cost of Airport’s Services, EUR	Discount	Charge for Airport’s Services	Proportion of charge for Airport’s Services in operating costs, %*
1	2	3	4	5	6	7	8
“British Airways”							
39 079	688	55 218	**	**	**	**	6.56
“Air Baltic”							
33 372	662	37 734	**	**	**	**	1.59

* Column 7 / Column 4 (in %)

** Restricted access information

Information included in the table 2 shows that, on the route Riga – London, “British Airways” transported more passengers (by 17%) and maximum take-off weight (MTOW) (by 46%) than “Air Baltic” and its charge for the Airport’s services was 6.3 times higher, but proportion of this charge in the airline’s operating costs was 4.1 times higher when compared to “Air Baltic”. Moreover, regardless of the fact that “British Airways” transported more passengers, it received eight times lower discount than “Air Baltic”.

A situation in which an airline transporting a smaller number of passengers on a particular route can receive a larger discount indicates that competition conditions are disadvantageous to the majority of airlines either in fact (as to “British Airways” in this example regarding the route Riga – London) or potentially by making it difficult for airlines with a comparatively smaller total number of passengers departing from the Riga Airport to open flight routes already operated by an airline receiving higher discounts.

7. Conclusions

(30)

Taking into account the established facts, the Competition Council concludes that:

- Principally, only two airlines benefit from the Discounts applied by the Airport on charges for its Services, but all other airlines either receive several times lower Discounts or do not receive them at all;

- The Discounts are unfair (charges for Services that are equivalent in their content, amount and quality are different (up to five times); consequently, they are not Discounts, but different charges, which cause dissimilar competition conditions by making some airlines to cover costs created by others; moreover, the Airport has not justified the Discounts with volume effect);
- As a result of the Discounts applied by the Airport, competition between airlines operating flights and mutually competing on particular routes is negatively affected, similarly also potential competition between airlines;
- The Airport's behaviour constitutes a breach of Article 82 of the EC Treaty prohibiting abuse of a dominant position by fulfilling the requirements of Paragraph 8 of the Regulation No 3 (from 1 November 2004 to 31 December 2004), Paragraph 8 of the Regulation No 5 (from 1 January 2005 to 17 January 2006) and Subparagraph 3.5 of the Regulation No 20 (since 18 January 2006), which are in conflict with Article 82(c) of the EC Treaty in conjunction with Article 10 of the EC Treaty and which actually cause this infringement.

8. Obligations of a national competition authority in application of Article 82 of the EC Treaty

(31)

According to Articles 5 and 35 of the Council Regulation (EC) No 1/2003 of 16 December 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* and Section 7(1), Subparagraphs 5 and 6 of the Competition Law, the Competition Council is entitled to apply the EU competition law, i.e. Articles 81 and 82 of the EC Treaty.

The ECJ has recognised that Article 81 of the EC Treaty together with Article 10 oblige Member States to refrain from measures which could be in conflict with the Community competition rules. The Court has indicated that the duty to disapply national legal measures that are in conflict with the Community law applies not only to national courts, but also to all organs of the State, including administrative authorities.³² It follows that, under certain circumstances, the national competition authority is obliged to take all appropriate measures to enable Community law to be fully applied.³³ The above-mentioned ECJ judgement is equally relevant also as regards application of the requirements of Article 82 of the EC Treaty in conjunction with Article 10 of the EC Treaty.

According to the ECJ judgement,³⁴ when infringement of Articles 81 and 82 of the EC Treaty has taken place due to an undertaking' conduct required by

³² Case C-198/01 *Conorzio Industrie Fiammiferi (CIF)*, Autorita Garante della Concorrenza e del Mercato, 2003 ECR I-08055, Paragraphs 49 and 51.

³³ *Ibid.*

³⁴ *Ibid.*, Paragraphs 53-55.

national law that has actually caused this infringement, the undertaking concerned can be exposed to penalties in respect of the infringement established in a decision of the national competition authority or the Commission only after the respective decision to disapply national law that is in conflict with the EC competition rules becomes binding.³⁵ Similarly in this case of application of the Discounts by the Airport, the Airport's liability for implementation of the Competition Council's decision will become effective after this decision enters into force.

If national legislation does not preclude undertakings from engaging in activities that are incompatible with competition law, the duty of the national competition authorities is to disapply such national legislation. As the principle of legal certainty applies to any undertaking, administrative or criminal penalties cannot be imposed in respect of the past activities performed before the competition authority's decision enters into force.

For that reason the Airport will be liable to be penalised for the infringement of Article 82 of the EC Treaty by applying unfair discounts in accordance with the legal measures of Latvia if it continues to apply the national legislation that is recognised as being incompatible with the EC Treaty after this decision of the Competition Council enters into force.

(32)

Taking into account that the Airport's behaviour constitutes a breach of Article 82 of the EC Treaty by fulfilling the requirements of Paragraph 8 of the Regulation No 3 (from 1 November 2004 to 31 December 2004), Paragraph 8 of the Regulation No 5 (from 1 January 2005 to 17 January 2006) and Subparagraph 3.5 of the Regulation No 20 (since 18 January 2006), which are in conflict with Article 82(c) of the EC Treaty in conjunction with Article 10 of the EC Treaty and which actually cause this infringement, no fine will be imposed on the Airport for the found infringement, if the Airport fulfils its legal obligation in the specified time as defined below in point 2.

On the basis of the above-mentioned and Articles 10 and 82(c) of the EC Treaty, Article 3 of the Council Regulation (EC) No 1/2003 of 16 December 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* and Section 28 of the Competition Law, the Competition Council

DECIDED:

- 1) To recognise that the Discounts' system applied by the Airport, as specified in the Regulation No 20 at present, constitutes a breach of

³⁵ Ibid, Paragraph 51.

Article 82(c) of the EC Treaty prohibiting abuse of a dominant position, and for that reason the respective requirements of the Regulation No 20 are not applicable to the State Joint Stock Company “Riga International Airport”.

- 2) To impose a legal obligation on the Airport to cease applying the Discounts no later than 90 days after the decision of the Competition Council enters into force.
- 3) The Airport shall submit evidence about fulfilment of the legal obligation defined above in point 2 of the decision to the Competition Council within 30 days after the time specified in point 2 of the decision.

In accordance with Section 8(2) of the Competition Law, the decision of the Competition Council may be appealed to a district administrative court within one month from the day when the decision enters into force.

I. Jaunzeme
Chairperson of the Competition Council