

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 December 2003

on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on air transport and Council Regulation (EEC) No 2408/92

(Case TREN/AMA/11/03 — German measures relating to the approaches to Zurich airport)

(notified under document number C(2003) 4472)

(Only the German text is authentic)

(2004/12/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Agreement between the European Community and the Swiss Confederation on air transport ⁽¹⁾ of 21 June 1999, and in particular Articles 15 and 18(2) thereof,

Having regard to Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes ⁽²⁾, and in particular Article 8(3) thereof,

After consulting the Advisory Committee established by Regulation (EEC) No 2408/92,

Whereas:

BACKGROUND

I

(1) Zurich airport is situated at Kloten, north-east of the city of Zurich and about 15 km south-east of the border between Switzerland and Germany. Zurich airport has three runways: one west-east (10/28), one north-south (16/34) crossing the west-east runway, and one north-west-south-east (14/32) which is independent of the two others. These runways have traditionally been used according to the following scheme: most take-offs during the day take place from the west-east runway towards the west, while in the early morning and late evening most take-offs use the north-south runway in the north direction. Incoming flight overwhelmingly use the north-west-south-east runway coming from the north-east.

Given the proximity to the German border, all flights landing in Zurich from the north or north-west must use German airspace while landing.

(2) The use of German airspace for approaching and leaving Zurich airport had been governed by a bilateral agreement between Switzerland and Germany of 17 September 1984 which was terminated by Germany on 22 March 2000 with effect from 31 May 2001, following implementation problems. Germany and Switzerland subsequently signed a new agreement on 18 October 2001, which has however not been ratified. In Switzerland, the *Nationalrat* voted against ratification on 19 June 2002 while the *Ständerat* sent it back to the transport commission on 12 December 2002. In Germany, the *Bundestag* approved the agreement on 17 May 2002, but the *Bundesrat* opposed it on 12 July 2002. It has not been taken up since.

(3) On 15 January 2003, the German Federal Aviation Authority published the 213th regulation for the implementation of German air traffic regulations establishing procedures for instrument-guided landings and take-offs at Zurich airport. This regulation sets out a number of limitations for the approach to Zurich airport as of 18 January 2003. In particular:

— it imposes minimum waiting levels of 6 000 feet above the waiting areas SAFFA and EKRI, and 13 000 feet above the waiting area RILAX,

⁽¹⁾ OJ L 114, 30.4.2002, p. 73.

⁽²⁾ OJ L 240, 24.8.1992, p. 8.

- it sets out nine landing procedures above German territory. The six ILS landing procedures may not be used between 22.00 and 6.00 on workdays, and between 20.00 and 9.00 on weekends and public holidays. When using the three VOR/DME landing procedures during these hours, planes must not descend below 10 000 feet above German territory. Exemptions from these rules are granted if external conditions enable only landing approaches from the north,
 - it imposes the use of five routes Z 1, 2, 3, 4, and 5 for planes taking off from Zurich airport when entering German territory, except for take-offs from runways 32 and 34 which technically cannot reach these coordinates.
- (4) On 4 April 2003 the German Federal Aviation Authority published the first regulation amending the 213th regulation. The amendment had the following effects as of 17 April 2003:
- it increases the minimum waiting levels (see recital 3, first indent) above SAFFRA and EKTRIT to 12 000 feet between 21.00 and 7.00 on weekdays, and between 20.00 and 9.00 on weekends and public holidays. It increases the minimum waiting level above RILAX to 18 000 feet at the corresponding times,
 - it extends the limitations for the six ILS and the three VOR/DME landing procedures (see recital 3, second indent) from the time period 22.00 to 6.00 to the time period 21.00 to 7.00 on weekdays and increases the minimum height for the three VOR/DME procedures during these hours to 12 000 feet,
 - it bans the special take-off procedures from runways 32 and 34 (see recital 3, third indent) between 21.00 and 7.00 on weekdays and between 20.00 and 9.00 on weekends and public holidays and imposes a minimum flight height of 10 000 feet when entering German territory.
- (5) The amending regulation also specifies the weather conditions when external conditions are deemed only to enable approaches from the north, thus allowing exemptions from the rules under recital 4, second indent. However, this provision was scheduled to come into force only on 10 July 2003.
- (6) The effect of the German measures is to prevent, under normal weather conditions, the overflight in low altitude over the German territory close to the Swiss border between 21.00 and 7.00 on weekdays and between 20.00 and 9.00 on weekends and public holidays, thus reducing the noise to which the local population is exposed. As a result, the two landing approaches from the north previously used as the main approaches by flights landing at Zurich airport, and take-offs to the north previously used for take-offs late at night and early in the morning, are no longer possible during these hours. The level of noise over German territory had been the main subject of the various negotiations and agreements of the last 20 years specified under recital 2.
- (7) On 10 June 2003, the Swiss Confederation submitted to the Commission a request for it to take a decision with the effect that:
- Germany may not continue to apply the 213th regulation for the implementation of German air traffic regulations establishing procedures for instrument-guided landings and take-offs at Zurich airport as amended by the first amending regulation of 4 April 2003,
 - Germany must suspend the application of the 213th regulation for the implementation of German air traffic regulations establishing procedures for instrument-guided landings and take-offs at Zurich airport until the Commission decision requested above.
- (8) On 26 June 2003, the German and Swiss authorities changed the factual situation on which the complaint was based by reaching an agreement on the following points:
- Switzerland ensures that the following instrument landing approaches can be operated on runway 34:
 - procedure VOR/DME by 30 October 2003,
 - procedure LZ/DME by 30 April 2004,
 - procedure ILS CAT1 by 31 October 2004.
- (9) Germany agreed to suspend implementation of the provisions of the first regulation amending the 213th regulation which were to come into force on 10 July (see recital 5) until 30 October 2003. Further modifications of the agreement are possible when it reviews weather conditions for allowing landing on runways 14 and 16 eight weeks before the dates under recital 8. It will also abolish the waiting procedures EKTRIT and SAFFA; Switzerland will create corresponding waiting procedures by February 2005.
- (10) On 20 June 2003, the Commission requested the German authorities to comment upon the Swiss request. By letter of the same day, the Commission also requested the Swiss authorities to provide additional information. In response, Germany notified the Commission by letter of 30 June 2003 of the agreement they had reached with the Swiss authorities, dated 26 June 2003, with the effect of postponing some of the measures provided for in the 213th regulation. It therefore considered the Swiss complaint void and expected the procedure of the European Commission to be terminated. On 27 June 2003 the Swiss authorities equally notified the Commission of the above agreement. However, they maintained that the complaint was in no way affected by the agreement.

(11) By letter of 4 July, Switzerland announced that it was collecting the additional information requested by the Commission as well as evaluating the impact of the agreement of 26 June 2003 on its request for interim measures. On 14 July 2003 the Commission asked the Swiss authorities to pinpoint possible alterations to the complaint due to the fact that the measures with which Switzerland had justified the request for interim measures had been postponed until 30 October. On 24 July 2003, the Swiss authorities provided additional information in response to the Commission request of 20 June. They also pointed out that they wished to maintain the request for interim measures. The Commission requested further complementary information by letter of 12 August 2003, which was made available by Switzerland by letter of 17 September, registered on 24 September.

(12) On 16 July 2003 the Commission wrote to the German authorities, informing them that Switzerland wished to maintain the complaint, and renewing the request for comments upon the Swiss allegations. By letter of 28 August the German authorities submitted its comments on the Swiss allegations. On 6 October they submitted comments reacting to the Swiss letter of 17 September and notified the second amending regulation to the 213th implementation regulation.

(13) A statement of objections was sent to the Swiss and German authorities for comments on 14 October 2003. Germany submitted its comments on the overall analysis on 20 October and maintained a reservation as to the applicability of Regulation (EEC) No 2408/92. Switzerland responded on 21 October with comments to the statement of objections as well as comments to the German observations of 28 August.

II

(14) In support of their complaint to the Commission against the German rules, the Swiss authorities rely on the following arguments:

A. The 213th implementing regulation infringes Regulation (EEC) No 2408/92

(a) *The German rule reduces operating capacity at Zurich airport, affecting traffic rights*

According to the Swiss authorities, the maximum capacity at Zurich airport using landing approaches from the north is 68 movements per hour (36 planned landings, and/or 44 take-offs). Due to the German operational rules, Zurich airport is forced to make aircraft approach from the east on runway 28 during no-go hours. Because there is no precision instrument approach procedure available for this runway, the VOR/DME procedure is used for incoming aircraft. In addition, the runway has no fast exits. Theoretically, the maximum landing capacity is approximately 28 per hour for these

reasons, but in practice it is less because runway 28 is suitable for most wide-bodied aircraft to land only under optimum conditions; mostly, however, it is too short. The Swiss authorities believe that Zurich airport is no longer able to guarantee that the carriers will be able to exercise their traffic rights because its capacity is severely restricted during the German operational rules. Instead of 39 landings (36 planned landings) per hour, it can only handle some 20 to, at best, 28, which represents a substantial reduction in capacity. A figure of 39 would be necessary for full and complete operation. In addition, take-off capacity suffers, which leads to appreciable delays.

In the medium-to-long term, limited upgrading of the landing approaches from the south and east are possible. These measures cannot be implemented at short notice, however, and can not fully substitute the landings from the north. There, ILS category 3 approaches ('blind approaches') are possible on runway 14. The area to the south is however densely developed and full of obstacles, and the land rises to heights of up to 700 metres at a distance of 7 km from the airport. Only an approach angle of 3,3° is possible. Therefore, runway 34 can only be equipped with ILS category 1, meaning that aircraft can only land if the horizontal (ground) visibility is at least 550 metres and the vertical visibility (cloud base) is at least 60 metres/200 ft. Unless and until fast exits are built, its maximum capacity will average some 30 to 32 landings per hour. Runway 28 from the east, which currently has a capacity of 28 landings/hour (see above), could be equipped with an ILS, but the capacity would still only increase to a maximum of approximately 30 landings per hour. Having aircraft land on runway 28 or 34 would always decrease the take-off capacity by some six movements per hour. It is not certain that it is possible to install an ILS category 3 system for aircraft approaching from the south-east on runway 32, because there are obstacles in the way and aircraft can only approach at an angle of 3,3°. In all cases, however, capacity remains reduced, thus affecting traffic rights.

In the immediate future, an extreme case would have occurred if the German rules planned for 10 July 2003 had come into force at that time, because they make erroneous assumptions about the technical installations at Zurich airport. Since this date, the weather conditions under which Germany would be prepared to grant exceptional permits for approaches over German airspace during the restricted hours cover only a part of the weather conditions under which landings from the south, south-east and east are not feasible. As a result, if horizontal visibility is more than 1 800 metres, but less than 4 000 metres, or if vertical visibility is more than 700 ft, but less than 1 200 ft, aircraft cannot land at all at Zurich airport during the operational rules. Under certain weather conditions, therefore, the airport would have to be closed from 21.00 to 7.00 or from 20.00 to 9.00, clearly affecting traffic rights.

- (b) *The German restriction increases airport operating costs, therefore airport fees, affecting traffic rights*

The Swiss authorities maintain that an operation scheme that alternates between approaches from the north, south and east would necessitate considerable expenditure for additional staff, infrastructure and staff training. For the airport a total CHF 65 million would be required, 10 million of which has already been spent. The air traffic control company would have to invest CHF 15 million and increase its operational spending by CHF 2 to 3 million per year. As a consequence, airlines would have to pay higher airport fees and hence be affected in the exercise of their traffic rights.

- (c) *The German rules are discriminatory*

Switzerland argues that the German measures are doubly discriminatory. Firstly, because no comparable German airport is subject to night-time restrictions as lengthy as those provided for in the 213th regulation. Secondly, because Swiss International Air Lines, as the main user of Zurich airport, is affected more than other carriers by these measures and is thus put at a disadvantage as compared to its competitors, which represents an indirect discrimination.

- (d) *The protection of the environment can not provide a justification for the German measures*

Switzerland reckons that the interests of the citizens in the German areas in question are already adequately respected. The Swiss air traffic infrastructure regulation provides for night flight regulation, which only permits very low-noise aircraft to fly between the hours of 22.00 and 6.00. On top of this, for an intercontinental airport, Zurich has some of the strictest night flying rules in the whole of Europe. The night-time flying ban imposed by Zurich airport in 1972 essentially provides that there are to be no flights between the hours of midnight and 5.30. Moreover, in Switzerland more than 150 000 people are subjected to continuous noise levels such as those that are recorded during the day in Germany in certain parts of Hohentengen, the municipality that is most affected, namely 50 to 56 dB. Added to which there are more than 70 000 people living in Switzerland who are subjected to much higher noise levels than those that prevail in southern Germany.

The German measures only reduce noise annoyance over Germany, but increase it by a larger amount over Switzerland, because the population density in the new landing paths is higher and villages are closer to Zurich airport than the German villages protected, so that the airplanes overfly them at a lower altitude, producing more noise. As a result, the overall level of noise annoyance is increased, not decreased.

B. The 213th implementing regulation infringes the Agreement of 21 June 1999 on air transport between the European Community and the Swiss Confederation, Article 17 of which states that:

'The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement and shall refrain from any measures which would jeopardise attainment of the objectives of this Agreement.'

According to the Swiss authorities, this disposition creates an obligation for loyal cooperation which Germany has infringed by adopting the disputed measures without taking into due account the rights and interests of Switzerland. Furthermore, the German measures are being enforced with unnecessary haste, which means that Zurich airport does not have sufficient time to make the necessary adjustments (see point (a) above).

III

- (15) The German authorities advance essentially the following arguments against the Swiss request:

A. The Commission is not competent to take a decision on the 213th implementing regulation

- (a) *Regulation (EEC) No 2408/92 is not applicable to the Swiss complaint*

The liberalisation of European air services in the late 1980s and early 1990s was based on the Chicago Convention of 1944, which confirmed the sovereignty of States over their airspace. This Convention lists eight 'freedoms'. Only the economic freedoms (third to eighth freedoms) have been dealt with by Community law. The technical freedoms (overflight and landing for non-commercial purposes) are therefore only subject to the Chicago Convention.

Regulation (EEC) No 2408/92 is part of the third package of the liberalisation of air services in Europe. The objective of this process, and therefore of Regulation (EEC) No 2408/92, was to allow air service providers freely to use available infrastructures (airports, flight paths) in a competitive way, subject to the rules provided for in the regulations. The regulations do not deal with the infrastructures, they assume their existence. Instead, infrastructure provision remains unregulated at European level. Just as the choice of where to build an airport remains a national competence, so does the choice of where overflight should take place. Even the creation of the single European sky, which is not yet in force, will respect sovereignty in airspace management.

Therefore, not only does the Commission have no competence in the matter, but as a consequence of the sovereignty over one's airspace no State can be requested by another to make specific parts of its airspace available, as Switzerland's complaint is doing. In any case, Regulation (EEC) No 2408/92 does not apply to flights to and from third countries, which are those most concerned, according to Switzerland, by the impact of the 213th implementing regulation.

(b) *The Commission is not competent to settle disputes under the Agreement between Switzerland and the Community*

In so far as the Swiss allege a contravention of the freedom to provide services in conjunction with Article 15 of the Agreement between Switzerland and the Community, the freedom to provide transport services exists in relation to Switzerland only in so far as specifically based on Community legislation and transferred into the Community-Swiss Agreement. However, the competence to settle disputes over the extent of the provisions in the Agreement rests with the Joint Committee established by the Agreement, and not with the European Commission.

B. The German rules are neither discriminatory nor disproportionate

(a) *The German measures are not discriminatory*

The 213th implementing regulation is applicable to all air services, regardless of nationality or identity of the carrier. Hence, there is no discrimination. As far as indirect discrimination is alleged, the purpose of this criterion is to avoid circumventing the non-discrimination principle by using secondary features to discriminate in a hidden way. It does not imply that any national measure with a negative impact on undertakings from other Member States constitutes discrimination. In the case at hand, indirect discrimination would have been present if the limitations applied only to carriers with their hub at Zurich airport. This is not the case.

(b) *The German measures are proportionate*

The German measures are necessary. Fundamentally, noise has to be suffered by the producer country, which is the country deriving economic benefit from the activity which generates the noise. This has been confirmed by a Federal Court decision in Switzerland⁽¹⁾. Since the economic benefits to Germany of the opera-

tion of Zurich airport are marginal (not even 1 % of the employees have German nationality), the noise pollution in Germany caused by the fact that virtually all landings and all early-morning and late-evening take-offs take place over German territory is completely disproportionate.

The preferred way to solve the problem would be by mutual agreement. The long history of negotiations between Switzerland and Germany without any improvement of the situation, but with a further deterioration of the noise pollution in the affected German areas, is proof that Germany has endeavoured to find a consensual solution. However, this proved to be impossible. The latest attempt at such a solution has been rejected by Switzerland, despite the fact that the intention of Germany to take unilateral measures in such a case was well known.

As it is the responsibility of Germany to take into account the interest of the German citizens, unilateral measures have become unavoidable. The interests of the German areas concerned have never been taken into account properly by Switzerland. The consultation quoted by Switzerland took place in the framework of the negotiations between both countries. An autonomous consultation of the German citizens by Switzerland has apparently never happened.

The German measures do not lead to a reduction in the capacity of Zurich airport. They are merely providing for a different flight path to be used over German territory and do not impose limitations on the use of Zurich airport; Germany has no competence to do so. If the Swiss authorities take appropriate measures to adapt the airport to the new arrival procedures, capacity at Zurich airport will not be affected.

Within this context, several of the Swiss affirmations are false. Firstly, runway 28 is long enough to accommodate even the largest planes. Secondly, the waiting areas are still useable despite higher altitude; although a descent of 4 degrees is optimal, up to 8 degrees is acceptable, and the new altitude requires merely 7,5 degrees which can be easily reduced to 5 degrees by a modified procedure over Switzerland. Thirdly, as a German court has recently found, Zurich airport continues to operate under the 213th implementing regulation with a regularly used capacity of 32 and above, much higher than the figure of 20 to 24 advanced by Switzerland.

⁽¹⁾ Decision of the Federal Court Lausanne on the fifth stage of extension of 24 June 1998-BGE 124 II 293.

During building which took place at Zurich airport in 2000, landings from the south on runways 32 and 34 were possible without further complication. With the procedure then applied and the installation of the VOR/DME procedure as agreed in the bilateral agreement between Germany and Switzerland, Zurich airport can be operated without loss of capacity. Germany refers in particular to a document from the Swiss Department for Environment, Transport, Energy and Communication⁽¹⁾ concerning the aborted treaty between Germany and Switzerland, which corresponds largely to the unilateral measures, according to which there are several operating options compatible with the operational rules.

The lack of precision landings procedures (ILS category 2 or 3 not possible for landings from the south on runway 32) has an impact not on the capacity, but on the reliability of this capacity in bad weather conditions. Germany recognizes that therefore exemptions to the operational rules may be necessary and has indeed chosen the conditions for exemptions defined in the 213th implementing regulation so as to coincide with weather conditions which require ILS categories 2 or 3. Even if under the original legislation transition problems might have occurred, the agreement of 26 June 2003 sets out a calendar for the upgrading of Zurich which has been accepted by Switzerland and can therefore be considered as ensuring that such problems do not occur.

The German measures do not excessively impose burdens on the environment in Switzerland. The new landing approaches over Swiss territory do not create noise exceeding the limits currently in force in Switzerland. Indeed, again citing the above document concerning the aborted treaty, it is possible to rearrange flight paths in Switzerland in such a way that the number of noise-exposed citizens actually decreases relative to the approaches over German territory. In any case, the nuisance impact of noise does not depend just on the number of citizens exposed, but also on other factors, such as the fact that the German area concerned has a significant recreational function as well as a high economic dependence on tourism.

LEGAL ASSESSMENT

IV — THE RELEVANT LEGAL FRAMEWORK

The Agreement between the European Community and the Swiss Confederation on air transport

- (16) The relations between the European Community and the Swiss Confederation concerning air transport, are governed by a bilateral agreement of 21 June 1999 (hereafter the 'Agreement') which entered into force on 1 June 2002.

⁽¹⁾ Botschaft zum Vertrag zwischen der Schweizerischen Eidgenossenschaft und der Bundesrepublik Deutschland über die Durchführung der Flugverkehrskontrolle durch die Schweizerische Eidgenossenschaft über deutschem Hoheitsgebiet und über Auswirkungen des Betriebes des Flughafens Zurich auf das Hoheitsgebiet der Bundesrepublik Deutschland http://www.uvek.admin.ch/imperia/md/content/gs_uvek2/d/verkehr/luftverkehrsverhandlungen/21.pdf.

- (17) According to its Article 1 the Agreement 'sets out rules for the Contracting Parties in the field of civil aviation'. In so far as the provisions of the Agreement 'are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement.' However, those concerning 'rulings and decisions given after the date of signature of this Agreement' shall merely be 'communicated to Switzerland'. In such cases, and at the request of one of the Contracting Parties, 'the implications of such latter rulings and decisions shall be determined by the Joint Committee in view of ensuring the proper functioning of this Agreement.'

- (18) Article 3 of the Agreement specifically forbids discrimination: 'Within the scope of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

- (19) However, although Article 15 stipulates that: 'Subject to the provisions of Council Regulation (EEC) No 2408/92, as included in the Annex to this Agreement, Community and Swiss air carriers shall be granted traffic rights between any point in Switzerland and any point in the Community', it also limits the scope of reciprocal rights by providing that: 'two years after the entry into force of this Agreement, Swiss air carriers shall be granted traffic rights between points in different EC Member States' and that: 'The Contracting Parties shall undertake negotiations on the possible extension of the scope of this Article to cover traffic rights between points within Switzerland and between points within the EC Member States five years after the entry into force of this Agreement.'

- (20) Concerning the application of the Agreement, Article 18(2), first sentence, provides that in 'cases which may affect air services to be authorised under Chapter 3, the Community institutions shall enjoy the powers granted to them under the provisions of the regulations and directives whose application is explicitly confirmed in the Annex.' According to Article 20, the exercise of

these powers is subject exclusively to review by the European Court of Justice. Article 29 provides that all other matters under dispute which concern 'the interpretation or application of this Agreement' can be brought before the Joint Committee established by the Agreement.

- (21) According to the Annex to the Agreement, 'wherever acts specified in this Annex contain references to Member States of the European Community, or a requirement for a link with the latter, the references shall, for the purpose of the Agreement, be understood to apply equally to Switzerland or to the requirement of a link with Switzerland'. Among the acts the application of which is thus 'explicitly confirmed in the Annex' figures Regulation (EEC) No 2408/92, except its Article 11 (provision on the Advisory Committee). For the application of Regulation (EEC) No 2408/92, as far as services between the Community and Switzerland are concerned, the Commission enjoys thus the same powers it has for the application of the regulation within the Community, subject to the same powers of review by the European Court of Justice except 'in cases where Switzerland has taken or envisages taking measures of an environmental nature under either Article 8(2) or 9 of Council Regulation (EEC) No 2408/92' in which case 'the Joint Committee, upon request by one of the Contracting Parties, shall decide whether those measures are in conformity with [the] Agreement'.

Relevant Commission powers

- (22) According to the dispositions of Article 18(2) of the Agreement (see recital 20), the Commission enjoys the powers conferred to it under Articles 8 and 9 of Regulation (EEC) No 2408/92. Article 8(2) and 8(3) provide that the Commission shall at the request of a Member State or on its own initiative examine 'published Community, national, regional or local operational rules relating to safety, the protection of the environment and the allocation of slots' to which traffic rights are subject and that it shall decide, after consulting the Committee referred to in Article 11, whether the Member State may continue to apply the measure. Article 8(4) enables any Member State to refer the Commission's decision to the Council. The Council, acting by a qualified majority, may in exceptional circumstances take a different decision.
- (23) Article 9(1) empowers Member States, 'when serious congestion and/or environmental problems exist' to 'impose conditions on, limit or refuse the exercise of traffic rights in particular when other modes of transport can provide satisfactory levels of service'. The Member State is obliged to notify the action to other Member States and the Commission. Article 9(4) allows the Commission to examine such actions and to prevent its implementation during the examination. After consulting the Committee referred to in Article 11, it must decide whether the action is appropriate and in conformity with Regulation (EEC) No 2408/92 and not in any way contrary to Community law. The Council, acting by a qualified majority, may in exceptional circumstances take a different decision.
- (24) Given the scope of the Agreement between Switzerland and the Community, these powers are however limited to the exercise of traffic rights between Switzerland and the Community, excluding flights within the Community, within Switzerland as well as flights between Switzerland and third countries and between the Community and third countries.

Application of Article 8 in a purely Community context

- (25) While Article 9 has not yet been applied, the European Commission has already applied Article 8 several times relating to situations entirely within the Community⁽¹⁾. The Commission has examined the situations on the basis of, on the one hand, the general principles on the freedom to provide services, i.e. the criteria of non-discrimination and proportionality, and on the other hand, compliance with other provisions of Community law.
- (26) As the European Court of Justice has confirmed in recent case-law, the purpose of Regulation (EEC) No 2408/92 is, *inter alia*, 'to define the conditions for applying in the air transport sector the principle of the freedom to provide services which is enshrined in, *inter alia*, Articles 59 and 61 of the Treaty'⁽²⁾, which 'requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.' In order for measures that constitute restrictions on the freedom to provide services to be authorised under Regulation (EEC) No 2408/92, they must be justified and, in particular, proportionate to the purpose for which they were adopted⁽³⁾.

⁽¹⁾ See e.g. Decisions 1994/290/EC 'Orly' (OJ L 127, 19.5.1994, p. 22), 2001/163/EC 'Malpensa' (OJ L 58, 28.2.2001, p. 29), 98/523/EC 'Karlstad' (OJ L 233, 20.8.1998, p. 25).

⁽²⁾ Now Articles 49 and 51.

⁽³⁾ Judgment of the Court in Case C-361/98 *Malpensa* [2001] ECR, I-385, at paragraphs 31 to 36. It is also noteworthy that the decision on the access to Karlstad airport established that the Commission, 'when using the powers conferred upon it by Article 8(3) of Regulation (EEC) No 2408/92, must ensure that any measures taken by Member States' authorities are not contrary to other provisions of Community law.' See OJ L 233, 20.8.1998, p. 25.

V — ANALYSIS

Legal base

- (27) As has been stated in section IV, the first sentence of Article 18(2) of the Community-Swiss Agreement, confers, in cases which may affect air services to be authorised under Chapter 3 of the Agreement i.e. in so far as traffic rights according to Article 15 of the Agreement are concerned, powers upon the Commission to examine the 213th implementing regulation pursuant to Articles 8(2) to (4) and Article 9 of Regulation (EEC) No 2408/92. The Swiss complaint refers to both provisions of Regulation (EEC) No 2408/92 without explicitly specifying the basis on which it asks the Commission to intervene. Although the Commission has asked the Swiss authorities in writing to clarify the legal basis for its request, Switzerland has maintained that it is the responsibility of Germany to specify whether it intends to justify its measures under Article 8(2) to (4) or under Article 9. In the absence of further clarification, the Commission should examine the German measures in all these respects.
- (28) Article 8(2) of Regulation (EEC) No 2408/92 subjects the exercise of traffic rights to 'published Community, national, regional or local operational rules relating to safety, the protection of the environment and the allocation of slots'. The 213th regulation is a published national operational rule relating to safety⁽¹⁾ and to the protection of the environment and therefore within the scope of Article 8(2).
- (29) The German argumentation that air traffic control measures are excluded from the scope of the Commission's powers of review under Article 8 of Regulation (EEC) No 2408/92 cannot be followed.
- (30) In contrast with Article 9(4) of the Regulation, Article 8 does not refer to interim measures as requested by Switzerland. Switzerland has based its request for interim measures in the absence of a specific provision for the taking of such interim measures, in so far as the Commission did not retain Article 9 as the appropriate basis for a decision, on case-law according to which: 'it is important to ensure that, whilst inquiries are being carried out, no irreparable damage is caused such as could not be remedied by any decision which the
- (31) The application of Article 8(2) to (4) must be seen within the context of the scope and purpose of the EC-Swiss agreement and Regulation (EEC) No 2408/92. This has the consequence that the powers conferred to the Commission in Article 8(3) are limited to measures which affect air carrier's operations i.e. 'in cases which may affect air services', to use the wording of Article 18(2) of the Agreement.
- (32) Article 9(3) of Regulation (EEC) No 2408/92 provides that a Member State may only implement an action adopted under paragraph 1 of that Article if no other Member State concerned nor the Commission has contested that action within one month of receipt of the notification thereof from the first Member State. Such notification must take place at least three months prior to the entry into force of the proposed action. The German authorities did not notify their measures to the Commission three months before its entry into force, nor in fact at any time. Therefore, the Commission cannot apply Article 9 for the examination of the German operational rules⁽²⁾.
- (33) Consequently, the Commission shall examine the German measures under Article 8(2) and 3 of Regulation (EEC) No 2408/92.
- (34) Article 11 of Regulation (EEC) No 2408/92 to which Article 8(3) thereof makes reference is not contained in the Annex to the Agreement. In general, references to the Advisory Committee in other articles of the Regulation are part of the Agreement. Furthermore, the Final Act contains a Declaration on Swiss attendance of committees according to which: 'Switzerland's representatives may, in so far as the items concern them' attend, among others, 'advisory committees on air routes'. On balance, then, the Commission has considered it necessary to consult the Advisory Committee established under Article 11 of the regulation, with Switzerland attending as an observer.

⁽¹⁾ Based on § 32(1), sentence 1 number 1 and (3), sentences 2 and 3 of German air traffic law (OJ p. 550 of 27 March 1999) in conjunction with § 27a(1) and (2) first sentence of the air traffic regulation (OJ p. 580 of 27 March 1999).

⁽²⁾ Judgment of the Court in Case C-792/79 *Camera Care* [1980] ECR 119.

⁽³⁾ The Swiss authorities argue in their letter of 21 October that the non-notification can not exclude the applicability of Article 9. However, paragraph 4 of Article 9 clearly states that: 'when the Commission, within one month of having been informed under paragraph 3, takes the action up for examination'. See also Commission Decision 98/523/EC 'Karlstad', op. cit. at paragraphs 41 to 43.

Applicable criteria

- (35) The criteria identified under recitals 25 and 26 have been established in a purely Community context ⁽¹⁾. The question therefore arises whether the same criteria can be used in the context of the Community-Swiss Air Transport Agreement.

(a) Non-discrimination

The prohibition of discrimination is clearly applicable. As pointed out above, Article 3 of the Agreement between Switzerland and the Community states that: 'Within the scope of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' Given the context of the agreement, the analysis of potential discrimination cannot be limited to direct discrimination, but must equally include indirect discrimination.

(b) Proportionality

Contrary to the principle of non-discrimination, the principle of proportionality is not specifically mentioned in the Agreement. In the case-law cited above ⁽²⁾, the Court found that the principle of proportionality was applicable because Regulation (EEC) No 2408/92 defined 'the conditions for applying in the air transport sector the principle of the freedom to provide services which is enshrined in, *inter alia*, Articles 59 and 61 of the Treaty' ⁽³⁾. However, as indicated above, at this stage, Switzerland is not participating in the internal market for air services. Flights within the Community will be available to Swiss carriers only in June 2004, while access for Community carriers to routes within Switzerland and access for Swiss carriers to routes within a Member State of the European Community still need to be negotiated. As a consequence, currently the Agreement merely provides for an exchange of traffic rights. It is therefore evident that the freedom to provide services in the sense of Articles 49 and 51 of the Treaty does not exist as far as the Community-Swiss Agreement is concerned ⁽⁴⁾. In any case, as the internal market for air services as laid down in Regulation (EEC) No 2408/92 does not apply to traffic rights between Member States and third countries flights between third countries and Switzerland are excluded from the examination.

In any event, the case-law cited above was handed down after the Agreement was concluded. Article 1(2) provides that: 'rulings and decisions given after the date of signa-

ture of this Agreement shall be communicated to Switzerland. At the request of one of the Contracting Parties, the implications of such latter rulings and decisions shall be determined by the Joint Committee in view of ensuring the proper functioning of this Agreement.' The Joint Committee has not addressed the case-law in question.

It appears therefore that it is inappropriate to examine the Swiss request under the principle of proportionality. However, given its application in previous cases and the ambiguous nature of the provisions of the Agreement, the criterion of proportionality should be examined as a subsidiary point to see whether the German measures would be in breach of it, if it were applicable.

(c) Compliance with other provisions of the agreement

As far as compliance with other provisions of the Agreement is concerned, only those provisions of Community law which fall within the scope of the Agreement can potentially be relevant. However, the basic rule for the enforcement of the Agreement is to be found in Article 18(1), stating that: '1. Without prejudice to paragraph 2 and the provisions of Chapter 2, each Contracting Party shall be responsible in its own territory for the proper enforcement of this Agreement and, in particular, the regulations and directives listed in the Annex.' The powers granted to the Community institutions in Article 18(2) are an exception from this basic rule. Consequently, the Commission does not appear to have the powers to consider possible breaches of the Agreement outside the confines of Article 18(2), first sentence, of the agreement.

Non-discrimination

- (36) The 213th implementing regulation does not make any distinction on the basis of the nationality or identity of carriers. The criteria used for exemptions to the general rules are objective (save-and-rescue missions, bad weather, runways blocked because of accidents, breakdowns of navigation systems, planes too heavy to climb fast enough to achieve certain heights over the German border). As a consequence, they apply equally to Community and Swiss carriers when approaching Zurich airport over German territory or when leaving Zurich airport over German territory. If flight paths must be adjusted or additional fees paid, all carriers are subject to the same treatment.

⁽¹⁾ It must be noted that the European Court of Justice has established that similarity of the provisions in international agreements between the Community and a third country with terms of the Treaty is not sufficient reason to transpose to the provisions of the agreement the case-law of the Court. The scope of case-law must be determined in light of the Community's objectives and activities as defined by the Treaty, including in particular the objective of a single market having the characteristics of a domestic market. Judgment of the Court in Case C-270/80 *Polydor* [1982] ECR 329.

⁽²⁾ See footnote 8, C-361/98, *Malpensa*.

⁽³⁾ Now Articles 49 and 51.

⁽⁴⁾ This contrasts with the full right of establishment provided for in Article 4 of the Agreement.

(37) However, as already stated by the Commission in Decisions 95/259/EC ⁽¹⁾, 98/710/EC ⁽²⁾ and 2001/163/EC ⁽³⁾, the principle of non-discrimination set out in Article 8(1) also precludes any measure which, even without explicitly making reference to the carrier's nationality or identity, in practice nonetheless produces discriminatory effects, even indirectly. It must therefore be examined whether Swiss air carriers are affected in a way that Community carriers are not. It is settled case-law that discrimination consists in the application of different rules to comparable situations or in the application of the same rule to different situations ⁽⁴⁾.

(38) In this regard, the Commission notes that the operation of hub-and-spoke networks has become a common feature among air carriers. The networks of those carriers are based on hub airports which are nearly always located in the State where the carriers are licensed and have their principal place of business. The hub system allows them to achieve a comprehensive coverage of the air transport market by providing services between any two airports served from the hub airport without supporting the investments required by direct services. Air carriers which use a given airport as a hub usually have a very high traffic share at this airport. As a consequence, any given restriction is bound to automatically affect the dominant carrier of the airport more than its competitors. This in itself does not appear to amount to discrimination. Indeed, otherwise any restriction would automatically have to be considered discriminatory, and the ability of Member states to impose operational rules in the sense of Article 8(2) would be negated.

(39) In order for indirect discrimination to exist, the German measures would have to affect, among the flights falling within the scope of the Agreement, i.e. only those between the Community and Switzerland, predominantly the flights operated by Swiss air carriers. In so far as flights during the hours of the German measures are concerned, this is clearly not the case, since Swiss carriers and Community carriers are affected in exact proportion to their share of flights falling within the scope of the Agreement, because all flights between the Community and Switzerland are affected equally irrespective of the nationality of the carrier. Therefore, the German measures cannot be considered discriminatory.

(40) The subject of Regulation (EEC) No 2408/92 within the context of Article 18(2), first sentence, of the Community-Swiss Agreement are traffic rights. It does not create any rights for airports. A potential discrimination of Zurich airport relative to German airports, if it existed, would therefore fall outside the scope of the

analysis the Commission has to perform. In any case, the situations are not comparable, since Germany has complete authority to direct the development of the airports on its own territory, while it has no authority over Zurich airport. Similarly, Regulation (EEC) No 2408/92 does not regulate the exposure of population to aircraft noise. A potential discrimination of the population in the concerned Swiss areas relative to the population in the concerned German areas, if it existed, would therefore equally fall outside the scope of the analysis the Commission has to perform in this context.

Proportionality

(41) It would appear appropriate to conclude on the basis of the arguments mentioned in section IV that the principle of proportionality is not a criterion the Commission is bound to use in the context of the Community-Swiss Agreement. Indeed, as has been shown above, the freedom to provide air transport services has not been introduced, but only an exchange of traffic rights between the Community and Switzerland, leaving out, for the time being at least, cabotage and flights between Community Member States. Furthermore, it is not evident that the German measures necessarily amount to restrictions in the first place as the measures essentially require adjusting flight paths without as such affecting traffic rights. In addition, the judgment of the Court of Justice in *Malpensa* ⁽⁵⁾ has not been notified and considered in the Joint Committee and cannot therefore provide any guidance for the interpretation of the Community-Swiss air transport agreement:

(42) Even if it were considered that the principle of proportionality should apply, the Commission considers that German measures are not disproportionate. Firstly, it is not the case that the German measures are unnecessary. On the contrary, the lengthy negotiations between Germany and Switzerland over the years appears to be proof that measures are indeed necessary although Switzerland does advance that in the current situation noise levels in Germany do not exceed 'valid noise limits'. However, noise limits must be considered maximum acceptable thresholds, not comfort levels. Member States are in principle free to take measures to lower noise levels below these limits depending on local circumstances. As Germany has pointed out, the German area overflown by planes approaching Zurich is an important tourist destination and as such particularly vulnerable to noise emissions. Furthermore, the German measures concern mostly early morning and late evening hours, when noise sensitivity is particularly high.

⁽¹⁾ OJ L 162, 13.7.1995, p. 25.

⁽²⁾ OJ L 337, 12.12.1998, p. 52, recital 30.

⁽³⁾ OJ L 58, 28.2.2001, p. 29, paragraph 49.

⁽⁴⁾ See e.g. Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, at paragraph 26.

⁽⁵⁾ ECJ: Case C-361/98 *Malpensa*.

- (43) Nor can it be said that the German measures are disproportionate, i.e. that other less onerous rules imposed by Germany would achieve the same result, i.e. an improvement in the environmental situation in Germany, which is the scope of the powers of the German authorities in this context. As Germany has pointed out, it does not have any authority over the airport, since it is on Swiss territory. Any other means of ensuring a reduction of noise over German territory, such as a different utilisation of the airport, are therefore out of German hands. Only Switzerland has the authority to impose such measures, including the installation of the necessary equipment. Indeed, it appears that one of the purposes of the negotiations with Switzerland was to ensure that Switzerland would take the appropriate measures within its powers, which it has not done during the last 20 years.
- (44) Moreover, in evaluating whether other measures with equivalent result would have been less onerous, the examination under the EC-Swiss Agreement and Regulation (EEC) No 2408/92 is necessarily limited to taking into account only their impact on air services. In the first instance the impact of the 213th implementing regulation is merely a change in the flight path that incoming airplanes early in the morning and late at night may take. Currently, incoming planes are required to follow a particular approach; the effect of the German regulation in combination with Swiss air traffic control measures will be to substitute one required approach by another required approach during certain times of the day.
- (45) Nor is it evident that the German measures reduce the capacity of Zurich airport to any significant extent. With the appropriate measures taken by Switzerland in terms of equipping the other runways with suitable precision-landing equipment and in terms of establishing the corresponding flight procedures, the impact is likely to be very small, if at all existent.
- (46) Switzerland alleges that the capacity of Zurich airport is significantly reduced from the previous maximum rate of 40 to 42 landings, 44 take-offs (together 68). Under the German measures the maximum capacity would be 26 to 30 landings, 30 to 32 take-offs (together 56 to 60). However, even without the German measures the system used for flights between 21.00 and 7.00 would have only an average capacity of 25 landings and take-offs. In any case, according to the summer 2003 and winter 2003/04 timetables, the maximum number of scheduled landings during these hours is 23, and the maximum number of total movements is 34 ⁽¹⁾.
- (47) If at all, the impact would therefore be limited to three hours on weekends and public holidays. For the summer and winter schedules, the highest number of total movements during these hours is 60; only a small number of flights are in excess of the capacity indicated above, and only for some of these hours. Furthermore, there is significant spare capacity in the hours immediately before and afterwards ⁽²⁾.
- (48) As for the concern that due to the German measures planned for 10 July 2003 Zurich airport might have to be closed under certain regular weather conditions, this has been addressed by the bilateral agreement of 26 June 2003. Germany has agreed to postpone the planned measures, while Switzerland has specified a schedule to equip Zurich airport for landings from the south in such a way as to enable it to handle all those weather conditions for which Germany would not grant exceptional authorisations. This particular element of the complaint has therefore become void.
- (49) Consequently, the proportionality of the German measures could only have been questioned if it had been possible for Germany, by taking other, less onerous measures, to achieve the same result. However, in order to ensure the desired noise reduction, Germany did not have any other means at its disposal. Moreover, since the impact on air services is very small or even non-existent, it is difficult to imagine Germany taking any other measure within its powers with even less impact on traffic rights. Thus, even if the principle of proportionality were applicable in the present context, which the Commission considers not to be the case, the Commission is of the view that the principle would not have been breached by the German measures under examination.
- German measures in breach of other provisions of the Agreement**
- (50) The Swiss Confederation alleges moreover that the 213th implementing regulation infringes Article 17 of the Agreement of 21 June 1999 on air transport between the European Community and the Swiss Confederation.
- ⁽¹⁾ It should be noted that, during the hour between 6.00 and 7.00, when there is allegedly excess demand, the overwhelming majority of incoming flights are from third countries and are therefore not within the scope of the EC-Swiss Air Transport Agreement.
- ⁽²⁾ In this context, it should be noted that these calculations are based on figures provided by Switzerland, which are contested by Germany, and rely therefore on the assumptions most favourable for Switzerland's argumentation.

(51) Article 17 stipulates that:

'The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement and shall refrain from any measures which would jeopardise attainment of the objectives of this Agreement'

(52) As becomes clear from the text of Article 17, it creates obligations on the Parties to the Agreement, i.e. Switzerland and the European Community. Germany is not a Contracting Party to the Agreement and is therefore not covered by this provision. Nevertheless, it is noteworthy, as shown by the history of the negotiations between Germany and Switzerland over the last 20 years, that there has been a serious and sustained effort to reach a mutually acceptable solution.

(53) Switzerland also refers to Directive 2002/30/EC of the European Parliament and of the Council ⁽¹⁾ on noise-related operating restrictions at Community airports, recital 7 of which requires a 'balanced approach' on noise management. Since the Directive was adopted by the Community after the Agreement between the Community and Switzerland had been concluded, it must be adopted by the Joint Committee according to Article 23 of the Agreement between the Community and Switzerland in order for it to apply for the purposes of the Agreement. This has not yet been done and is therefore

not applicable contrary to what Switzerland states in its letter of 21 October 2003. However, even if it had been incorporated into the agreement, it should be emphasised that according to Article 4(1) of the Directive Member States shall adopt a balanced approach in dealing with noise problems *at airports in their territory*,

HAS ADOPTED THIS DECISION:

Article 1

Germany may continue to apply the 213th regulation for the implementation of German air traffic regulations establishing procedures for instrument-guided landings and take-offs at Zurich airport as amended by the first amending regulation of 4 July 2003.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 5 December 2003.

For the Commission
Loyola DE PALACIO
Vice-President

⁽¹⁾ OJ L 85, 28.3.2002, p. 40.