

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 20 September 2001 ¹

I — Introduction

II — Legal background

1. These two reference for preliminary rulings concern the validity of a provision of Regulation (EC) No 925/1999. That regulation restricts the use of aeroplanes at European airports, in the interests of protection against noise. The Court is asked whether it is lawful for the regulation to exclude aeroplanes which have been completely re-engined from those restrictions only if the engines have what is known as a by-pass ratio of three or more, while a lower by-pass ratio leads to the application of restrictions on use.² Omega intends to equip Boeing 707s with new engines which have a by-pass ratio of 1.74.³ Omega claims that as a result of further technical measures these aeroplanes are not in fact noisier, and are moreover more economical and cleaner.

A — Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) ('the Regulation')⁴

2. The aim of the Regulation is to reduce aircraft noise at airports in the Community by laying down rules for the operation and registration of older aeroplanes which have been modified to reduce their noise. On its background in international and Community law, the report of José Valverde López,

1 — Original language: German.

2 — For the facts, see point 17 et seq.

3 — By-pass ratio is explained in point 6.

4 — OJ 1999 L 115, p. 1; the original version was replaced by a corrected version, OJ 1999 L 120, p. 64.

Member of the European Parliament,⁵ states as follows:

'The Chicago Convention on International Civil Aviation is one of the main documents where the regulation of noise emissions from aeroplanes is concerned. It divides aeroplanes into three categories or chapters:

Chapter 1 covers aeroplanes that were among the noisiest at the time and may now no longer be used.

Chapter 2 aeroplanes are, under Directive 92/14/EEC, [6] to be phased out from April 1995 to April 2002. From 1 April 2002 they may no longer be used in the EU, even if exempted in the annex to the directive referred to above. These Chapter 2 aeroplanes may, however, be equipped with "hushkits" so that they produce less noise and can be included in Category 3.

However, "hushkitted" aeroplanes only just satisfy the standards for *Chapter 3* and are not therefore really comparable with "proper" Chapter 3 aeroplanes. They are not only relatively noisy and so cause considerable noise pollution around airports, but also cause more pollution in the form of CO₂ and other air pollutants than more recent Chapter 3 aeroplanes. Both fuel consumption and emissions of carbon monoxide and nitrogen oxide are far higher in hushkitted Chapter 2 aeroplanes than genuine Chapter 3 aeroplanes (by as much as 50% and 30% respectively).'

3. The issue in the present proceedings is not, however, modification by means of 'hushkits', but complete re-engining. The Regulation prohibits the use of modified aeroplanes at airports in the Community, unless they have been modified by complete re-engining with engines having a by-pass ratio of three or more. Aeroplanes with new engines with a by-pass ratio of less than three may thus in principle not be used in the Community. Only aeroplanes which were already operated in the Community on the date of application of the Regulation could continue to be used.

4. To understand the importance of by-pass ratio, a brief description of

5 — Report on the proposal for a Council Directive on the registration and use within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993), 21 July 1998, Parliament document No. A4-0279/98.

6 — Council Directive of 2 March 1992 on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988), OJ 1992 L 76, p. 21.

how turbofan engines function is appropriate.

by-pass airflow is three times greater than the core airflow. For the engines envisaged by Omega, however, the by-pass airflow is not even twice the core airflow.

5. The engines of jet aircraft produce mainly two sorts of noise. Part of the noise comes from the mechanical parts of the engine, the other — traditionally no doubt the predominant — part is produced by the air expelled by the engine when it meets the surrounding air. This airflow produces the thrust of a jet engine. It is characterised by a high temperature and a high speed. The higher those are in relation to the surrounding air, the more noise is produced.

7. Omega further states, without being contradicted, that increasing the by-pass airflow requires a larger fan at the front of the engine, however. The larger the fan, the more noise it produces. Fan noise is greater during landing because the slower speed of the fan blades produces a less aerodynamic and hence noisier flow of air.⁸

6. In a turbofan engine the noise from the exhaust is reduced because, in addition to the high-speed airflow through the core of the engine (the actual turbine) an airflow at lesser speed is directed through a duct surrounding the engine core (the by-pass airflow). This by-pass airflow is produced by a fan at the front of the engine. The fan contributes to the overall thrust of the engine. The by-pass airflow has the result that when the core airflow leaves the engine it meets the external air less turbulently. As a result, the noise of the exhaust is less than where there is no by-pass airflow. The higher the ratio of the by-pass airflow to the core airflow, the less noise is produced.⁷ The by-pass ratio of three used as the limit in the Regulation means that the

8. The prohibition of re-engined aeroplanes whose engines have a by-pass ratio of less than three follows from Article 3 in conjunction with the definition in Article 2(1) and (2) of the Regulation.

9. Article 3, headed 'Non-complying aeroplanes', reads as follows:

'1. Recertificated civil subsonic jet aeroplanes shall not be registered in the national register of a Member State as from the date of application of this Regulation.

⁷ — According to <http://www.jetfire.de/engines.htm>, visited on 27 June 2001, 'the cold by-pass flow surrounds the hot, fast and noisy exhaust of the core like a silencer'.

⁸ — The expert for the United Kingdom Department of the Environment submitted in the main proceedings, however, that take-off noise has hitherto been much more important because it affects a much greater proportion of the population.

2. Paragraph 1 shall not affect civil subsonic jet aeroplanes which were already on the register of any Member State on the date of application of this Regulation and have been registered in the Community ever since.

covered by the Regulation as 'a civil subsonic jet aeroplane... powered by engines with a by-pass ratio of less than three'. Already in this definition a by-pass ratio of less than three is used as a limiting criterion. Civil subsonic jet aeroplanes powered by engines with a higher by-pass ratio do not fall within the scope of the Regulation at all.

3. Notwithstanding the provisions of Directive 92/14/EEC and in particular Article 2(2) thereof, as from 1 April 2002 recertificated civil subsonic jet aeroplanes registered in a third country shall not be allowed to operate at airports in the territory of the Community unless the operator of such aeroplanes can prove that they were on the register of that third country on the date of application of this Regulation and prior to that date have been operated, between 1 April 1995 and the date of application of this Regulation, into the territory of the Community.

11. Article 2(2) of the Regulation defines a 'recertificated civil subsonic jet aeroplane' as

4. Recertificated civil subsonic jet aeroplanes which are on the registers of Member States may not be operated at airports in the territory of the Community as from 1 April 2002 unless they have been operated in that territory before the date of application of this Regulation.'

'a civil subsonic jet aeroplane initially certificated to Chapter 2 or equivalent standards, or initially not noise-certificated which has been modified to meet Chapter 3 standards either directly through technical measures or indirectly through operational restrictions; civil subsonic jet aeroplanes which initially could only be dual-certificated to the standards of Chapter 3 by means of weight restrictions, have to be considered as recertificated aeroplanes; *civil subsonic jet aeroplanes which have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio of three or more* are not to be considered as recertificated aeroplanes' (emphasis added).

10. Article 2(1) of the Regulation first defines a 'civil subsonic jet aeroplane'

12. The 'chapters' referred to are, according to Article 2(3) of the Regulation, 'the noise standards as defined in Volume I, Part II, Chapter 2 and Chapter 3 respectively of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993)'.

of aeroplanes to Member States' registers as from the date of application of this Regulation can be considered as a protective measure aimed at preventing a deterioration of the noise situation around Community airports as well as improving the situation regarding fuel burn and gaseous emissions'.

13. Recitals 5 and 6 in the preamble to the Regulation give the following reasons for the prohibition laid down in the Regulation:

14. The Common Position of the Council of 16 November 1998⁹ justifies the introduction of the passage on re-engined aeroplanes as follows:

'(5) Whereas older types of aeroplanes modified to improve their noise certification level have a noise performance which is significantly worse, mass for mass, than that of modern types of aeroplanes originally certificated to meet the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993); whereas such modifications prolong the life of an aeroplane that would normally have been retired; whereas such modifications tend to worsen the gaseous emissions performance and fuel burn of earlier technology aero engines; whereas aeroplanes may be re-engined to achieve a noise performance comparable to that of those originally certificated to meet Chapter 3 requirements;

'In addition, the Council explicitly excluded re-engined aeroplanes (i.e. aeroplanes whose engines have been completely replaced) as these aeroplanes have noise performance comparable to those originally certificated to meet Chapter 3 standards.'

(6) Whereas a rule which prohibits the addition of those older modified types

15. Why the Council requires a by-pass ratio of three or more is not explained.

⁹ — OJ 1998 C 404, p. 1, at p. 7.

B — WTO law

graphical factors or fundamental technical problems.

16. Article 2 of the Agreement on Technical Barriers to Trade¹⁰ states:

...

‘2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade....

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.’

2.3 Technical regulations shall not be maintained... if the... objectives can be addressed in a less trade-restrictive manner.

III — Facts

2.4 Where technical regulations are required and relevant international standards exist... Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geo-

17. The main proceedings are brought by Omega Air Ltd and several associated undertakings. They will be referred to below as Omega.

18. According to the order for reference in Case C-27/00, Omega is concerned with trading in aircraft, primarily Boeing 707s. It also carries on related activities, such as aircraft engine maintenance. Omega is developing a programme for the gradual replacement of the engines in Boeing 707s by newly manufactured engines with a by-pass ratio of 1.74. The modified aeroplanes will be referred to below as Omega 707s.

10 — Annex I to the WTO Agreement, OJ 1994 L 336, p. 86.

19. The aeroplanes to which this programme is directed are not currently operated in the Community, nor do they fly to Community airports. The transitional provisions in Article 3 of the Regulation would therefore not apply to them. They could not be operated in the Community in the form envisaged. For that reason the Omega 707 would not be commercially viable for potential customers.

20. Omega submits that its modified aeroplanes comply with the same noise and gaseous emission standards as those required of aeroplanes which are not excluded. Its plans to fit the Boeing 707s with new engines are effectively brought to a halt by the Regulation. As a result it is unable to secure further financing for its re-engining programme and will incur financial losses.

21. In the proceedings before the Court, Omega gave more information on the background to its project. It says that the re-engining programme was already made public in September 1996.

22. Before reaching a decision, Omega looked at the use of other engines with a higher by-pass ratio. Since the use of such engines would have necessitated extensive

and cost-intensive modifications to the wings, the engine now to be used was chosen.

23. There have been only three programmes so far for the complete re-engining of civil aircraft.¹¹ Omega's programme was the only one in existence during the drafting and adoption of the Regulation.

IV — The questions referred

24. The High Court of Justice of England and Wales states in its order for reference:

'Omega advanced six grounds for the invalidity of the Regulation. The High Court, after inspection of the application and evidence, considers that three of these grounds merit reference to the Court of Justice. They are reflected in the three parts

11 — Omega acknowledges that in the other two programmes engines with a by-pass ratio over three were used. It refers to another programme which is also based on the engines intended for use in the present case, but envisages replacement of only some of the engines. However, Aviation Upgrade Technologies Inc., in connection with its 'Registration of Securities of a Small-Business Issuer' (Form 10-SB) of 12 July 1999 for the US Securities and Exchange Commission, stated its intention of replacing Pratt & Whitney JT8D engines in Boeing 727s by Rolls Royce RB211-535E4 engines with a by-pass ratio of 4.3.

of the question referred to the Court of Justice. The High Court rejected as unarguable the other three grounds advanced by Omega, relating respectively to discrimination, legitimate expectations and breach of the Chicago Convention on International Civil Aviation, 7 December 1944.'

(iii) such rights as private parties may derive from the General Agreement on Tariffs and Trade and/or the Agreement on Technical Barriers to Trade?'

25. It therefore refers the following question to the Court for a preliminary ruling:

26. The High Court of Ireland states that the case before it raises the question of the validity of the Regulation. As it does not have jurisdiction to decide the point, it refers the following question to the Court:

'Is Article 2(2) of Council Regulation (EC) No 925/1999 invalid in so far as it defines "recertificated civil subsonic jet aeroplanes" so that re-engined aeroplanes "with engines having a by-pass ratio of three or more" are not subject to prohibitions imposed by the Regulation but aeroplanes wholly re-engined with engines having a by-pass ratio of less than three are subject to prohibitions, having regard in particular to:

'Is Article 2(2) of Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993), invalid so far as it defines "recertificated civil subsonic jet aeroplanes" as including "civil subsonic jet aeroplanes" as defined at Article 2(1) thereof that have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio of less than three, having regard in particular to:

(i) the duty to give reasons under Article 253 EC;

I. the duty to give reasons under Article 253 EC,

(ii) the general principle of proportionality;

II. the principle of equal treatment,

28. The order for reference from the High Court, London, criticises the absence of any statement of reasons for the provision at issue.

III. the principle of proportionality,

IV. the compatibility of that provision with the Agreement establishing the World Trade Organisation and in particular the Agreement on Technical Barriers to Trade annexed thereto?’

29. Omega regards the insertion of the provision at issue into the draft regulation in November 1998 as incomprehensible. It submits in detail that the statement of reasons makes no reference to the following aspects:

27. With the order for reference, the High Court, Dublin, referred to the already pending Case C-27/00 and requested the Court to hear both cases together expeditiously.

— why the Regulation covers re-engining at all;

— why it bases the limit on by-pass ratio;

V — Legal assessment

— why the limit is a by-pass ratio of three;

A — *The duty to give reasons*

Assessments of the referring courts and submissions of the parties

— why, contrary to the usual practice of Community law, a standard is based not on actual performance but on design;

- why, contrary to the WTO Agreement on Technical Barriers to Trade, it replaces existing international standards — Chapter 3 of the annexes to the Chicago Convention — by a new criterion; and
- why the business of an undertaking is affected so radically in order to bring about so little advantage, or even a disadvantage, for the Community.

30. Omega states that it learnt in early September 1998 of the proposal to introduce a by-pass ratio criterion, and at once started to make its interests known to the Commission, Members of the European Parliament and representatives of the Member States.

31. The other parties observe, referring to the case-law, that the statement of the reasons for a general measure may be confined to indicating the general situation which led to its adoption and the general objectives which it is intended to achieve. It is not necessary, on the other hand, to give reasons for every technical choice in the regulation. They take the view that the statement of reasons in the Regulation discloses its objectives and the starting situation sufficiently clearly, whereas the decision to set a by-pass ratio of three is a technical means for achieving those objectives. The reasons for that need not be

stated in detail, in the case of a general measure.

32. The Commission, the Council and the United Kingdom Government point out that by-pass ratio was already used in other provisions at Community level and in the context of the International Civil Aviation Organisation (ICAO). Undertakings active in air transport were aware of this.

33. The United Kingdom Government considers, finally, that it is not permissible when assessing the statement of reasons in the Regulation to take account of alleged contradictions in the reasons of the Common Position of the Council for the introduction of the provision at issue. Nor is the Council obliged to state reasons for amending the Commission's proposal for a legal measure. Moreover, the Common Position did not express a view on the importance of by-pass ratio for reducing noise.

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34. The requirements which statements of reasons for measures of general application must comply with are limited, according to

settled case-law. Thus the Court said in its judgment on the working time directive:

‘[W]hilst the reasoning required by Article 190 of the EC Treaty [now Article 253 EC] must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, the authority is not required to go into every relevant point of fact and law...’.¹²

35. In Case C-122/94, cited in the judgment in Case C-84/94, the Court said: ‘... if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution.’¹³

36. The Court regularly points out that ‘in the case of measures of general application, the statement of reasons may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other’.¹⁴

37. The preamble to the Regulation shows both the general situation which led to its adoption and the objectives pursued by the Community with the measure. The situation is characterised by environmental harm caused by air traffic at Community airports. The aim of the Regulation is to reduce aircraft noise, harmful emissions and fuel burn.

38. The recitals show further that the Regulation is intended to introduce stricter requirements than those which derive from Chapter 3 alone. Recital 5 states that meeting the standards of Chapter 3 by modifying aeroplanes leads to results which are worse than those of modern types of aeroplanes. That is the reason for departing from the standard of Chapter 3.

39. By introducing the criterion of modification, the Regulation already departs from the general regulatory practice alleged by Omega of basing standards on actual performance. Modification, like re-engining, is not an element of performance but of design.

40. Recital 5 at the same time states without reservation, finally, that re-engined aeroplanes *may* achieve the same results as modern aeroplanes. By-pass ratio is not mentioned.

¹² — Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 74.

¹³ — Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29.

¹⁴ — See, for example, Case C-150/94 *United Kingdom v Council* [1998] ECR I-7235, paragraph 25, and Case 5/67 *Beus* [1968] ECR 83, at p. 95.

41. Only the definitions of civil subsonic jet aeroplanes and recertificated civil subsonic jet aeroplanes in Article 2(1) and (2) of the Regulation use the by-pass ratio of three to delimit the types of aeroplane covered by the Regulation. No express reason is given for the use of that criterion.

43. More extensive obligations to state reasons could arise if it is taken into account that the legislature — as will be discussed in detail — had a broad discretion in the present case. In this respect, the Court has held in connection with Commission decisions on agriculture:

‘... Where the Commission has such latitude [a wide power for the assessment of complex economic situations], it has a duty not only to identify the factors which influenced its decision but also to state their effect.’¹⁵

42. It must be doubted, however, whether the lack of such a reason withholds from the addressees of the Regulation information which must be communicated in the context of the statement of reasons for a regulation. It may be concluded from the overall structure of the Regulation that the legislature assumed that new engines with a by-pass ratio of less than three would produce worse environmental results than engines with a higher by-pass ratio or completely newly developed aeroplanes. Since the addressees of the Regulation as a rule have expert knowledge in the field of aircraft technology, it must have been possible for them to draw that conclusion. A corresponding explanation would indeed have been desirable, but would in the present case have produced little more clarity. Detailed considerations of questions of engine technology may in any event, according to the case-law referred to above, not be required of the statement of reasons for a regulation of general application. Whether the implied view taken by the legislature is correct is not a question of the statement of reasons but a question of the assessment to be carried out by the legislature.

44. That requirement could be applied by analogy to all legislative measures which are adopted on the basis of a wide power of assessment. However, only in those few cases where the effect of the material factors is unclear, so that the relevant expectations of the legislature require explanation, does it have independent significance. In the present case it was surely clear to all concerned that engines with a high by-pass ratio are because of their design quieter in principle than engines with a lower by-pass ratio. An express reference in the context of the statement of reasons would certainly have been in the interests of clarity, but does not appear to be essential here. Even if this stricter requirement for the statement of reasons were applied, the lawfulness of the contested provision would not therefore be called into question.

¹⁵ — Case C-358/90 *Compagnia Italiana Alcool v Commission* [1992] ECR I-2457, paragraph 42.

45. As regards the alleged departure from international standards and from the WTO Agreement on Technical Barriers to Trade, the duty in Community law to state reasons cannot extend to showing that every provision is consistent with such international rules or giving reasons for any divergence. The latter would even contain an implied admission of a breach of international law.

46. The lawfulness of the use of the by-pass ratio of three as a limiting criterion is not therefore called into question by the Regulation's statement of reasons.

B — *Proportionality*

Submissions of the parties

47. It is common ground between the parties that in accordance with the principle of proportionality a measure must be appropriate and necessary for achieving its objective. They also agree in principle that the contested provision is intended for the protection of the environment, primarily by reducing noise, but also by reducing fuel burn and harmful emissions.

48. Omega takes the position, however, that the Court must examine strictly whether the principle of proportionality has been complied with, because the contested provision diverges from the Chicago Convention, the normal legislative approach of Community law, and the law of the WTO, and seriously affects Omega's business activity without producing a corresponding benefit for the Community. Omega also points out that the legislature did not have to make an urgent decision in this case and was able to rely on definite scientific knowledge when assessing the situation.

49. Omega disputes both the appropriateness and the necessity of the contested provision for achieving the objective. Defining a by-pass ratio takes no account at all of actual noise performance. Omega accepts that by-pass ratio is of importance for the noise profile of an engine, but asserts that the aeroplanes to be re-engined by it would, because of special technical measures, be comparable in all respects with modern aeroplanes under Chapter 3 whose engines have a considerably higher by-pass ratio.

50. Omega has submitted estimated figures for the Omega 707 and comparison values for the Airbus A300 B4-203 and the Boeing 767-200 JT90-7R4D, whose engines each have a by-pass ratio of three or more. According to those figures, the Omega 707 is said to be slightly noisier on take-off and

laterally but slightly quieter on approach. It even appears that the comparison aeroplanes may be noisier on approach than the Omega 707 on sideline measurement.

51. Omega then observes that the emission figures of the engines envisaged, in terms of hydrocarbons, carbon monoxide and oxides of nitrogen, are below the figures for engines of a comparable Airbus A300-B4-200F, and in terms of hydrocarbons and oxides of nitrogen even below the figures for all comparable aeroplanes. For fuel burn too, a Boeing 707 re-engined by Omega is over 40% better than an Airbus A300-B4-200F.

52. Omega emphasises that the provision at issue is in any case not necessary. It is obviously less restrictive to determine limits for noise, gaseous emissions and fuel burn than to regulate the design of aeroplane engines. That method corresponds to the approach previously used in Community law, the Chicago Convention and the WTO.

53. The other parties — the United Kingdom Government, the Irish Aviation Authority, the Council and the Commission — regard the Regulation as proportionate, on the other hand.

54. They point out that because of the wide legislative discretion judicial review is limited to cases of manifest error of assessment, misuse of powers or exceeding the bounds of discretion. In the main proceedings the United Kingdom Department of the Environment referred to the case-law of the Court of Justice in matters of agriculture, according to which a regulation may be declared to be disproportionate only if it is manifestly inappropriate for achieving the objective pursued.

55. The other parties further stress that the Regulation is intended not only to reduce noise but also to limit other harm to the environment. They are of the opinion that the by-pass ratio of an engine is inextricably linked with noise generation, and also with fuel burn and gaseous emissions.

56. According to the United Kingdom Government, it appears from a report by the experts from the United Kingdom Department of the Environment in the main proceedings that the boundary between 'noisy' and 'quiet' engines is to be drawn at a by-pass ratio of three. The Commission observes that it is immaterial in practice whether the line is drawn at a by-pass ratio of three or a by-pass ratio of two. In practice no engines are used with a by-pass ratio between those two figures. The United Kingdom Government refutes in detail the comparisons made by Omega with other types of aeroplanes.

57. The expert from the United Kingdom Department of the Environment submitted in a report for the Commission that in addition to the subjective evaluation of measurements at specific points the influence of the noise measured there on the size of the 'noise footprint' — the area affected by a specified noise level — should also be taken into account. The expert states that a reduction by 5 decibels leads to a reduction of that area on take-off by over 50%, and another 5 decibels would lead to a reduction by over 80%.

ence to a by-pass ratio of three is a less restrictive means than the definition of new standards for noise, gaseous emissions and fuel burn. On the one hand, the number of re-engined aeroplanes is relatively small. On the other hand, the expense of defining new standards is very great, and it would in particular require the involvement of international institutions. The existing noise standards apply to whole aeroplanes, while the standards for certain emissions apply to engines. They are not appropriate for attaining the objectives of the Regulation.

58. The United Kingdom Government and the Irish Aviation Authority state that the definition of noise limits could not serve the more comprehensive aims of the Regulation in the field of environmental protection as well as the contested provision, which may be expected to produce improvements in fuel burn and gaseous emissions as well.

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(1) The criterion of review to be applied

(a) The principle of proportionality

59. The Commission and the Council refer to the high degree of complexity of measuring aircraft noise. The Regulation is also not meant to anticipate the agreement of new standards within the ICAO. They point out, finally, that all those concerned could be aware of the forthcoming regulation from 1998.

61. The Court defines the principle of proportionality as follows:

60. On being specifically asked, the United Kingdom, the Commission and the Council expressly reiterated their view that refer-

'The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures are

appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.’¹⁶

A measure is therefore proportionate only if it is appropriate and necessary and is not disproportionate to the aim pursued.

62. Those principles do not apply only where there is a financial charge, but to any assessment of a conflict between the aims of Community measures and the consequent effects on legally protected interests.¹⁷

(b) Discretion of the legislature

63. The criterion of review to be applied is, however, relativised by the Court:

‘In a sphere in which the Community legislature is called on to undertake com-

plex assessments based on technical and scientific information which is liable to change rapidly, judicial review of the exercise of its powers must be limited to examining whether it has been vitiated by a manifest error of assessment or a misuse of powers or whether the legislature has manifestly exceeded the limits of its discretion.’¹⁸

64. The provision at issue is based on such ‘complex assessments based on technical and scientific information which is liable to change rapidly’. The criterion of judicial review in the context of proportionality is therefore limited in the way described.¹⁹

(c) No restriction of review for appropriateness

65. According to the formulations used in consistent case-law in the field of agriculture, review might even be restricted further. In that field the Court regularly states, when reviewing proportionality, that ‘the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having

16 — Case 265/87 *Schröder* [1989] ECR 2237, paragraph 21.

17 — See, for example, Case C-84/94, cited in note 12, paragraph 57; Case C-233/94 *Germany v Council and Commission* [1997] ECR I-2405, paragraph 54; and Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 89.

18 — *Norbrook Laboratories*, cited in note 17, paragraph 90.

19 — Compare, with respect to transport policy, Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 23 et seq.

regard to the objective which the competent institution intends to pursue'.²⁰ The stages of necessity and proportion between the contested measure and the aim pursued would then no longer have to be examined.²¹

66. Closer consideration shows, however, that cases in which the Court addressed the question of appropriateness alone did not raise any points concerning necessity or reasonableness. Furthermore, there are judgments of the Court²² and the Court of First Instance²³ and opinions²⁴ in which that formulation is used even though questions of necessity and reasonableness were then discussed.

20 — *Schröder*, cited in note 16, paragraph 22; see also Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 14, Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 42, Case C-27/95 *Bakers of Nailsea* [1997] ECR I-1847, paragraph 38, Case C-157/96 *National Farmers' Union* [1998] ECR I-2211, paragraph 61, and Case C-101/98 *UDL* [1999] ECR I-8841, paragraph 31.

21 — As happened, for example, in *Schröder*, paragraph 23, *National Farmers' Union*, paragraph 65 et seq., and *UDL*, paragraph 32 et seq., all cited in note 20.

22 — Case C-17/98 *Emesa Sugar* [2000] ECR I-675, paragraph 53 et seq.

23 — Case T-106/96 *Wirtschaftsvereinigung Stahl v Commission* [1999] ECR II-2155, paragraph 143.

24 — Opinions of Advocate General Cosmas in Case C-185/95 *Affish* [1997] ECR I-4315, point 80, in Case C-375/96 *Zaninotto* [1998] ECR I-6629, point 131 et seq., in Case C-56/99 *Gascogne Limousin Viandes* [2000] ECR I-3079, points 57 and 59, of Advocate General Ruiz-Jarabo Colomer in Case C-103/96 *Eridania Beghin-Say* [1997] ECR I-1453, points 41 and 43, of Advocate General Saggio in Case C-301/98 *KVS International* [2000] ECR I-3583, point 55 et seq., and Advocate General La Pergola in Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, point 69.

67. The conclusion must be that manifest errors of assessment with respect to necessity and the proportion between the contested measure and its aim may also lead to annulment of the contested provision.²⁵

(d) Review of manifest error of assessment

68. In its judgment in *Nölle* the Court defined the requirements for a manifest error in connection with the adoption of anti-dumping regulations.²⁶ The finding of dumping necessary in such cases may be based on a comparison of the prices charged by the manufacturers of the product in question in a comparable country. The Court then verifies 'whether the institutions neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and whether the information contained in the documents in the case were considered with all the care required for the view to be taken that the normal value was determined in an appropriate and not unreasonable manner.'

69. In the context of that verification the Court held that a finding that there has been such a manifest error presupposes

25 — Compare the judgment in *SAM Schifffahrt and Stapf*, cited in note 19, paragraph 67 et seq.

26 — Case C-16/90 [1991] ECR I-5163, paragraph 13.

proof of the error. If such proof is not possible, that goes to the onus on the person who asserts that a regulation is unlawful.²⁷

part of the legislature, the Court may not ignore that. That is all the more so if the basic facts must have already been known to the legislature during the legislative procedure.

70. If, moreover, already in the legislative procedure specific facts have been submitted which contradict the view taken by the legislature, then it may be obliged to take those facts into account.²⁸

(2) Application to the reference for a preliminary ruling

71. It must be conceded that findings from anti-dumping cases may not be applied without further ado to other proceedings. Although regulations imposing anti-dumping duties by their nature and scope are of a legislative nature, they may be of direct and individual concern to producers, exporters or importers.²⁹ They are therefore to be classified by their nature as between legislation and individual decision. However, the consequences of this particularity are limited essentially to procedural law, in particular the standing of the undertakings concerned to bring proceedings. The findings in the *Nölle* judgment on the criterion of review for manifest errors of assessment, on the other hand, raise no particular problems when transferred to legislative activity in the classic sense. If it can be proved beyond doubt, in the context of a reference for a preliminary ruling, that there was an error of assessment on the

72. According to the above considerations, the contested provision is based on a manifest error of assessment if it is shown beyond doubt

- that it is not appropriate for reducing environmental damage by aeroplanes, especially noise,
- that it does not constitute the least restrictive means of achieving that objective equally effectively, or

27 — Ibid., paragraph 17.

28 — Ibid., paragraph 32.

29 — Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 21, with further references.

- if the burden caused by it is not proportionate to that aim.

(a) Legislative objective

73. The legislative objective of the reference to a by-pass ratio of three or more is the reduction of environmental harm caused by air traffic, with respect in particular to noise, fuel burn and harmful emissions. The basis of that determination was the view that engines with a by-pass ratio of three or more are not as noisy, consume less fuel and also emit less harmful substances than engines with a by-pass ratio of less than three.

aeroplanes. The figures submitted by Omega do not, however, impose the conclusion that its re-engined aeroplanes would be just as quiet as aeroplanes constructed with the aim of complying with the noise standards of Chapter 3. The measurements on take-off and laterally at least are higher than for the comparison aeroplanes mentioned. If one accepts as true Omega's assertion that the human ear can perceive a difference only from noise differences of 3 decibels, then Omega's aeroplanes would be audibly noisier measured laterally, but on take-off there would be no perceivable difference, and their advantage on approach would be at the margin of what is audible. It would in principle be within the legislature's discretion in that situation to attach greater weight to the disadvantages of Omega's aeroplanes than to their advantages.

(b) Appropriateness

74. There is a manifest error in the assessment of appropriateness if it is the case that aeroplanes under Chapter 2 which are equipped with new engines whose by-pass ratio is below three are at least comparable, as regards noise, fuel burn and emissions, with aeroplanes under Chapter 3.

76. Moreover, Omega has not measured these figures in practice, but can only produce estimates. Omega has not therefore shown convincingly that the provision at issue was manifestly inappropriate for attaining the objective of improved protection of the environment.

75. As far as can be seen, the parties are not in dispute over fuel burn and harmful emissions. Only with respect to noise do the two sides disagree in their assessment of the noise to be expected from re-engined

77. The appropriateness of the by-pass ratio as a criterion for quieter aeroplanes is also supported, finally, by the fact that the Community legislature has already based other rules on the assessment that a greater by-pass airflow is likely to mean quieter engines. A by-pass ratio of two is

used in Article 2(1) of Directive 92/14 and Article 4(e) of Directive 89/629/EEC³⁰ as an alternative to compliance with noise limits. This alternative to compliance with noise limits is already suggested in Resolutions A31-11 and A32-8 of the ICAO Assembly, according to which the Member States, if anticipating the application of the limits in Chapter 3, are to provide for an exception for aeroplanes having engines with a high by-pass ratio.

78. It cannot therefore be said that the criterion of by-pass ratio is inappropriate for reducing aeroplane noise.

(c) Necessity

79. A manifest error in the assessment of necessity presupposes that other measures can be adopted which are just as appropriate for achieving the aim pursued, but are less burdensome for manufacturers in the position of Omega and at least no more burdensome for third parties.

80. A possibility here is the definition of specific standards for noise, fuel burn and

emissions separately, which may even, depending on the legislative objective, go beyond the requirements of Chapter 3. That would be at least as suitable for achieving the legislative objective, since it would guarantee compliance with those standards in any event. The criterion of by-pass ratio alone, by contrast, does not guarantee any precise standards for the individual factors. That criterion allows only a presumption that the aeroplanes certificated will perform better than those not certificated. At least in theory, that criterion would, however, also permit the use of aeroplanes or engines with less good performance.

81. The definition of specific standards would at the same time be less burdensome, because it would not restrict the freedom of choice of designers and airlines as regards the technical solution to be used for attaining the regulatory objective. As Omega rightly submits, that view is confirmed in the law of public procurement both at Community level and at WTO level. Article 18(4) of Directive 93/38/EEC,³¹ Article 14(6) of Directive 92/50/EEC³² and Article VI(2)(a) of the Agreement on Government Procurement³³ each provide that requirements as to the technology used are permitted only in

30 — Council Directive of 4 December 1989 on the limitation of noise emission from civil subsonic jet aeroplanes, OJ 1989 L 363, p. 27.

31 — Council Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199, p. 84.

32 — Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209, p. 1.

33 — Annex 4 to the Agreement establishing the World Trade Organisation, Marrakesh, 15 April 1994, OJ 1994 L 336, p. 275.

exceptional cases and on objective grounds. The same approach may also be found in Article 2.8 of the Agreement on Technical Barriers to Trade.³⁴

82. The arguments put forward in the present case against such standards fail to convince. There is no apparent reason why those standards should be confined to noise without taking reasonable account of fuel consumption or harmful emissions. The Commission may be right in its view that ascertaining whether a type of aeroplane complies with such standards is more difficult than simply taking account of the by-pass ratio. However, it also submits that noise values at least are already ascertained in the context of certification, still necessary, of the aeroplane type for the purpose of compliance with Chapter 3. Stricter standards could link up with that examination. Moreover, there should be no objection to imposing the costs of additional examinations on the person seeking to have a type of aeroplane certificated.

83. The legislature's presumption, in principle not refuted by the submissions of the parties to the present proceedings, that re-engined aeroplanes whose engines have a by-pass ratio of three or more are quieter could even — depending on how strict

such standards were — justify exempting those aeroplanes from the, possibly cost-intensive, additional demonstration of compliance with such standards.

84. As regards anticipation of stricter international standards, European rules may well prejudice them politically, but certainly not as a matter of law. Nor is it apparent why international bodies should be involved in setting new standards, while an additional criterion not used internationally may be determined unilaterally.

85. Further indications of the lack of necessity of a rule which fastens exclusively on by-pass ratio are the earlier references to by-pass ratio in Directives 92/14 and 85/629 and in ICAO Resolutions A31-11 and A32-8. They provide that aeroplanes may be certificated if they either comply with noise limits or have a by-pass ratio of two or more or a high by-pass ratio as the case may be. Those provisions manifestly proceed from the assessment that aeroplanes with lower by-pass ratios too may be able to comply with noise limits.

86. Finally, it was explained at the hearing that the draft of a new Chapter 4, to be decided on shortly, of the annexes to the Chicago Convention would determine the next generation of noise standards not by reference to by-pass ratio but solely on the basis of specific noise limits.

³⁴ — See point 16 above.

87. Consequently, the introduction of the by-pass ratio as the criterion for prohibiting the use of re-engined aeroplanes is based on a manifest error of assessment with respect to necessity. The provision is therefore invalid.³⁵

That distinction is not helpful, however, as all international agreements rest on that basis. Moreover, in that case the element of mutuality had been irrelevant, since it concerned the obligations under international law of subjects of international law. The Court should therefore abandon that line of case-law.

C — GATT 1994 and the Agreement on Technical Barriers to Trade

Submissions of the parties

88. In Case C-27/00, Omega stated that, subject to a change in the Court's case-law, it would not pursue this point further in view of the judgment in Case C-149/96.³⁶ In Case C-122/00, however, Omega criticises that judgment, aiming at a ruling that the contested provision is void on the ground of breach of WTO law.

89. The Court — according to Omega — distinguishes, when reviewing the compatibility of Community measures with international agreements, according to whether those measures are based on 'reciprocal and mutually advantageous arrangements'.

90. Even if the Court wishes to continue in principle to exclude direct effect of WTO law in the Community, it can still review whether individual provisions are sufficiently clear and unconditional to permit direct application. Unlike with other provisions of WTO law, in the case of the provisions of the Agreement on Technical Barriers to Trade³⁷ that condition is satisfied. The provision at issue clearly infringes those provisions in several respects, which Omega describes in detail.

91. The United Kingdom Government, the Irish Aviation Authority, the Commission and the Council refer to the judgment in Case C-149/96, according to which a possible conflict with WTO law cannot affect the validity of a regulation. They submit in the alternative that the provisions of the Agreement on Technical Barriers to Trade are not infringed.³⁷

35 — A prohibition of re-engined aeroplanes would moreover appear open to challenge for the same reasons.

36 — *Portugal v Council* [1999] ECR I-8395, paragraph 47.

37 — See point 16 above.

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92. Omega misunderstands the basis of the Court's case-law. The decisive point is that legal disputes on the content of WTO law are based on negotiations between the Governments. The withdrawal of unlawful measures is indeed the solution given preference in WTO law, but WTO law does also permit other solutions — for example, settlement, payment of compensation or suspension of concessions. The Court set this out in detail in its judgment in Case C-149/96.³⁸

93. The Community's position in those negotiations would be seriously affected if Community law recognised a unilateral direct effect of obligations under WTO law.

94. Direct reliance on rules of WTO law as against measures taken by WTO members appears inappropriate from the point of view of WTO law as well, however. Regardless of their wording, all provisions of WTO law are subject to a general reservation which accords the States concerned various possibilities of reacting to a breach.

95. It is therefore not for the Court but for the WTO, or the members of the WTO, to ensure that WTO law is observed in the legal systems concerned. Direct effect of WTO rules is clearly not part of their legislative content. Such content may not be ascribed, at Community level, to WTO law in its original form but at most in the form of transposition measures. In that context WTO law may be (indirectly) significant.³⁹ Direct effect of WTO law in the legal systems of the WTO members cannot, on the other hand, sensibly be brought about unilaterally by individual legal systems, but only at WTO level.

96. The conclusion in the judgment in Case C-149/96, namely that 'having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions',⁴⁰ must therefore be maintained. The exceptions mentioned there do not apply here. The fact that the provisions of the Agreement on Technical Barriers to Trade⁴¹ referred to above are perhaps sufficiently precise and unconditional in their wording to be amenable to direct application cannot lead to a different conclusion. They are subject to the general condition of WTO law that the members of the WTO are to comply with their obligations not by direct effect of

38 — Cited in note 36, paragraph 36 et seq.

39 — Compare Case C-149/96, cited in note 36, paragraph 49, with further references.

40 — Cited in note 36, paragraph 47.

41 — See point 16 above.

WTO law in their legal systems but exclusively by specific transposition of those obligations.

99. Omega also objects to the fact that re-engining with engines with a by-pass ratio below three is equated with modifying aeroplanes by the installation of 'hushkits'.

D — *Equal treatment*

Submissions of the parties

97. Omega considers that the contested provision unjustifiably differentiates between aeroplanes which have been re-engined with engines with a by-pass ratio below three and noisier aeroplanes which can continue to be used at European airports. Recital 5 in the preamble to the Regulation shows that re-engined aeroplanes can attain the same performance as modern Chapter 3 aeroplanes. Re-engining does not therefore justify the additional requirement of a by-pass ratio of three or more.

98. Omega points out that there are aeroplanes under Chapter 3 — MD 80s — which were fitted as new with the engines it intends to use. The engine envisaged also achieves similar results, as regards noise, fuel consumption and emissions, as engines with a by-pass ratio of three or more.

100. Finally, Omega asserted in its pleadings in Case C-27/00 that the fixing of the by-pass ratio discriminates against United States manufacturers, since the prohibition of re-engined aeroplanes was justified by reference to engines of the American manufacturer Pratt & Whitney. At the hearing, however, the representative of Omega in Case C-122/00 stressed that he had not made that submission.

101. The United Kingdom Government submits, with respect to alleged discrimination against United States manufacturers, that US and European manufacturers offer engines with a by-pass ratio of three or more. The engine used by Omega is also not the only one with a by-pass ratio below three, as at least one Russian engine of that kind is probably still produced. Moreover, the idea of discrimination against American manufacturers is far-fetched in view of international interconnections. The United Kingdom Government further sets out in detail why the comparisons with individual types of aeroplanes by Omega are mistaken.

102. The Irish Aviation Authority takes the view that it is in any event justified to subject re-engined aeroplanes to stricter requirements than older aeroplanes. Since the by-pass ratio is moreover decisive for noise performance, engines with a higher by-pass ratio may be treated differently from engines with a low by-pass ratio. Finally, American and European undertakings are affected equally by the Regulation.

103. The Commission and the Council emphasise that no reasons are given for this question and therefore base their observations on assumptions. Differentiating according to by-pass ratio is justified by the consequences of the by-pass ratio for noise, fuel burn and gaseous emissions. The distinction as against aeroplanes equipped from the outset with the same engine is justified by the fact that the latter were also certificated originally under Chapter 3. Equal treatment with re-engined aeroplanes follows from the fact that in both cases the original construction is considerably modified. Any disadvantageous treatment of American manufacturers is to be dealt with, finally, only in the context of the questions referred concerning WTO law.

parable situations must not be treated differently and different situations not treated alike unless such treatment is objectively justified.⁴²

105. Its special importance alongside the principle of proportionality lies in the fact that it prohibits the introduction of measures which are proportionate in principle if they affect comparable situations differently without objective justification. For this element of review, it is thus irrelevant whether — as put forward here — the reference to a by-pass ratio of three is not necessary. What matters is whether like situations have been treated differently without objective justification.

106. Omega adduces three different comparison groups:

— European and United States engine manufacturers;

— re-engined aeroplanes and Chapter 3 aeroplanes; and

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104. It is settled case-law that the principle of equal treatment requires that com-

⁴² — Case C-292/97 *Karlsson* [2000] ECR I-2737, paragraph 39, and Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 25.

— re-engined aeroplanes with engines with a by-pass ratio below three and aeroplanes merely modified with hush-kits.

107. No sufficient indications have been submitted of direct or covert disadvantageous treatment of US undertakings by the reference to a by-pass ratio of three. The fact that no undertaking located in the European Community and only one remaining American undertaking manufactures engines with a by-pass ratio below three if anything confirms the Commission's view that such engines no longer correspond to the state of technology.

108. The distinction between re-engined or modified aeroplanes and aeroplanes originally designed for the requirements of Chapter 3 is justified above all by considerations of protecting the existing position. Manufacturers who have designed an aeroplane to meet Chapter 3 standards and airlines which have acquired those aeroplanes in principle enjoy greater protection of legitimate expectations with respect to the usability of those aeroplanes than manufacturers and owners of aeroplanes which as originally designed do not meet those standards. The latter must have reckoned with the fact that their aeroplanes would no longer be usable in their existing form when the standards of Chapter 3 were introduced.

109. Moreover, it must be presumed that newer aeroplanes which were already designed with a view to the standards of Chapter 3 will in principle perform better than older aeroplanes which meet the standards under Chapter 3 only as a result of being modified.

110. Re-engined aeroplanes are thus not comparable with aeroplanes which were originally designed in accordance with the requirements of Chapter 3.

111. As regards the comparison between re-engined aeroplanes with a by-pass ratio below three and aeroplanes which have merely been equipped with hushkits, Omega complains not of unequal treatment but of equal treatment of the two groups.

112. The two groups of aeroplanes are made subject by the Regulation to the same prohibition and the same exceptions. They differ, however, in that modification involves reduced engine performance together with increased fuel burn and emissions, whereas new engines already meet the corresponding noise limits in their normal operation. A side-effect of those circumstances is that modified aeroplanes often comply only marginally with the noise limits under Chapter 3, as any further

improvement in noise emission will presumably cause loss of performance.

113. Not every difference between comparison groups, however, can preclude treating them in the same way, since otherwise any general rule would be impossible. Rather, it must be the case that the differences between the comparison groups actually require different treatment. As already stated, the legislature was entitled to assume that re-engining with engines with a by-pass ratio below three will lead to worse noise results than re-

engining with engines with a higher by-pass ratio. That would also apply to a comparison with aeroplanes which were designed from the outset in accordance with Chapter 3. However, modification with hushkits would also lead to poorer noise results. From the point of view of the principle of equal treatment, the common points of the comparison groups adduced are preponderant, not the differences between them.

114. There is therefore no indication of a breach of the principle of equal treatment.

VI — Conclusion

115. I therefore propose the following ruling:

Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) is invalid, in so far as in Articles 2 and 3 it prohibits the operation in the Community of civil subsonic jet aeroplanes which have been modified to meet Chapter 3 standards by being completely re-engined with engines having a by-pass ratio below three.