Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 19 July 2016[1]

Case C-272/15

Swiss International Air Lines AG
v
The Secretary of State for Energy and Climate Change,
Environment Agency

(Request for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom))

(Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading within the Union — Decision No 377/2013/EU — Validity — Temporary derogation from the obligation to monitor and report emissions and to surrender emission allowances in respect of flights between Member States of the EEA and most third countries — Exclusion of flights between Member States of the EEA and Switzerland — Different treatment of third countries — General principle of equal treatment — Not applicable)

I – Introduction

1. The scheme for greenhouse gas emission allowance trading within the European Union ('EU ETS'), instituted by Directive 2003/87/EC,[2] is applicable from 1 January 2012 onwards to emissions from aircraft flights to and from the Member States of the European Economic Area (EEA).[3]

2. However, Decision No 377/2013/EU[4] temporarily suspended the application of that scheme to emissions from flights between the Member States of the EEA and most third countries. Flights between the Member States of the EEA and certain areas or third countries closely connected or associated with the Union, including Switzerland, were nevertheless excluded from that moratorium.[5]

3. By its request for a preliminary ruling, the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), principally questions the Court about the validity of that decision in so far as it establishes a difference in treatment as between flights to and from Switzerland and flights to and from other third countries.

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

3 — See points 5 and 6 of this Opinion.

4 — Decision of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ 2013 L 113, p. 1).

5 — See points 11 to 16 of this Opinion.

II – Legal framework

A – *EU law*

1. Directive 2003/87

4. According to recital 5 thereof, Directive 2003/87 is intended to contribute to the fulfilment by the European Union and its Member States of the commitments given under the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[6]

5. Initially, the EU ETS did not apply to emissions from aviation activities. However, as a result of the amendments made to Directive 2003/87 by Directive 2008/101/EC,[7] all flights arriving at and departing from aerodromes within the European Union have been covered by the EU ETS since 1 January 2012.[8]

6. Decisions No 146/2007[9] and No 6/2011[10] of the EEA Joint Committee incorporated Directives 2003/87 and 2008/101 respectively into the Agreement on the European Economic Area ('the EEA Agreement').[11]

7. In accordance with Article 3e of Directive 2003/87, in respect of each calendar year, each aircraft operator may apply for the allocation by the Member States of allowances, free of charge. Article 3d of that directive provides for the auctioning by the Member State of additional allowances. In accordance with Article 3(a) of the directive, each allowance, whether allocated free of charge or for consideration, authorises the holder thereof to emit one tonne of carbon dioxide equivalent during the period specified. Allowances may be transferred subject to the conditions set out in Article 12(1) of the directive.

8. Pursuant to Article 12(2a) of Directive 2003/87, the Member States are to ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances corresponding to the total emissions produced during the previous calendar year by its aviation activities.

9. Article 14(3) of the directive requires the Member States to ensure that each aircraft operator monitors and reports the emissions during the preceding calendar year from the aircraft which it operates.

10. Article 16(3) of the directive provides that the Member States are to ensure that any aircraft operator that fails to surrender sufficient allowances to fulfil its obligation under Article 12(2a) of the directive is held liable for the payment of an excess emissions penalty. Under Article 16(5), any aircraft operator that fails to comply with the requirements of Directive 2003/87 may, under certain circumstances, have an operating ban imposed on it.

6 — The protocol was approved on behalf of the European Community by Council Decision 2002/358/EC of 25 April 2002 (OJ 2002 L 130, p. 1).

7 — Directive of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

8 — Article 2(1) of and point 6 of Annex I to Directive 2003/87.

9 — Decision of the EEA Joint Committee of 26 October 2007 amending Annex XX (Environment) to the EEA Agreement (OJ 2008 L 100, p. 92).

10 — Decision of the EEA Joint Committee of 1 April 2011 amending Annex XX (Environment) to the EEA Agreement (OJ 2011 L 93, p. 35).

11 — Agreement of 2 May 1992 (OJ 1994 L 1, p. 3).

2. Decision No 377/2013

11. Decision No 377/2013 introduced a moratorium on certain requirements laid down in Directive 2003/87. Decision No 50/2013 of the EEA Joint Committee [12] incorporated that decision into the EEA Agreement.

12. Recital 5 of Decision No 377/2013 refers to the progress made within the International Civil Aviation Organisation (ICAO) 'towards the adoption … of a global framework for emissions reduction policy which facilitates the application of market-based measures to emissions from international aviation, and on the development of a global market-based measure (MBM)'. According to recital 6 of that decision, the objective of the decision was to 'facilitate this progress and provide momentum [for it]' by deferring the enforcement of the requirements laid down in Directive 2003/87 in so far as they relate to flights to and from aerodromes in countries outside the Union, with the exception of members of the European Free Trade Association (EFTA), dependencies and territories of States in the EEA and countries having signed a Treaty of Accession with the Union.

13. Recital 9 of that decision states:

'The derogation provided for by this Decision should not affect the environmental integrity and the overarching objective of the Union's climate change legislation, nor should it result in distortions of competition. Accordingly, and so as to preserve the overarching objective of [Directive 2003/87], which forms part of the legal framework for the Union to achieve its independent commitment to reduce its emissions to 20% below 1990 levels by 2020, that Directive should continue to apply to flights from, or arriving in, aerodromes in the territory of a Member State [and] to or from aerodromes in certain closely connected or associated areas or countries outside the Union.'

14. Article 1 of Decision No 377/2013 provides, 'by way of derogation from Article 16 of [Directive 2003/87], Member States shall take no action against aircraft operators in respect of the requirements set out in Article 12(2a) and Article 14(3) of that Directive for the calendar years 2010, 2011 and 2012 in respect of activity to and from aerodromes in countries outside the Union that are not members of EFTA, dependencies and territories of States in the EEA or countries having signed a Treaty of Accession with the Union, where such aircraft operators have not been issued free allowances for such activity in respect of 2012 or, if they have been issued such allowances, have returned, by the 30th day following the entry into force of this Decision, to Member States for cancellation a number of 2012 aviation allowances corresponding to the share of verified tonne-kilometres of such activity in the reference year 2010'.

15. The category of 'members of EFTA' referred to in that provision specifically designated Switzerland, since the three other EFTA Member States, Iceland, Liechtenstein and Norway, are also members of the EEA and were therefore not in any event covered by the moratorium, since the EU ETS continued to apply to flights within the EEA. [13] The category of 'dependencies and territories of States in the EEA' covered overseas countries and territories of EEA States. [14] In so far as concerns the category of 'countries having signed a Treaty of Accession with the Union', that included Croatia alone. Therefore, the only flights to or from third countries (States not members of the EEA) that were excluded from the moratorium were those to or from Switzerland or Croatia. Following the latter's accession to the European Union on 1 July 2013, Switzerland became the only third country excluded from the moratorium.

12 — Decision of the EEA Joint Committee No 50/2013 of 30 April 2013 amending Annex XX (Environment) to the EEA Agreement (OJ 2013 L 231, p. 24).

13 — See the Communication from the Commission — Guidance on the implementation of Decision No 377/2013/EU of the European Parliament and of the Council derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ 2013 C 289, p. 1) ('the Commission guidelines') (point 2.1.1).

14 — See point 2.1.2 of the Commission guidelines.

16. In accordance with Article 6 thereof, Decision No 377/2013 applied with effect from 24 April 2013, that is to say, a few days before the deadline of 30 April 2013 set in Article 12(2a) of the directive for the surrender of allowances corresponding to the emissions produced during 2012.

B – *United Kingdom law*

17. By the Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2013 ('the national regulations at issue'), the Secretary of State for Energy and Climate Change (United Kingdom) amended the national rules for the greenhouse gas emission trading scheme (transposing Directive 2003/87 into national law) so as to implement Decision No 377/2013.

III – The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

18. Swiss International Air Lines AG ('Swiss Airlines'), an airline company established in Switzerland, acquired, for the year 2012, a certain number of greenhouse gas emission allowances, both free of charge and for consideration. That company surrendered the allowances corresponding to the emissions from the flights between the Member States of the EEA and Switzerland which it had operated during 2012.

19. Swiss Airlines brought an application before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom), seeking the annulment of the national regulations at issue in so far as they excluded flights between EEA Member States and Switzerland from the moratorium on the application of the EU ETS. In support of its application, it argued that the Decision No 377/2013, which the national regulations at issue had transposed into national law, was inconsistent with EU law. More specifically, Swiss Airlines argued that the decision infringed the principle of equal treatment by excluding the abovementioned flights from the moratorium while including within the moratorium flights between the EEA Member States and most other third countries.

20. Swiss Airlines also applied for the cancellation of its surrender of allowances in respect of flights between EEA Member States and Switzerland and the consequent rectification of the registry of allowances. In the alternative, it claimed restitution of the value of the allowances that it had been required to purchase and then surrender, or any other form of appropriate relief.

21. That application was dismissed, whereupon Swiss Airlines brought an appeal before the referring court.

22. By decision of 24 March 2015, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does [Decision No 377/2013] infringe the general EU principle of equal treatment in so far as it establishes a moratorium on the requirements to surrender emissions allowances imposed by [Directive 2003/87] in respect of flights between [the EEA] and almost all non-EEA States, but does not extend that moratorium to flights between EEA States and Switzerland?

(2) If so, what remedy must be provided to a claimant in the position of [Swiss Airlines], which has surrendered emissions allowances in respect of flights that took place during 2012 between EEA States and Switzerland, to restore that claimant to the position it would have been in but for the exclusion from the moratorium of flights between EEA States and Switzerland? In particular:

(a) Must the register be rectified to reflect the lesser number of allowances that such a claimant would have been required to surrender if flights to or from Switzerland had been included in the moratorium?

(b) If so, what (if any) action must the national competent authority and/or the national court take to procure that the additional allowances surrendered are returned to such a claimant?

(c) Does such a claimant have a right to claim damages under Article 340 TFEU against the European Parliament and the Council for any loss that it has suffered by reason of having surrendered additional allowances as a result of [Decision No 377/2013]?

(d) Must the claimant be granted some other form of relief and, if so, what relief?'

23. Swiss Airlines, the Italian and United Kingdom Governments, the European Parliament, the Council of the European Union and the European Commission have lodged written observations. All of those parties, with the exception of the Italian Government, were represented at the hearing on 4 May 2016.

IV – Assessment

A – *Preliminary remarks*

24. By way of preliminary argument — without disputing the Court's jurisdiction or the admissibility of the questions referred for a preliminary ruling — the Commission contends that the United Kingdom has infringed EU law by adopting, by means of the national regulations at issue, measures to transpose Decision No 377/2013 into national law.

25. The Commission states that the national regulations at issue amended the national rules transposing Directive 2003/87, setting out the content of Decision No 377/2013. Those regulations thereby concealed the legal nature of the provisions of the decision and their direct effect. At the hearing, the Commission requested the Court, in substance, to declare the national regulations at issue invalid on those grounds.

26. I would point out in this connection that, in proceedings brought under Article 267 TFEU, the Court has no jurisdiction to rule upon the compatibility of provisions of domestic law with EU law. [15]

15 — See, inter alia, judgment of 23 March 2006 in *Enirisorse* (C-237/04, EU:C:2006:197, paragraph 24 and the case-law cited).

27. The Court may nevertheless provide the national court with an interpretation of EU law on such points as may enable that court to determine the issue of the compatibility of domestic law for the purposes of its ruling.[16] However, in the present proceedings, that too would, in my view, exceed the Court's jurisdiction. The argument which the Commission puts forward addresses an issue which the referring court has not raised. In accordance with the division of jurisdiction provided for by Article 267 TFEU, it is for the national court alone to determine the subject matter of the questions which it wishes to refer to the Court.[17]

28. That being so, I think it unnecessary for the Court to reply to the preliminary observations submitted by the Commission.

29. In any event, I am inclined to the view that EU law does not preclude the adoption of measures transposing Decision No 377/2013 into national law.

30. Admittedly, the Court has repeatedly held that the adoption by Member States of measures of reception of regulations is an infringement of EU law to the extent that it obstructs their direct application, provided for by the second paragraph of Article 288 TFEU, and thus jeopardises their simultaneous and uniform application throughout the European Union.[18] In particular, Member States may not adopt measures which conceal from those subject to them the fact that a legal rule is of EU law origin or the consequences which arise from that legal rule.[19]

31. In this instance, Decision No 377/2013 requires the Member States to refrain from applying certain measures provided for in Directive 2003/87. Although the Member States must give effect to that decision, adopting certain administrative measures where necessary,[20] its application is not dependent on its transposition or incorporation into national law. Accordingly, Decision No 377/2013 makes no provision for its transposition by the Member States.[21] Pursuant to Article 6 thereof, it applies as from the date of its adoption, and it seems to me that it is therefore, like a regulation, directly applicable.[22]

16 — See, inter alia, judgment of 23 March 2006 in *Enirisorse* (C-237/04, EU:C:2006:197, paragraph 24 and the case-law cited).

17 — See judgments of 3 October 1985 in *CBEM* (311/84, EU:C:1985:394, paragraphs 9 and 10), and 12 February 2004 in *Slob* (C-236/02, EU:C:2004:94, paragraph 29). On the other hand, the Commission is entitled to put forward this argument in an action for failure to fulfil obligations brought against the United Kingdom under Article 258 TFEU (see judgments of 7 February 1973 in *Commission* v *Italy* (39/72, EU:C:1973:13, paragraph 15), and 28 March 1985 in *Commission* v *Italy* (272/83, EU:C:1985:147, paragraph 4)).

18 — See, to that effect, judgments of 7 February 1973 in *Commission* v *Italy* (39/72, EU:C:1973:13, paragraphs 16 to 18); 10 October 1973 in *Variola* (34/73, EU:C:1973:101, paragraph 10); and 15 November 2012 in *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa* (C-539/10 P and C-550/10 P, EU:C:2012:711, paragraphs 85 to 87).

19 — See, inter alia, judgments of 10 October 1973 in *Variola* (34/73, EU:C:1973:101, paragraph 11), and 15 November 2012 in *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa* (C-539/10 P and C-550/10 P, EU:C:2012:711, paragraph 87 and the case-law cited).

20 — See, in particular, point 3.3.2 (on the cancellation of allowances) and point 3.3.3 (on the publication of returns of allowances) of the Commission guidelines. It is clear from the case-law (see, in particular, judgment of 5 May 2015 in *Spain* v *Commission* (C-147/13, EU:C:2015:299, paragraph 94 and the case-law cited)) that the prohibition on the adoption of measures of reception of regulations into national law is without prejudice to the adoption by the Member States of 'the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of [such regulations]'.

21 — I do not concur with the interpretation proposed by the United Kingdom Government according to which the reference in Article 4 of Decision No 377/2013 to the 'implementation' of the decision implies that the Member States are required adopt measures to transpose the decision into national law. More precisely, Article 4 provides that 'the Commission shall issue the guidance necessary for the implementation of [the] Decision'. To my mind, implementation in this context is merely a reference to the Member States' obligation to apply Decision No 377/2013 in accordance with the obligations which that decision imposes on them. That reading is corroborated by the Commission guidelines, drafted pursuant to Article 4, which are aimed at achieving a more consistent 'application' of the decision by the competent authorities in the Member States (see, in particular, point 1 of the Commission guidelines).

22 — On the distinction between direct applicability and direct effect, see Winter, J.A., 'Direct applicability and direct effect: two distinct and different concepts in Community law', CMLR, 1972, vol. 2, pp. 425 to 438. To my mind, the provisions of Decision No 377/2013 also have direct effect since they impose obligations on the Member States clearly, precisely and unconditionally, without being contingent on any discretionary implementing measure (see judgment of 15 January 1986 in *Hurd* (44/84, EU:C:1986:2, paragraph 47)). Corresponding to the obligations imposed on the Member States are the rights which aircraft operators may invoke before national courts.

32. Assuming that the principle stated in point 30 of this Opinion with reference to regulations also applies to decisions, it nevertheless does not absolutely prohibit the adoption of measures of reception into national law. Indeed, the Court has acknowledged that, under certain circumstances, the provisions of a regulation may be incorporated into such measures, in particular for the sake of the internal coherence of provisions applying the regulation and in order to make them comprehensible to the persons to whom they apply.[23]

33. In my opinion, circumstances of that kind are present in this case. Given the link between Decision No 377/2013 and Directive 2003/87, the Member States should be allowed to adopt measures of reception of that decision into domestic law so as to make it easy to understand the scope of the directive, and in the interests of legal certainty. Indeed, in the absence of such measures of reception, national rules transposing the directive would fail to reflect the moratorium instituted by Decision No 377/2013. Aircraft operators might thereby be misled as to the scope of the obligations imposed on them by the national rules. Moreover, since such measures are inextricably linked to the national rules transposing the directive, they are not likely to conceal the fact that the obligations which they impose arise under EU law.

34. In the main proceedings, the referring court has fully acknowledged the origin of the rules provided for by the national regulations at issue. Indeed, the referring court has rightly taken the view that, since the national regulations at issue incorporate Decision No 377/2013 into domestic law, their validity is dependent upon the validity of the decision, which is the reason why it has made the present reference for a preliminary ruling.

B – *The nature of the alleged difference in treatment*

35. Article 1 of Decision No 377/2013 essentially requires the Member States to refrain from penalising aircraft operators in the event that they fail to fulfil their obligations under Directive 2003/87 to monitor and report emissions produced during the years 2010, 2011 and 2012 and to surrender allowances corresponding to emissions produced during the year 2012,[24] provided that those emissions are from flights between Member States of the EEA and countries outside the European Union — with the notable exception of Switzerland.[25]

36. By excluding flights to and from Switzerland from the moratorium, that provision gives rise to different treatment of air routes on the basis of the place of departure and the destination of the flight. As the Parliament has argued, distinguishing between air routes in that way is the equivalent of different treatment of third countries.[26] Air routes are, in fact, defined exclusively by reference to the countries which they connect. That different treatment of third countries results, by extension, in different treatment of aircraft operators according to the flights they operate, that is to say, on the basis of a geographical criterion relating to their activities.

23 — Judgment of 28 March 1985 in *Commission* v *Italy* (272/83, EU:C:1985:147, paragraph 27). See also Opinion of Advocate General Kokott in *Skoma-Lux* (C-161/06, EU:C:2007:525, point 55).

24 — The derogation only applies on the condition that, if it has received free allowances for the year 2012, the airline operator has returned a number of allowances corresponding to emissions from flights covered by the derogation.

25 — Following Croatia's accession to the European Union, Switzerland became the only third country excluded from the moratorium (see point 15 of this Opinion).

26 — Similarly, the Court has held that different treatment of goods depending on their origin constitutes different treatment of third countries (see, in particular, judgments of 22 January 1976 in *Balkan-Import-Export* (55/75, EU:C:1976:8, paragraph 14); 28 October 1982 in *Faust* v *Commission* (52/81, EU:C:1982:369, paragraph 25); and 10 March 1998 in *Germany* v *Council* (C-122/95, EU:C:1998:94, paragraph 56)).

37. Moreover, while the moratorium applies irrespective of the nationality of the aircraft operator or the place where its registered office is located, operators established in Switzerland, such as Swiss Airlines, could be more seriously affected by the exclusion of flights to and from Switzerland than operators established in other third countries, to the extent that there is a greater focus in their activities on the operation of such flights.

38. In order to remove any possible doubt surrounding this matter, I would observe that the general principle of equal treatment on the basis of nationality or registered office,[27] to which the provisions of the TFEU on freedom of movement give specific expression, solely benefits nationals of the Member States and companies having their registered office in the European Union.[28] Further, Article 3 of the EC-Switzerland Agreement on air transport,[29] which enshrines the principle of non-discrimination on the ground of nationality in the field of application of that agreement, prohibits, in my opinion, solely discrimination between companies established in Switzerland and those established in the European Union (and not between companies established in Switzerland and those established in third countries). It is undisputed that Decision No 377/2013 confers no advantage on aircraft operators established in the European Union over those established in Switzerland. The moratorium that decision puts in place covers neither flights between the Member States of the EEA and Switzerland, nor flights within the EEA. Moreover, Swiss Airlines has not alleged the existence of any indirect discrimination on the basis of the nationality of aircraft operators or the place where their registered office is located.

39. It is therefore necessary, in order to answer the first question, to consider the validity of Decision No 377/2013 in the light of the general principle of equal treatment which circumscribes the powers of the EU institutions and which requires, in general, that ‘comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified’.[30]

C – *The scope of ‘the Balkan principle’ (first question)*

1. Introductory remarks

40. Traditionally, relations between States and international organisations — in their capacity as subjects of public international law — are governed by public international law. As the Commission observed at the hearing, public international law does not recognise any general principle of equal treatment that requires one subject of that law to treat other subjects on an equal footing.[31]

27 — As the Court emphasised in its judgment of 28 January 1986 in *Commission* v *France* (270/83, EU:C:1986:37, paragraph 18), the registered office of a company, inasmuch as it serves as the connecting factor with the legal system of a particular State, plays a comparable role to nationality in the case of physical persons.

28 — See Articles 49, 54, 56 and 62 TFEU.

29 — Agreement between the European Community and the Swiss Confederation on Air Transport, signed on 21 June 1999 in Luxembourg, approved on behalf of the Community by Decision 2002/309/EC, Euratom of the Council and the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1).

30 — Judgment of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23 and the case-law cited).

31 — In particular, the law of Treaties permits the establishment of privileged relations between subjects of international public law. That applies without prejudice to the right of such subjects to agree contractually to observe the principle of equal treatment. This is illustrated by the most favoured nation status clause stipulated in Article 1(1) of the General Agreement on Tariffs and Trade 1994 (GATT), set out in Annex 1A to the Agreement establishing the World Trade Organisation, signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

41. Nor is the principle of equal treatment of third countries enshrined in EU law. As the Court observed in its judgment in *Balkan-Import-Export,*[32] 'in the Treaty there exists no general principle obliging the [Union], in its external relations, to accord to third countries equal treatment in all respects'.

42. In its judgment in *Faust* v *Commission*, the Court clarified the implications of that fact for economic operators, as follows, 'if different treatment of non-member countries is compatible with [EU] law, different treatment accorded to traders within the [Union] must also be regarded as compatible with [EU] law where that different treatment is merely an automatic consequence of the different treatment accorded to non-member countries with which such traders have entered into commercial relations'.[33] That conclusion applies, *a fortiori*, it seems to me, to different treatment of operators established outside the European Union (or of operators within the Union and operators established outside the Union).

43. The principle identified by the Court in *Balkan-Import-Export*[34] and its corollary, enunciated in *Faust* v *Commission*[35] together make up what I shall refer to hereinafter as 'the Balkan principle'.

44. In this instance, operators of flights between EEA Member States and Switzerland suffer a disadvantage inasmuch as, by contrast with operators of flights between EEA Member States and other third countries, they do not benefit from the moratorium provided for in Decision No 377/2013. No party has disputed the fact that that disadvantage is the 'automatic consequence' of the European Union's treating Switzerland differently from other third countries, by distinguishing between air routes to and from Switzerland and air routes to and from other third countries.

45. Swiss Airlines nevertheless questions the legality of that different treatment of Switzerland and the other third countries and, by extension, between aircraft operators on the basis of the flights they operate.

2. Swiss Airlines' argument concerning a possible limitation of the Balkan principle

46. Swiss Airlines' argument is based on inductive reasoning that draws on the judgments in *Balkan-Import-Export,*[36] *Faust* v *Commission*[37] and *Germany* v *Council.*[38]

47. Each of those judgments concerned the validity, in the light of the general principle of equal treatment, of Community measures imposing tougher Community restrictions on imports of goods from certain third countries than on imports of goods from other third countries.

48. More specifically, *Balkan-Import-Export*[39] concerned the consistency with that principle of the imposition of monetary compensation amounts on imports of cheese from Bulgaria, while imports of cheese from Switzerland, in particular, were exempt.

32 — Judgment of 22 January 1976 in *Balkan-Import-Export* (55/75, EU:C:1976:8, paragraph 14).

33 — Judgment of 28 October 1982 (52/81, EU:C:1982:369, paragraph 25). Theoretically speaking, it seems to me that that conclusion follows from the fact that, in such circumstances, the economic operators are not in a comparable situation, inasmuch as they are connected with different third countries which the European Union treats differently. In any event, any difference in treatment as between such operators may be justified by the fact that it is an automatic consequence of the different treatment accorded to the non-member countries with which they have entered into commercial relations. The result is the same. See, to that effect, Opinion of Advocate General Sir Gordon Slynn in *Faust* v *Commission* (52/81, EU:C:1982:205, p. 3773).

34 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

35 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

36 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

37 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

38 — Judgment of 10 March 1998 (C-122/95, EU:C:1998:94).

39 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

49. *Faust* v *Commission* [40] concerned the legality of a regulation suspending the issue of import licences for preserved mushrooms from all third countries (including Taiwan) except those that had given undertakings to limit their exports (namely China and South Korea). [41]

50. In *Germany* v *Council,* [42] the Court assessed the validity of a Council decision approving a framework agreement fixing tariff quotas for imports of bananas from third countries ('the framework agreement on bananas'), which gave rise to different treatment of various categories of banana importers depending on the country from which the bananas were imported. [43]

51. Swiss Airlines alleges, first of all, that the Court did not follow the same line of reasoning in each of those judgments. In *Faust* v *Commission* [44] and in *Germany* v *Council* [45] it concluded that the principle of equal treatment did not apply. In *Balkan-Import-Export,* [46] on the other hand, the Court applied the principle of equal treatment and concluded that it had not been infringed because the difference in treatment was objectively justified.

52. Swiss Airlines observes in this connection that the Court considered the justification for the different treatment of third countries only in its judgment in *Balkan-Import-Export.* [47] Indeed it is true that, after confirming that no general principle of EU law obliged the Union to accord equal treatment to third countries, the Court set out the reasons which justified the different treatment of the goods in question on the basis of their origins. [48] By contrast, in its judgments in *Faust* v *Commission* [49] and *Germany* v *Council,* [50] the Court merely concluded that, in the absence of any such obligation, the principle of equal treatment was not infringed where the difference in treatment of economic operators was the automatic consequence of the different treatment of third countries. [51]

53. Secondly, Swiss Airlines attempts to explain this alleged divergence in reasoning by the absence, in the case which gave rise to the judgment in *Balkan-Import-Export,* [52] of any external action, such as an international agreement, that might provide grounds for the difference in treatment at issue. By contrast, the different treatment instituted by the Community measures examined in *Faust* v *Commission* [53] arose from a commercial agreement between the European Community and China and from negotiations — which concluded in the exchange of informal documents (telexes) — between the two relating to China's undertaking to restrict its exports of the goods in question. The difference in treatment at issue in *Germany* v *Council* [54] also arose from an international agreement, namely the framework agreement on bananas.

40 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

41 — The Court had already considered a similar issue in its judgment of 15 July 1982 in *Edeka Zentrale* (245/81, EU:C:1982:277).

42 — Judgment of 10 March 1998 (C-122/95, EU:C:1998:94).

43 — The Court also ruled on the validity of the regulation implementing the framework agreement on bananas, in so far as that regulation provided for such differential treatment, in its judgment of 10 March 1998 in *T. Port* (C-364/95 and C-365/95, EU:C:1998:95).

44 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

45 — Judgment of 10 March 1998 (C-122/95, EU:C:1998:94).

46 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

47 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

48 — Judgment of 22 January 1976 in *Balkan-Import-Export* (55/75, EU:C:1976:8, paragraphs 14 and 15). The exemption for cheese from Switzerland arose from the fact that the importation of Swiss cheese entailed a lesser risk of disturbance in trade in agricultural products than that associated with the importation of Bulgarian cheese.

49 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

50 — Judgment of 10 March 1998 (C-122/95, EU:C:1998:94).

51 — Judgments of 28 October 1982 in *Faust* v *Commission* (52/81, EU:C:1982:369, paragraph 25), and 10 March 1998 in *Germany* v *Council* (C-122/95, EU:C:1998:94, paragraphs 56 and 57). The Court adopted the same line of reasoning in its judgments of 15 July 1982 in *Edeka Zentrale* (245/81, EU:C:1982:277, paragraphs 19 and 20), and 10 March 1998 in *T. Port* (C-364/95 and C-365/95, EU:C:1998:95, paragraphs 76 and 77).

52 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

53 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

54 — Judgment of 10 March 1998 (C-122/95, EU:C:1998:94).

54. Thirdly, Swiss Airlines deduces from this that the application of the Balkan principle is subject to a condition reflecting that factual distinction. It alleges that the Balkan principle applies only 'when [the Union is] exercising external action competences (such as treaty making, typically in the context of the common commercial policy)'. In substance, the principle applies only to situations where the different treatment of third countries is the continuation of some 'external action' having the following characteristics:

— In substantive terms, the action, which need not necessarily be an international agreement, must fall within the exercise of the Union's 'external action' competence, as opposed to the implementation of external aspects of its internal policy.

— In addition, in formal terms, the external action must precede the EU legislation instituting the different treatment of third countries [55] and it must be 'concrete' and 'public'. At the hearing, Swiss Airline submitted that the reason for this requirement is that such a difference in treatment must be publicised and must be subject to democratic scrutiny.

55. According to Swiss Airlines, that condition is not fulfilled in the present case. Therefore, the different treatment of flights connecting the Member States of the EEA and Switzerland, on the one hand, and flights connecting the Member States of the EEA and the other third countries, on the other, cannot escape the application of the principle of equal treatment. It alleges that, in the absence of any objective justification — and there is none in this case — such treatment amounts to discrimination.

56. For the reasons which I shall set out below, I consider that neither the substantive aspect nor the formal aspect of any such condition may be inferred from the abovementioned case-law.

3. The application of the Balkan principle is not dependent on the existence of any 'external action' in the substantive sense suggested by Swiss Airlines

57. To the extent that, by 'external action' it refers solely to acts adopted in the exercise of the Union's competence in the sphere of external action within the meaning of Article 21(3) TEU, [56] Swiss Airlines' argument conflicts with the terms which the Court has used to give expression to the Balkan principle. Indeed, the Court has formulated this principle as meaning that the European Union is not obliged, 'in its external relations', to accord the various third countries equal treatment. [57]

55 — According to Swiss Airlines, that is the case even where the EU legislation itself falls within the exercise of the Union's external action competence. It alleges that the Balkan principle could not have been applied in the judgment of 28 October 1982 in *Faust* v *Commission* (52/81, EU:C:1982:369) if the different treatment of Taiwan on the one hand and China and South Korea on the other (and between economic operators importing goods from those countries), which nevertheless arose from regulations in the sphere of the common commercial policy, that is to say, of the Union's external action within the meaning of Article 21(3) TEU, had not been founded on 'concrete external action' as mentioned in point 53 of this Opinion.

56 — Swiss Airlines has not defined precisely what it means by 'external action'. However since it contrasts external action with the external aspects of the Union's internal policies, it appears to be referring the external action of the Union within the meaning of Article 21(3) TEU.

57 — Judgments of 22 January 1976 in *Balkan-Import-Export* (55/75, EU:C:1976:8, paragraph 14); 28 October 1982 in *Faust* v *Commission* (52/81, EU:C:1982:369, paragraph 25); 15 July 1982 in *Edeka Zentrale* (245/81, EU:C:1982:277, paragraph 19); 10 March 1998 in *Germany* v *Council* (C-122/95, EU:C:1998:94, paragraph 56); and 10 March 1998 in *T. Port* (C-364/95 and C-365/95, EU:C:1998:95, paragraph 76). See also judgment of 24 June 1986 in *Malt* (236/84, EU:C:1986:254, paragraph 21).

58. As the United Kingdom Government has pointed out, the concept of 'external relations' is not limited to the Union's external action, within the meaning of Article 21(3) TEU, in the areas covered by Title V of the TEU[58] and by Part Five of the TFEU.[59] 'External relations' also includes the external aspects of other Union policies,[60] which, in accordance with that provision, are governed by the same principles and pursue the same objectives as the Union's external action.

59. The external aspects of the Union's other policies include the Union's exercise of its competences under Article 192(1) TFEU to pursue the objective of 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change', which is referred to in the fourth indent of Article 191(1) TFEU.

60. Indeed, the legal basis for Decision No 377/2013 is Article 192(1) TFEU and the moratorium instituted by that decision was in fact aimed at facilitating negotiations for a global approach to reducing emissions from air transport within the framework of the ICAO.[61] Nevertheless, the legislature regarded it as necessary to exclude from that moratorium flights between EEA Member States and Switzerland in order to avoid distortion of competition and to preserve the environmental integrity of the EU ETS which, it may be remembered, is intended to contribute to the fulfilment of the commitments given by the EU and its Member States in the Kyoto Protocol.[62] As the Parliament has emphasised, Decision No 377/2013 therefore reflects the status of the external relations of the Union in the field of environmental or climate law.

61. Consequently, I do not think that the scope of application of the Balkan principle is limited to differences in treatment as between third countries which arise from the Union's exercise of its competence in the sphere of external action within the meaning of Article 21(3) TEU.

4. The application of the Balkan principle is not dependent on the existence of any 'external action' in the formal sense suggested by Swiss Airlines

62. According to Swiss Airlines, the Balkan principle does not apply to differences in treatment as between third countries which are purely the result of the act which institutes those differences. The scope of the principle is limited to differences in treatment that are founded on concrete, public external action preceding the EU legislation which gives rise to those differences in treatment.[63]

63. First of all, I would observe that that approach would deprive the Balkan principle of any practical effect. Indeed, it amounts to requiring that justification be given, in the form of such action, for the different treatment of third countries, which presupposes that that difference in treatment falls within the scope of application of the principle of equal treatment. However, the very effect of the Balkan principle is to exclude the application of the principle of equal treatment to relations between the European Union and various third countries.

58 — That is to say, the various areas of the common foreign and security policy (CFSP).

59 — That is to say, the common commercial policy, cooperation and humanitarian aid, restrictive measures, international agreements and the Union's international relations and delegations.

60 — This is clear from the judgment in *Balkan-Import-Export* (55/75, EU:C:1976:8), which concerned the validity of a Community regulation in the sphere of the common agricultural policy, which is regarded as an internal policy of the Union. By 'external relations', the Court was therefore referring to external aspects of that internal policy.

61 — Recitals 5 and 6 of Decision No 377/2013.

62 — Recital 9 of Decision No 377/2013.

63 — Such as Decision No 377/2013, at issue in the main proceedings, the regulation setting the monetary compensation amounts at issue in the judgment of 22 January 1976 in *Balkan-Import-Export* (55/75, EU:C:1976:8), the regulations instituting the restrictions on imports of certain products at issue in the judgments of 28 October 1982 in *Faust* v *Commission* (52/81, EU:C:1982:369), and 15 July 1982 in *Edeka Zentrale* (245/81, EU:C:1982:277), the decision approving the framework agreement on bananas at issue in the judgment of 10 March 1998 in *Germany* v *Council* (C-122/95, EU:C:1998:94), and the decision implementing that framework agreement at issue in the judgment of 10 March 1998 in *T. Port* (C-364/95 and C-365/95, EU:C:1998:95).

64. As I observed in point 40 of this Opinion, that exclusion is consistent with public international law. Relations between subjects of public international law in general, and the external relations of the European Union in particular, are in fact characterised by their broadly discretionary nature. To my mind, it was from that perspective that Advocate General Sir Gordon Slynn asserted in his Opinion in *Faust* v *Commission* that, 'even where the failure to agree a limitation of exports is the result of arbitrary discrimination on the part of the Commission, it still does not constitute unlawful discrimination as between importers because the Commission is under no legal duty to accord equal treatment to third countries'.[64]

65. Contrary to what Swiss Airlines suggests, the Balkan principle is not, therefore, an 'exception' to the principle of equal treatment. The principle of equal treatment simply does not apply to the treatment that the European Union accords to various third countries in the course of conducting its external relations, for otherwise it would render that task significantly more difficult, or even impossible.[65] The Union's external relations rest upon decisions of a political and diplomatic nature. Many parameters will come into play in the making of those decisions, in relation to which the legislature must enjoy a broad discretion.[66] Furthermore, in the absence of any general principle of equal treatment of third countries in public international law, the Union would be unilaterally restricting its freedom of action in its external relations if it submitted to that principle.

66. In the light of those considerations I, like the Parliament, incline to the view that it was for the sake of completeness and to reinforce its conclusion that the regulation in question did not infringe the principle of equal treatment that the Court considered, in *Balkan-Import-Export*,[67] whether the different treatment of third countries resulting from that regulation was objectively justified.

67. Furthermore, the interpretation proposed by Swiss Airlines implies that, paradoxically, the Court did not apply the Balkan principle in its judgment in *Balkan-Import-Export*.[68] I find it difficult to accept that the Court would have laid down that principle, for the first time, in paragraph 14 of the judgment only to then disapply it in paragraph 15. If that had been its intention, it seems to me that it would at least have expressly stated that the situation under consideration did not fall within the scope of the principle, and would have clarified the reasons for that exclusion.

68. Secondly, the *circumstantial* facts of the cases which gave rise to the judgments in *Faust* v *Commission*[69] and *Germany* v *Council*[70] cannot, in my opinion, be elevated to the rank of a *condition* of the applicability of the Balkan principle.

69. In this connection, the Parliament has rightly observed that, in the judgment in *Faust* v *Commission*,[71] the existence of the commercial agreement between the Community and China was not a direct explanation for the preferential treatment of imports from that country. That preferential treatment arose from the fact that China, by contrast with Taiwan, had unilaterally undertaken to limit

64 — Opinion of Advocate General Sir Gordon Slynn in *Faust* v *Commission* (52/81, EU:C:1982:205, p. 3779).

65 — On this point, Advocate General Elmer pertinently observed in his Opinion in *Germany* v *Council* (C-122/95, EU:C:1997:309, point 61) that 'Community law therefore does not protect traders against any adverse effects associated with the Community's political relations with non-member countries, which, incidentally, may be difficult to distinguish from other general commercial risks. To accept the opposite argument might make it extremely difficult for the Community to adopt measures relating to commercial policy'.

66 — Generally speaking, according to consistent case-law, where the Union is required to make complex evaluations, it enjoys a broad discretion, the exercise of which is subject to only limited judicial review. See, in particular, judgments of 22 January 1976 in *Balkan-Import-Export* (55/75, EU:C:1976:8, paragraph 8), and 7 April 2016 in *ArcelorMittal Tubular Products Ostrava and Others* v *Council* and *Council* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209, paragraph 34).

67 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

68 — Judgment of 22 January 1976 (55/75, EU:C:1976:8).

69 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

70 — Judgment of 10 March 1998 (C-122/95, EU:C:1998:94).

71 — Judgment of 28 October 1982 (52/81, EU:C:1982:369).

its exports. The agreement was therefore no more than one element of the overall context of the commercial relations between the Community and China.[72] In any event, there was no question of such an agreement between the Community and South Korea. Nevertheless, the Court also held the different treatment of Taiwan and South Korea to be valid.

70. As regards the telexes exchanged by the Community and China in anticipation of the undertaking given by China to limit its exports, these were unilateral acts, probably of a confidential nature; yet in support of its argument Swiss Airlines refers to the need for public scrutiny, in particular by the Parliament, of the reasons justifying differences in treatment as between third countries. Furthermore, I fail to see the need in the present case for such scrutiny by the Parliament, since that institution was in fact one of the co-authors of Decision No 377/2013.

71. To my mind, those circumstances merely attest to the fact that the different treatment of the third countries at issue in the abovementioned judgments took place in an international context. That is also true of the different treatment at issue in *Balkan-Import-Export*.[73] It is also true with respect to the distinction drawn between third countries in Decision No 377/2013.[74] Generally speaking, it seems to me that the treatment which the European Union reserves to third countries is, by its very nature, always rooted in an international context.

72. Having regard to those considerations, the applicability of the Balkan principle does not depend, in my view, on the existence of specific, public Union external action that precedes the EU legislation instituting the different treatment of third countries and that justifies that difference in treatment.

5. Conclusion concerning the validity of Decision No 377/2013

73. It follows from the foregoing considerations that the scope of the Balkan principle is not limited to situations where the EU legislation providing for different treatment of third countries is the continuation of some external Union action having the characteristics described in point 54 of this Opinion.

74. Consequently, the principle does apply in the present case. The European Union is not therefore required to treat equally flights between Member States of the EEA and Switzerland, on the one hand, and flights between EEA Member States and the other third countries, on the other, the difference in treatment as between those air routes being comparable to different treatment of third countries.[75] Nor is the Union under any obligation to treat operators of those two categories of flights equally. Indeed, the different treatment of operators on the basis of the place of departure and the destination of the flights they operate is the automatic consequence, within the meaning of *Faust* v *Commission*,[76] of the different treatment of air routes.

72 — The purpose of the agreement between the Community and China was ‘to foster the harmonious expansion of their reciprocal trade’ (see judgment of 28 October 1982 in *Faust* v *Commission*, 52/81, EU:C:1982:369, p. 3755).

73 — The background to the favourable treatment of imports of Swiss cheese was a commercial dispute between Switzerland and the Community concerning the application of the GATT (see judgment of 22 January 1976, 55/75, EU:C:1976:8, paragraph 25).

74 — See point 60 of this Opinion. Moreover, the Agreement between the European Community and the Swiss Confederation on Air Transport, signed on 21 June 1999 in Luxembourg and approved on behalf of the Community by Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1), refers to the particular relationships between the two parties in the field covered by Decision No 377/2013. In particular, it is clear from Article 1(2) of, and Annex I to that agreement that a significant portion of the *acquis* in the field of air transport applies to Switzerland. In addition, at the time when Decision No 377/2013 was adopted, the Union and Switzerland were conducting negotiations concerning the linking of the EU ETS with the Swiss emission trading scheme for the air transport sector.

75 — See point 36 of this Opinion.

76 — Judgment of 28 October 1982 (52/81, EU:C:1982:369, paragraph 25).

75. Moreover, the Italian and United Kingdom Governments, the Parliament, the Council and the Commission have put forward strong arguments to justify that difference in treatment, should the Court regard such justification as necessary. Essentially, they raise points concerning the international context in which Decision No 377/2013 was adopted, such as those mentioned in point 60 of this Opinion. I think it unnecessary to examine those arguments in any greater detail. Indeed, since no general principle of equal treatment applies to the difference in treatment in question, it is not necessary for that difference in treatment to be justified.

76. For the same reasons, it is irrelevant that, by Regulation (EU) No 421/2014, the legislature extended, for the period from 1 January 2013 to 31 December 2016, the moratorium on the application of the EU ETS to all flights to and from countries outside the EEA, including Switzerland.[77] That fact would be potentially relevant only if it were necessary to provide justification for the difference in treatment resulting from Decision No 377/2013. However, I have concluded that that is not the case. In any event, I think the legislature is entitled to adjust the Union's external relations policies as the international context of those policies evolves.[78]

77. Those considerations lead me to the conclusion that Article 1 of Decision No 377/2013 does not infringe the principle of equal treatment in that the derogation laid down therein does not apply to flights between Member States of the EEA and Switzerland.

D – *The second question*

78. Since the first question referred should be answered in the negative, I think it unnecessary to answer the second question referred for a preliminary ruling.

V – Conclusion

79. In the light of all the foregoing, I propose that the Court's answer to the first question referred for a preliminary ruling by the Court of Appeal (England & Wales) (Civil Division), should be as follows:

Article 1 of Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community does not infringe the principle of equal treatment in that the derogation laid down therein does not apply to flights between Member States of the European Economic Area (EEA) and Switzerland.

77 — Article 1(1) of Regulation of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (OJ 2014 L 129, p. 1).

78 — The Parliament has pointed out, in this connection, that negotiations concerning the linking of the EU ETS with Switzerland's ETS were suspended following a vote in February 2014 to reintroduce immigration quotas in Switzerland, and were resumed in March 2015. Negotiations had also been commenced to link the EU ETS with Australia's ETS. In addition, the negotiations for a worldwide emission trading scheme had not progressed as far as had been expected within the ICAO.