



## Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

7 March 2013\*

(Appeal — External relations — Agreement between the European Community and the Swiss Confederation on air transport — Regulation (EEC) No 2408/92 — Access of Community air carriers to intra-Community air routes — Articles 8 and 9 — Scope — Exercise of traffic rights — Decision 2004/12/EC — German measures relating to the approaches to Zurich Airport — Duty to state reasons — Non-discrimination — Proportionality — Burden of proof)

In Case C-547/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 19 November 2010,

**Swiss Confederation**, represented by S. Hirsbrunner, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

**European Commission**, represented by T. van Rijn, K. Simonsson and K.-P. Wojcik, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

supported by:

**Federal Republic of Germany**, represented by T. Henze, acting as Agent, assisted by T. Masing, Rechtsanwalt,

**Landkreis Waldshut**, represented by M. Núñez Müller, Rechtsanwalt,

interveners at first instance,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta (Rapporteur), acting as President of the Chamber, K. Lenaerts, E. Juhász, T. von Danwitz and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 26 April 2012,

\* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 13 September 2012,  
gives the following

### Judgment

- 1 By its appeal, the Swiss Confederation seeks to have set aside the judgment of the General Court of the European Union in Case T-319/05 *Switzerland v Commission* [2010] ECR II-4265 ('the judgment under appeal'), by which the General Court dismissed the action brought by the Swiss Confederation seeking the annulment of Decision 2004/12/EC of 5 December 2003 on a procedure relating to the application of the first sentence of Article 18(2) of the Agreement between the European Community and the Swiss Confederation on Air Transport and Council Regulation (EEC) No 2408/92 (Case TREN/AMA/11/03 — German measures relating to the approaches to Zurich Airport ) (OJ 2004 L 4, p. 13; 'the contested decision').

### Legal context

#### *The Agreement between the European Community and the Swiss Confederation on Air Transport*

- 2 Article 1 of the Agreement between the European Community and the Swiss Confederation on Air Transport, signed in Luxembourg on 21 June 1999, 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; 'the EC-Switzerland Air Transport Agreement'), states:

'1. This Agreement sets out rules for the Contracting Parties in the field of civil aviation. These provisions are without prejudice to those contained in the EC Treaty and in particular to existing Community competences under the competition rules and the regulations of application of such rules, as well as under all relevant Community legislation listed in the Annex to this Agreement.

2. For this purpose, the provisions laid down in this Agreement as well as in the regulations and directives specified in the Annex shall apply under the conditions set out hereafter. Insofar as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement. The rulings and decisions given after the date of signature of this Agreement shall be communicated to Switzerland. At the request of one of the Contracting Parties, the implications of such latter rulings and decisions shall be determined by the Joint Committee in view of ensuring the proper functioning of this Agreement.'

- 3 Article 2 of the EC-Switzerland Air Transport Agreement is worded as follows:

'The provisions of this Agreement and its Annex shall apply to the extent that they concern air transport or matters directly related to air transport as mentioned in the Annex to this Agreement'.

- 4 Article 3 of the Agreement provides:

'Within the scope of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

5 Article 15(1) of the Agreement states:

‘Subject to [Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8)], as referred to in the Annex to the present Agreement:

— traffic rights shall be granted to Community and Swiss air carriers between any point in Switzerland and any point in the Community,

...’

6 Under Article 18 of the Agreement:

‘1. Without prejudice to paragraph 2 and the provisions of Chapter 2, each Contracting Party shall be responsible in its own territory for the proper enforcement of this Agreement and, in particular, the regulations and directives listed in the Annex.

2. In cases which may affect air services to be authorised under Chapter 3, the Community institutions shall enjoy the powers granted to them under the provisions of the regulations and directives whose application is explicitly confirmed in the Annex. However, in cases where [the Swiss Confederation] has taken or envisages taking measures of an environmental nature under either Article 8(2) or 9 of [Regulation No 2408/92], the Joint Committee, upon request by one of the Contracting Parties, shall decide whether those measures are in conformity with this Agreement.

...’

7 Under Article 20 of the EC-Switzerland Air Transport Agreement, all questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement shall be of the exclusive competence of the Court of Justice of the European Communities.

8 According to the annex to the Agreement, wherever acts specified in that annex contain references to Member States of the European Community, or a requirement for a link with the latter, those references are, for the purpose of the Agreement, to be understood to apply equally to the Swiss Confederation or to the requirement of a link with it.

9 That annex refers to Regulation No 2408/92, inter alia.

*Regulation No 2408/92*

10 Article 2 of Regulation No 2408/92 is worded as follows:

‘For the purposes of this Regulation:

...

(f) “traffic right” means the right of an air carrier to carry passengers, cargo and/or mail on an air service between two Community airports;

...’

11 Article 3(1) of the Regulation states:

‘Subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.’

12 Article 8(1) to (3) of the Regulation provides:

‘1. This Regulation shall not affect a Member State’s right to regulate without discrimination on grounds of nationality or identity of the air carrier, the distribution of traffic between the airports within an airport system.

2. The exercise of traffic rights shall be subject to published Community, national, regional or local operational rules relating to safety, the protection of the environment and the allocation of slots.

3. At the request of a Member State or on its own initiative the Commission shall examine the application of paragraphs 1 and 2 and, within one month of receipt of a request and after consulting the Committee referred to in Article 11, decide whether the Member State may continue to apply the measure. The Commission shall communicate its decision to the Council and to the Member States.’

13 Article 9 of the same regulation provides:

‘1. When serious congestion and/or environmental problems exist the Member State responsible may, subject to this Article, impose conditions on, limit or refuse the exercise of traffic rights, in particular when other modes of transport can provide satisfactory levels of service.

2. Action taken by a Member State in accordance with paragraph 1 shall:

- be non-discriminatory on grounds of nationality or identity of air carriers,
- have a limited period of validity, not exceeding three years, after which it shall be reviewed,
- not unduly affect the objectives of this Regulation,
- not unduly distort competition between air carriers,
- not be more restrictive than necessary in order to relieve the problems.

3. When a Member State considers that action under paragraph 1 is necessary it shall, at least three months before the entry into force of the action, inform the other Member States and the Commission, providing adequate justification for the action. The action may be implemented unless within one month or receipt of the information a Member State concerned contests the action or the Commission, in accordance with paragraph 4, takes it up for further examination.

4. At the request of a Member State or on its own initiative the Commission shall examine action referred to in paragraph 1. When the Commission, within one month of having been informed under paragraph 3, takes the action up for examination it shall at the same time indicate whether the action may be implemented, wholly or partially, during the examination taking into account in particular the possibility of irreversible effects. After consulting the Committee referred to in Article 11 the Commission shall, one month after having received all necessary information, decide whether the action is appropriate and in conformity with this Regulation and not in any other way contrary to Community law. The Commission shall communicate its decision to the Council and the Member States. Pending such decision the Commission may decide on interim measures including the suspension, in whole or in part, of the action, taking into account in particular the possibility of irreversible effects.

...'

### **Facts at the origin of the dispute**

- 14 Zurich airport is situated at Kloten (Switzerland), north-east of the city of Zurich (Switzerland) and about 15 km south-east of the border between Switzerland and Germany. Zurich airport has three runways: one west-east (10/28), one north-south (16/34) crossing the west-east runway, and one north-west-south-east (14/32) which is independent of the two others. Most take-offs during the day take place from the west-east runway towards the west, while in the early morning and late evening most take-offs use the north-south runway in a northerly direction. Incoming flights use mainly the north-west-south-east runway, approaching from the north-east. Given the proximity to the German border, all flights landing in Zurich from the north or north-west must use German airspace while landing.
- 15 The use of German airspace for approaching and leaving Zurich airport was governed by a bilateral agreement between the Swiss Confederation and the Federal Republic of Germany of 17 September 1984. This agreement was terminated by the Federal Republic of Germany on 22 March 2000, with effect from 31 May 2001, following implementation problems.
- 16 On 18 October 2001, the Federal Republic of Germany and the Swiss Confederation signed a new agreement, which has not been ratified.
- 17 On 15 January 2003, the German federal aviation authorities published the 213th Regulation for the implementation of German air traffic regulations establishing procedures for instrument-guided landings and take-offs at Zurich airport. The 213th Regulation set out a number of limitations governing the approach to Zurich airport as of 18 January 2003.
- 18 On 4 April 2003, the German federal aviation authorities published the first regulation amending the 213th Regulation ('the 213th Regulation, as amended'). That amendment came into force on 17 April 2003.
- 19 The measures provided for in the 213th Regulation, as amended, were designed, essentially, to prevent, under normal weather conditions, overflight at low altitude over the German territory close to the Swiss border between 21.00 and 07.00 on weekdays and between 20.00 and 09.00 on weekends and public holidays, with a view to reducing the noise to which the local population was exposed. As a result, the two landing approaches from the north previously used as the main approaches by flights landing at Zurich airport were no longer possible during these periods.
- 20 In addition, the 213th Regulation, as amended, contained two other measures designed to reduce noise pollution in the vicinity of the border between Germany and Switzerland.
- 21 First, with regard to the eastern approach to the airport, the second indent of Paragraph 2(6) of the 213th Regulation, as amended, laid down minimum flight altitudes to be maintained during the aforementioned periods.
- 22 Secondly, Paragraph 3 of the 213th Regulation, as amended, provided that take-offs towards the north had to be made in such a way as to maintain, from the time of entry into German airspace, minimum flight altitudes which varied according to the time of take-off. Thus, if the aircraft took off during the aforementioned periods, it would first have to make a detour before reaching the German border, so as not to enter German airspace until it had reached the prescribed minimum flight altitude.

- 23 On 10 June 2003, the Swiss Confederation lodged a complaint with the Commission requesting that it take a decision to the effect that:
- the Federal Republic of Germany could not continue to apply the 213th Regulation, as amended,
  - the Federal Republic of Germany was required to suspend the application of the 213th Regulation, as amended, until the Commission had adopted a decision.
- 24 On 20 June 2003, the Commission requested the German authorities to comment on that complaint.
- 25 By letter of the same day, the Commission requested the Swiss authorities to provide additional information.
- 26 On 26 June 2003, the German and Swiss authorities concluded an agreement on different issues relating to the application of the 213th Regulation, as amended.
- 27 On 27 June 2003, the Swiss authorities notified the Commission of that agreement, but stated that it did not affect the complaint.
- 28 By letter of 30 June 2003, the Federal Republic of Germany also notified the Commission of that agreement stating that it inferred from the agreement that the complaint was void and that it expected the Commission to terminate the procedure which had been initiated.
- 29 Following correspondence with the Swiss and German authorities, on 14 October 2003 the Commission sent a statement of objections to those authorities, inviting them to submit their observations.
- 30 The Federal Republic of Germany submitted its observations on 20 October 2003, followed by the Swiss Confederation on 21 October 2003.
- 31 By letter of 27 October 2003, the Commission communicated a draft decision on which the Swiss Confederation had an opportunity to submit its observations at the meeting of the Advisory Committee on 'market access (air transport)' on 4 November 2003.
- 32 The Commission adopted the contested decision on 5 December 2003.
- 33 Article 1 of the decision provides that the Federal Republic of Germany may continue to apply the 213th Regulation, as amended.
- 34 In accordance with Article 2, the decision is addressed to the Federal Republic of Germany.

### **The procedure before the General Court and the judgment under appeal**

- 35 By application lodged at the Registry of the Court of Justice on 13 February 2004, the Swiss Confederation brought an action seeking the annulment of the contested decision.
- 36 By order of the President of the Court of Justice of 21 July 2004, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Commission.
- 37 By order of 14 July 2005 in Case C-70/04 *Switzerland v Commission*, the Court of Justice referred the case to the General Court.

38 By order of 7 July 2006 in Case T-319/05 *Switzerland v Commission* [2006] ECR II-2073, the General Court granted Landkreis Waldshut leave to intervene in support of the form of order sought by the Commission.

39 A hearing was held on 9 September 2009.

40 In the judgment under appeal the General Court dismissed the action brought by the Swiss Confederation, but did not rule on its admissibility. The General Court found, inter alia, that the Commission could not be criticised for (i) finding that the measures laid down in the 213th Regulation, as amended, did not fall within the scope of Article 9(1) of Regulation No 2408/92, (ii) failing to take into account the rights of the operator of Zurich Airport and those of persons living near the airport when examining those measures in the light of the EC-Switzerland Air Transport Agreement and Article 8(3) of that regulation, and (iii) deciding that those measures were consistent with the principles of equal treatment and proportionality.

### **Forms of order sought by the parties**

41 By its appeal, the Swiss Confederation requests the Court of Justice to:

- set aside the judgment under appeal;
- annul the contested decision and, in accordance with the first paragraph of Article 122 of the Rules of Procedure of the Court, order the Commission to pay the costs, including those relating to the proceedings at first instance; and
- in the alternative, refer the case back to the General Court and reserve the decision on costs for that court.

42 The Commission contends that the Court of Justice should:

- dismiss the appeal;
- order the Swiss Confederation to pay the costs of the instance.

43 The German Government contends that the Court should:

- dismiss the appeal,
- order the Swiss Confederation to pay the costs.

44 Landkreis Waldshut contends that the Court should:

- dismiss the appeal;
- maintain its application at first instance that the action be dismissed;
- in the alternative, set aside the judgment under appeal and dismiss the action brought by the Swiss Confederation as inadmissible; and
- order the Swiss Confederation to pay the costs, including those relating to the proceedings at first instance and the extrajudicial costs incurred by Landkreis Waldshut.

## The cross-appeal

- 45 By its cross-appeal, Landkreis Waldshut submits that the action for annulment brought by the Swiss Confederation should have been dismissed by the General Court as inadmissible.
- 46 According to Landkreis Waldshut, the Swiss Confederation cannot be assimilated to a Member State and is not individually concerned by the contested decision, within the meaning of the fourth subparagraph of Article 263 TFEU.
- 47 In the present case, the Court considers it necessary to rule at the outset on the substance of the case (Case C-273/04 *Poland v Council* [2007] ECR I-8925, paragraph 33).

## The appeal

- 48 In support of its appeal, the Swiss Confederation raises six grounds of appeal alleging an infringement of (i) Articles 9(1) and 8(3) of Regulation No 2408/92, (ii) the duty to state reasons, (iii) the principle of the freedom to provide services, (iv) the principle of equal treatment, (v) the principle of proportionality, and (vi) the rules relating to the apportionment of the burden of proof.

### *The first ground of appeal*

#### Arguments of the parties

- 49 By its first ground of appeal, the Swiss Confederation submits that, by holding, in paragraphs 74 to 91 of the judgment under appeal, that Article 9(1) of Regulation No 2408/92 was not applicable to the measures laid down in the 213th Regulation, as amended, the General Court made an erroneous legal interpretation and application of that provision.
- 50 It claims that that article does not relate only to formal prohibitions on the exercise of traffic rights, but also, and alternatively, to material limitations or prohibitions, even partial ones, that is to say measures which limit the exercise of those rights.
- 51 In that regard, the Swiss Confederation considers that Article 9(1) of Regulation No 2408/92 applies to the measures laid down in the 213th Regulation, as amended, since they clearly limit the exercise of traffic rights both approaching and departing from Zurich airport and subject that exercise to conditions, namely compliance with those limitations, the effect of which is to render approaches to that airport from the north impossible in the hours during which low-altitude flights are prohibited.
- 52 Thus, according to the Swiss Confederation, those measures constitute, at least from a material point of view, a conditional or partial prohibition on the exercise of the traffic rights to which Article 9(1) of Regulation No 2408/92 applies.
- 53 The Commission, the German Government and Landkreis Waldshut contest the arguments raised by the Swiss Confederation.

#### Findings of the Court

- 54 The Court notes that, in accordance with Article 8(2) of Regulation No 2408/92, the exercise of traffic rights is subject to published national, regional or local operational rules, inter alia, relating to safety, the protection of the environment and the allocation of slots.



- 55 As stated by the General Court in paragraphs 75, 76 and 80 of the judgment under appeal, Article 9 of Regulation No 2408/92 covers a more specific category of operational rules applicable to the exercise of traffic rights, namely, pursuant to Article 9(1), operational rules which impose conditions on, limit or refuse the exercise of traffic rights.
- 56 In that regard, it must be found that, by the judgment under appeal, the General Court in no way limited the applicability of Article 9 of that regulation to measures formally prohibiting the exercise of traffic rights, but held, in paragraphs 75 and 88 of that judgment, that the measures referred to in Article 9 contain, in essence, at least a conditional or partial prohibition of that exercise.
- 57 In that respect, the General Court was right to state, in paragraph 89 of the judgment under appeal, that the fact that a Member State makes the exercise of traffic rights subject to published national, regional or local operational rules, in particular those relating to protection of the environment, does not amount to the imposition of a condition, for the purposes of Article 9(1) of Regulation No 2408/92, governing the exercise of those rights.
- 58 If that were the case, Article 8(2) of that regulation would be rendered meaningless.
- 59 The General Court's assessment, in paragraphs 75 and 88 of the judgment under appeal, relating to the scope of the measures laid down in Article 9 of that regulation, is therefore not vitiated by an error of law.
- 60 As pointed out by the General Court in paragraphs 86 and 87 of the judgment under appeal, it is apparent from a combined reading of recitals 1 to 6 and 44 in the preamble to the contested decision that the measures laid down in the 213th Regulation, as amended, in no way involve, during their period of application, any prohibition, whether conditional or partial, of passage through German airspace for flights leaving or arriving at Zurich airport, but a mere change in the flight path of the flights concerned after take-off from or prior to landing at that airport.
- 61 As noted by the General Court in paragraph 87 of the judgment under appeal, those measures are essentially limited to preventing, during the period of their application, low-altitude overflight of that part of German territory which is situated close to the Swiss border, while overflight of that territory at a higher altitude still remains possible.
- 62 Consequently, in finding that those measures did not fall within the scope of Article 9(1) of Regulation No 2408/92, the General Court did not commit an error of law.
- 63 In those circumstances, the first ground of appeal must be rejected.

### *The second ground of appeal*

#### Arguments of the parties

- 64 By its second ground of appeal, the Swiss Confederation submits that, in finding that sufficient grounds were provided in the contested decision in relation to the inapplicability of Article 9 of Regulation No 2408/92 to the measures laid down in the 213th Regulation, as amended, and by taking account of alternative grounds submitted by the Commission during the procedure at first instance, the General Court misinterpreted, in paragraph 84 of the judgment under appeal, the duty to state reasons provided for in Article 296 TFEU.
- 65 According to the Swiss Confederation, in the absence of grounds for excluding those measures from the scope of Article 9(1) of Regulation No 2408/92, the contested decision should have been annulled for infringement of an essential procedural requirement.

66 The Commission, the German Government and Landkreis Waldshut contest the arguments raised by the Swiss Confederation.

#### Findings of the Court

67 The Court observes that, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review (see, *inter alia*, Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 55, and Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, paragraph 147).

68 In the present case, it must be found that the Swiss Confederation does not elaborate as to the extent to which the allegedly insufficient grounds for the contested decision prevented it from understanding the reasons for that decision and from usefully defending its rights.

69 Moreover, it is clear from the judgment under appeal that, on the basis of the reasoning followed by the Commission in the contested decision, the General Court was able to exercise its powers of review.

70 As noted by the General Court, recitals 1 to 6, 32 and 44 in the preamble to the contested decision disclose in a clear and unequivocal fashion that, if the Commission considered that the measures laid down in the 213th Regulation, as amended, did not fall within the scope of Article 9 of Regulation No 2408/92 it is because (i) those measures had not been notified under Article 9(3), and (ii) during their period of application, those measures did not imply a prohibition of the exercise of traffic rights, but a mere change in the flight path of the flights concerned after take-off from or prior to landing at Zurich airport.

71 As regards the substitution of grounds for the contested decision which the Commission is alleged to have made in the course of proceedings, suffice it to note that, even though that decision already clearly sets out the reasons why the Commission considered that Article 9 of Regulation No 2408/92 was not applicable to the measures laid down in the 213th Regulation, as amended, the Swiss Confederation does not indicate the substance of the new grounds provided by the Commission in the context of the procedure before the General Court, nor the extent to which the grounds of the contested decision have been substituted by those grounds.

72 Consequently, the General Court was right to find that sufficient grounds were provided for the contested decision.

73 The second ground of appeal must therefore be rejected.

#### *The third ground of appeal*

#### Arguments of the parties

74 By its third ground of appeal, the Swiss Confederation alleges an erroneous interpretation and application of law in relation to Article 8(3) of Regulation No 2408/92 on the ground that the General Court did not take account, in paragraphs 118 to 132 of the judgment under appeal, of the rights of the operator of Zurich airport and of persons living near the airport and failed to appropriately assess,

in paragraphs 193 to 199 of that judgment, the compatibility of those measures with the freedom to provide services and with the principles of proportionality and respect for fundamental rights inherent therein.

- 75 The Swiss Confederation submits that, had account been taken of the rights of that operator and of those persons, the General Court would inevitably have come to the conclusion that the measures laid down in the 213th Regulation, as amended, are disproportionate, since they require that operator to carry out a costly reorganisation of its operating system and to increase significantly the noise pollution caused by the aeroplanes to which persons living near Zurich airport are exposed in Swiss territory.
- 76 Consequently, in its view, those measures are not such as to enable the objective pursued by those measures to be achieved, namely the reduction of the noise impact caused by aeroplanes, and amount to discrimination on the grounds of nationality, which is incompatible with Article 3 of the EC-Switzerland Air Transport Agreement.
- 77 The Commission, the German Government and Landkreis Waldshut contest the arguments raised by the Swiss Confederation.

#### Findings of the Court

- 78 It should be noted at the outset that the EC-Switzerland Air Transport Agreement, which forms part of a series of seven sectoral agreements between the same contracting parties, was signed on 21 June 1999 after the rejection by the Swiss Confederation, on 6 December 1992, of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) and that, by its refusal, the Swiss Confederation did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements between the European Union and its Member States in specific areas (see, to that effect, Case C-351/08 *Grimme* [2009] ECR I-10777, paragraphs 26 and 27, and Case C-541/08 *Fokus Invest* [2010] ECR I-1025, paragraph 27).
- 79 Therefore, the Swiss Confederation did not join the internal market of the European Union, the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes inter alia the freedom to provide services (see *Grimme*, paragraph 27, and Case C-70/09 *Hengartner and Gasser* [2010] ECR I-7233, paragraph 41).
- 80 Consequently, the interpretation given to the provisions of European Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the EC-Switzerland Air Transport Agreement, unless there are express provisions to that effect laid down in the Agreement itself (see, to that effect, *Grimme*, paragraph 29; *Fokus Invest*, paragraph 28; and *Hengartner and Gasser*, paragraph 42).
- 81 However, it must be found that the EC-Switzerland Air Transport Agreement does not contain any specific provision such as to enable the air carriers concerned to benefit from the provisions of European Union law on the freedom to provide services. The interpretation given to those provisions cannot therefore be transposed to that Agreement.
- 82 In those circumstances, given that the freedom to provide services does not apply in the context of the EC-Switzerland Air Transport Agreement, the General Court was right to find, in paragraphs 193 to 198 of the judgment under appeal, that the Commission did not infringe, by the contested decision, the principle of the freedom to provide services.

- 83 The same is true of the infringement, alleged by the Swiss Confederation, of the principles of proportionality and respect for fundamental rights, which are inherent in the freedom to provide services.
- 84 Moreover, in finding that the Commission did not err in not taking account, during its examination — under Article 8(3) of Regulation No 2408/92 — of the measures laid down in the 213th Regulation, as amended, of the possible rights of the operator of Zurich airport and of persons living nearby, the General Court interpreted and applied that provision correctly.
- 85 In that regard, the Court notes that, pursuant to Article 15(1) of the EC-Switzerland Air Transport Agreement, the grant of traffic rights to European Union and Swiss air carriers between any point in Switzerland and any point in the European Union is subject to Regulation No 2408/92.
- 86 As is apparent, *inter alia*, from Article 2(f) and 3(1) of Regulation No 2408/92, that regulation governs the grant and exercise of the traffic rights of air carriers.
- 87 In that context, Article 8(2) of the regulation makes the exercise of those rights subject to operational rules, in particular, published national, regional or local operational rules relating to safety, the protection of the environment and the allocation of slots. Therefore, the examination provided for in Article 8(3) of the regulation, which concerns the application of Article 8(1) and (2), can relate only, in the light of the application of those rules or the measures referred to in Article 8(1), to the conditions for exercising those same rights over the air routes at issue.
- 88 Consequently, the General Court rightly held that the possible rights of airport operators and of persons living near airports cannot be taken into account in the examination provided for in Article 8(3) of Regulation No 2408/92.
- 89 In those circumstances, the third ground of appeal must be rejected.

#### *The fourth ground of appeal*

##### Arguments of the parties

- 90 By its fourth ground of appeal, the Swiss Confederation accuses the General Court of having committed an error of law in finding, in paragraphs 133 to 192 of the judgment under appeal, that the principle of equal treatment has not been infringed.
- 91 First of all, the Swiss Confederation considers that, by failing to take account, in the examination of the compatibility of the measures laid down in the 213th Regulation, as amended, with the principle of non-discrimination laid down in Article 3 of the EC-Swiss Air Transport Agreement, of the rights of the operator of Zurich airport and of the persons living near to that airport, the General Court erred in law in its interpretation and application of that provision.
- 92 Next, the Swiss Confederation accuses the General Court of having recognised, in paragraphs 146 to 153 of the judgment under appeal, in the context of the examination of the justified and proportionate nature of the measures laid down in the 213th Regulation, as amended, that the tourist nature of the area concerned by those measures and the lack of authority of the Federal Republic of Germany over Zurich airport constituted objective circumstances justifying those measures.
- 93 First, in finding that the proximity of Zurich airport to a tourist area was not disputed by the Swiss Confederation, the General Court allegedly distorted the nature of its arguments that that area was not ‘important’ and was not one in which ‘tourism is of exceptional importance’. In any event, it claims that economic grounds cannot justify the discrimination resulting from those measures.

- 94 Second, the Swiss Confederation claims that recognition of the lack of legal competence of the German authorities over Zurich airport as an objective circumstance justifying the measures laid down in the 213th Regulation, as amended, has the effect of preventing the Commission from intervening.
- 95 In that respect, the Swiss Confederation considers that, as is apparent from paragraph 149 of the judgment under appeal, the General Court refused to examine whether those measures were actually necessary.
- 96 Finally, the Swiss Confederation submits that the findings made by the General Court in paragraph 156 of the judgment under appeal are erroneous in law on the ground that they result from a distortion of the evidence, an insufficient clarification of the facts, and a failure on the part of the General Court to observe the scope of its power of review, the right to be heard and the duty to state reasons.
- 97 The Commission, the German Government and Landkreis Waldshut contest the arguments raised by the Swiss Confederation.

#### Findings of the Court

- 98 First of all, as regards the error of law which, in the view of the Swiss Confederation, the General Court committed in finding that it was not necessary to take account, in the examination of the compatibility of the measures laid down in the 213th Regulation, as amended, with the principle of non-discrimination laid down in Article 3 of the EC-Switzerland Air Transport Agreement, of the rights of the operator of Zurich airport and of the persons living near that airport, it is sufficient to note that, as is apparent from paragraphs 84 to 88 above, that agreement and Regulation No 2408/92 do not provide that account is to be taken of those rights, but relate only to the exercise of traffic rights by air carriers.
- 99 In addition, the Court notes that, under the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on a point of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, inter alia, Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057, paragraph 26; Case C-16/06 P *Les Éditions Albert René v OHIM* [2008] ECR I-10053, paragraph 68; and Case C-254/09 P *Calvin Klein Trademark Trust v OHIM* [2010] ECR I-7989, paragraph 49).
- 100 Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see, inter alia, *Les Éditions Albert René v OHIM*, paragraph 69; Case C-535/06 P *Moser Baer India v Council* [2009] ECR I-7051, paragraph 33; and *Calvin Klein Trademark Trust v OHIM*, paragraph 50).
- 101 As regards the tourist nature of the area concerned by the measures laid down in the 213th Regulation, as amended, the Court finds that, although the Swiss Confederation alleges distortion of the facts by the General Court, it merely contests the General Court's assessment of the facts, without providing precise information as to how the facts were distorted.
- 102 In any event, in finding that Zurich airport is close to a tourist area, the General Court did not qualify that area as 'important', nor did it affirm that the area is one in which 'tourism is of exceptional importance'.

- 103 Moreover, the measures laid down in the 213th Regulation, as amended, are not the result of purely economic considerations, but of considerations related to the protection of persons and of the environment, since their objective is to reduce noise pollution caused by aeroplanes in the part of German territory in which those measures are applicable.
- 104 In so far as concerns the lack of authority of the Federal Republic of Germany over Zurich airport, it is sufficient to note that that fact is an indisputable objective circumstance, recognition of which did not prevent the Commission from examining those measures pursuant to Article 8(3) of Regulation No 2408/92.
- 105 As regards the Swiss Confederation's argument relating to the alleged refusal of the General Court to examine the necessity of the measures laid down in the 213th Regulation, as amended, the Court notes that that argument is based on a manifest misinterpretation of paragraph 149 of the judgment under appeal, which must be understood in the light of its context (see, to that effect, Case C-294/95 P *Ojha v Commission* [1996] ECR I-5863, paragraphs 48 and 49). In paragraph 149 of the judgment under appeal, the General Court merely stated that the German authorities were entitled to adopt such measures. However, it is apparent from paragraphs 154 et seq. of the judgment under appeal that, by that assertion, the General Court in no way sought to limit its power of review over the proportionate nature of those measures. In particular, in paragraphs 163 et seq. of that judgment, the General Court examined in a precise and detailed manner whether less onerous measures existed which would have enabled the Federal Republic of Germany to achieve the objective pursued by the measures laid down in the 213th Regulation, as amended.
- 106 Finally, the findings made by the General Court in paragraph 156 of the judgment under appeal result from the assessment which it made of the facts and evidence and can thus not, as noted in paragraph 99 above, be subject to review by the Court of Justice on appeal, save where they distort the evidence.
- 107 The Swiss Confederation does not provide any precise information so as to establish that the facts and evidence were distorted and, moreover, such an alleged distortion is not apparent from the file before the Court of Justice. Similarly, it does not appear that those findings are the result of insufficient clarification of the facts or a failure on the part of the General Court to have regard for the scope of its power of review, the right to be heard and the duty to state reasons.
- 108 Furthermore, in paragraph 157 of the judgment under appeal, the General Court clearly stated why the noise level at issue is sufficient to justify the adoption of measures such as those laid down in the 213th Regulation, as amended.
- 109 It is evident from the foregoing considerations that the fourth ground of appeal must be rejected.

### *The fifth ground of appeal*

#### Arguments of the parties

- 110 By its fifth ground of appeal, the Swiss Confederation invokes an arbitrary interpretation of the rules relating to the apportionment of the burden of proof and of the duty to cooperate and the duty to provide evidence, on the ground that, in paragraph 158 of the judgment under appeal, the General Court accuses it of not having specified the lower altitudes which could have been fixed without increasing noise levels in the area of German territory concerned by the measures laid down in the 213th Regulation, as amended.
- 111 In the view of the Swiss Confederation, the General Court thereby demands evidence which it is not able to produce, even though it is for those adopting the measures to prove that they are necessary.

112 The Commission, the German Government and Landkreis Waldshut contest the arguments raised by the Swiss Confederation.

#### Findings of the Court

113 The Swiss Confederation's mere reference to an arbitrary interpretation of the rules relating to the apportionment of the burden of proof cannot suffice to call into question the General Court's assessment in paragraph 158 of the judgment under appeal.

114 In so far as the contested decision and the judgment under appeal contain a detailed analysis of the justification for, and the proportionate nature of, the measures laid down in the 213th Regulation, as amended, the onus is on the Swiss Confederation to set out in a precise manner the arguments which make it possible, in its view, to challenge that analysis.

115 In that regard, the General Court was right to find that the Swiss Confederation's claim that some of the minimum altitudes for flights laid down in the 213th Regulation, as amended, were too high and that the fixing of lower altitudes would not increase noise levels in the area concerned by those measures is insufficient if, in support of that claim, that State fails to specify the lower altitudes which could have alternatively been fixed.

116 Consequently, the fifth ground of appeal must be rejected.

#### *The sixth ground of appeal*

#### Arguments of the parties

117 By its sixth ground of appeal, the Swiss Confederation accuses the General Court of having committed an error of law by ruling out the fact that less restrictive measures existed than those laid down in the 213th Regulation, as amended, on the ground that the Swiss Confederation had not pointed to any precedent for a noise quota covering only certain hours of the day or certain days of the week.

118 It claims that the assertion on the part of the General Court, in paragraph 171 of the judgment under appeal, is manifestly inconsistent with paragraph 105 of that judgment, according to which, on the contrary, the Swiss Confederation referred to a noise quota which existed during night hours, which was imposed from summer 2002 for Frankfurt am Main airport.

119 The Commission, the German Government and Landkreis Waldshut contest the arguments raised by the Swiss Confederation.

#### Findings of the Court

120 The Court of Justice notes that, by its sixth ground of appeal, the Swiss Confederation merely challenges the assertion made by the General Court, in paragraph 171 of the judgment under appeal, that that State has not pointed to any precedent for a noise quota covering only certain hours of the day or certain days of the week which would function satisfactorily in practice.

121 However, contrary to what the Swiss Confederation claims, that assertion is not manifestly inconsistent with paragraph 105 of the judgment under appeal, since, in that paragraph, the General Court stated only that that State referred to a noise quota which existed during night hours, which was imposed from summer 2002 for Frankfurt am Main airport, without specifying whether that quota functions satisfactorily in practice.

- 122 In any event, it must be found that, in paragraphs 171 et seq. of the judgment under appeal, the General Court relied on several grounds in reaching the conclusion that the measures laid down in the 213th Regulation, as amended, are proportionate and that each of those grounds, taken individually, justifies that conclusion.
- 123 Consequently, even supposing the sixth ground of appeal to be founded, it is not such as to invalidate the judgment under appeal and must, therefore, be rejected as ineffective since that conclusion remains founded on other grounds (see, to that effect, Case C-412/05 P *Alcon v OHIM* [2007] ECR I-3569, paragraph 41, and Case C-221/10 P *Artegoda v Commission* [2012] ECR, paragraph 110).
- 124 It follows that the sixth ground of appeal must be rejected as ineffective.
- 125 Consequently, since none of the grounds of appeal is founded, the appeal must be dismissed in its entirety.

### **Costs**

- 126 Under Article 184(2) of the Rules of Procedure, where the appeal is not well founded or where the appeal is founded and the Court itself gives final judgment in the case, the Court is required to make a decision as to costs. Under Article 138(1) of those Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against the Swiss Confederation, and as the latter has been unsuccessful in all of its submissions, the Swiss Confederation must be ordered to pay, in addition to its own costs, all of the costs incurred by the Commission both at first instance and on appeal.
- 127 The second sentence of Article 184(4) of the Rules of Procedure provides that, where an intervener at first instance takes part in the proceedings, the Court may decide that it shall bear its own costs. In accordance with that provision, it is appropriate to decide that the Federal Republic of Germany and Landkreis Waldshut are to bear their own costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders the Swiss Confederation to bear, in addition to its own costs, all of the costs incurred by the European Commission both at first instance and on appeal;**
- 3. Orders the Federal Republic of Germany and Landkreis Waldshut to bear their own costs.**

[Signatures]